# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms. F Shaheen**

**Respondent:** **Bridge2Future Care Limited**

**Heard at:** **Nottingham – Hybrid**

**On:** **14th, 15th & 16th October 2024**
**12th December 2024**
**18th December 2024**
**19th December 2024**
**12th February 2025**
**17th March 2025 (In Chambers) &**
**7th May 2025 (In Chambers)**

**Before:** **Employment Judge Heap**

**Members:** **Mr. Z Sher**
**Mrs. C Hatcliff**

**Representation**
**For the Claimant:** **In person**
**For the Respondent:** **Ms. R Clarke – Human Resources Manager - on 14th, 15th, 16th October 2024 & 12th December 2024**
**Mr. K Kiani – Director – on 18th & 19th December 2024 & 12th February 2024**

# JUDGMENT

1. The complaint of automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996 fails and is dismissed.

2. All complaints of detriment contrary to Section 47B Employment Rights Act 1996 fail and are dismissed.

3. All complaints of direct discrimination relying on the protected characteristic of religion or belief fail and are dismissed.

# RESERVED REASONS

## BACKGROUND & THE ISSUES

1. This claim is brought by Ms. Farzana Shaheen (hereinafter referred to as "The Claimant") against her now former employer, Bridge2Future Care Group Limited (hereinafter referred to as "The Respondent"). Whilst the Claimant has continued to refer to the Respondent as being Haven Care Group we are satisfied that there has been a change of name of the entity that employed the Claimant so that the correct identity of the Respondent to the proceedings is Bridge2Future Care Group Limited.

2. The claim was presented by way of a Claim Form received by the Tribunal on 20th July 2022. That followed on from a period of ACAS early conciliation which took place between 19th May 2022 and 29th June 2022. The claim is one of automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996; detriment contrary to Section 47B of that Act and discrimination relying on the protected characteristic of religion or belief.

3. The Respondent denies the claims in their entirety either on the basis the facts as set out were said not to have occurred and not to have occurred in the way the Claimant contends they did or, otherwise, that the Claimant was not discriminated against or subjected to detriment in respect of any matters of which she complains. It is also denied that the Claimant was unfairly dismissed on account of having made a protected disclosure or disclosures.

4. There have been a number of Preliminary hearings in respect of this claim and it is worth setting out the history of the matter. The first Preliminary hearing came before Employment Judge Ahmed on 28th February 2023. The basis of the claim was not at that stage clear and so Employment Judge Ahmed made Orders for clarification of the claim which he permitted as an amendment and listed a further Preliminary hearing to take place thereafter.

5. That second Preliminary hearing took place before Employment Judge Heap on 9th May 2023. At that hearing it was noted that the Claimant had failed to comply with Orders made by Employment Judge Ahmed on time and had not copied the information to the Respondent once she did so that Ms. Clarke who was representing the Respondent at that hearing had not seen it. The information also appeared to go further than Employment Judge Ahmed had agreed to permit as an amendment and some parts of the claim that the Claimant was seeking to advance remained unclear. Some aspects were able to be clarified with the Claimant at that Preliminary hearing and further Orders for additional clarification were also made.

6. The parties had expressed at that Preliminary hearing an interest in Judicial Mediation and the claim had been listed for a hearing in that regard. That did not take place because Orders for preparation for the hearing had not been complied with. The Judicial Mediation was therefore cancelled and a further Preliminary hearing took place before Employment Judge Cansick on 13th November 2023. The Orders for further information Ordered on 9th May 2023 were restated by Employment Judge Cansick because the Claimant had not complied with them and a further

Preliminary hearing was listed which came before Employment Judge Brewer on 23rd January 2024.

7. The parties had agreed a list of issues prior to this hearing. However, those were adopted entirely from the provisional identification of the issues which Employment Judge Brewer had set out at an earlier Preliminary hearing based on his understanding of the parties respective cases as they were explained to him at that point.

8. As it was, however, upon discussion of the complaints at the outset of the hearing that one of the recorded complaints at paragraph 4.1.1.2 of the Orders of Employment Judge Brewer contained an allegation the Claimant said that she knew nothing about. This was said to be a protected disclosure to someone identified as a Ms. Lucas but the Claimant's position was that she did not know who that was.

9. It seems inherently unlikely that Employment Judge Brewer simply created this allegation without being told about it by the Claimant but in all events she could not provide any satisfactory explanation why she had not notified the Tribunal in accordance with paragraph 12 of the Orders of Employment Judge Brewer that the issues were not correct nor why the final list of issues still incorporated a complaint that she said that she knew nothing about.

10. As we shall touch upon further below, the Claimant had written her witness statement in direct response to the statements from the Respondent. That had the result that there were a number of complaints advanced in the list of issues which did not appear to be dealt with in the Claimant's witness statement at all. We therefore spent some time with the parties, including adjournments, clarifying the issues in the claim and where the Claimant said that they featured in her evidence before we were able to commence the evidence.

11. It had also not assisted that the Claimant had failed to comply with the Orders of Employment Judge Brewer and particularly had not identified what section(s) of the Equality Act she was relying on in respect of the complaints of discrimination relying on the protected characteristic of religion or belief. The Claimant could not provide any reasonable explanation why she had not complied with those Orders but it was something of a pattern of behaviour which as we shall come to continued into the hearing in relation to the provision of written submissions and in relation to the exchange of witness statements.

12. After a relatively lengthy adjournment for the Claimant to look at the EHRC Code of Practice – which we note had been sent to her much earlier in the proceedings but she had not engaged with – she confirmed that she was seeking to advance all complaints of discrimination as allegations of direct discrimination.

## THE HEARING

13. It is fair to say that that the hearing of this matter has proceeded anything other than smoothly. We make no criticism of anyone for that as matters have been entirely outside anyone's control. However, we record those matters here so that it can be understood why there have been gaps in hearing dates and why it has taken so long

to conclude the proceedings.

14. The hearing was due to be concluded over the period 14th to 16th October 2024. However, on the last day of hearing time Ms. Clarke who was representing the Respondent informed us at the commencement of the hearing that she had been unwell all night and had not slept. We observed that Ms. Clarke looked visibly unwell and was plainly in no fit state to continue to represent the Respondent that day. Given the circumstances we did not feel that there was any fair or reasonable alternative than to grant the application to adjourn the hearing that she had made.

15. We relisted the hearing for 12th December 2024 to conclude the evidence and submissions and for a further day on 18th December 2024 for the Tribunal to deliberate in private. Unfortunately, the hearing was unable to proceed beyond a few minutes on 12th December 2024 as the Employment Judge learned on route to the hearing centre of the sudden and unexpected death of a close family member. Both parties kindly accepted that the Judge was not in a position to continue with the hearing that day for which she was and remains extremely grateful.

16. We agreed with the parties that we would use the date identified for deliberations of 18th December 2024 and add a further day of hearing time to conclude the evidence and submissions. On 18th December 2024 Ms. Clarke attended the hearing centre with Mr. Kashif Kiani who is a director of the Respondent. Mr. Kiani told us that Ms. Clarke was again unwell as a result of the stress of the hearing and we have no reason to believe having seen her presentation on the earlier occasion to which we have referred above that that was anything other than accurate. It was agreed that Mr. Kiani would take over the case on behalf of the Respondent. That included concluding cross examination of the Claimant. Ms. Clarke had made notes for Mr. Kiani which he sought to use for that purpose but those appeared to be more submissions than questions and we had to assist Mr. Kiani in being able to put the Respondent's case. Although both parties were not represented and that may appear inequitable to the Claimant, we were mindful of the fact that Mr. Kiani had not been present for any of the Claimant's evidence and did not appear to have any notes of that evidence because Ms. Clarke did not appear to have taken any.

17. The Claimant's evidence concluded on the late afternoon of 18th December 2024. On 19th December 2024 we had been due to hear the evidence of the Respondent's witnesses and hear submissions. It had been agreed that the Respondent's witnesses – who are still responsible for running a residential home for vulnerable people based in Bradford – would give their evidence remotely via Cloud Video Platform ("CVP"). We should observe that we had also offered the same facility to the Claimant who was also travelling from Bradford but she declined preferring to attend in person.

18. It became clear when trying to connect to the CVP link the Respondent's witnesses were unable to successfully do so to enable them to be seen and heard by the Tribunal. Various steps were taken to try and resolve that for a period of around two hours by Tribunal staff. Unfortunately, the issues could not be resolved and there was no alternative to adjourn without hearing the Respondent's evidence. We accordingly relisted the hearing for 12th February 2025 which was the first available date that the parties and the Tribunal could accommodate.

19. We concluded the evidence in the afternoon of 12th February 2025 but there was inadequate time for submissions. Both parties agreed that they would prefer to prepare written submissions than return for a further date and the Tribunal agreed that that was more proportionate.

20. We directed that written submissions must address the issues identified by Employment Judge Brewer and which we had discussed at the outset. We directed that those submissions must be prepared and submitted by no later than 4.00 p.m. on 10th March 2025 and listed a further day of time for the Tribunal to deliberate on 17th March 2025.

21. The Respondent provided their written submissions within that timeframe. The Claimant did not. She sent an email in purported compliance shortly before the deadline set to do so but no submissions were attached. She was sent an email about that by a member of the administration team. No submissions were received until the early hours of the morning of 12th March 2025 and in the covering email the Claimant citing an oversight in having forgotten to attach them to her earlier email. For reasons that we shall come to below in relation to witness statements, we were left with the almost inescapable conclusion that the initial omission of the submissions was more than likely not an error and was intended to give the Claimant the opportunity to review the Respondent's submissions before preparing her own. We viewed that as the Claimant seeking another unfair advantage and that what was said to be an omission in her second email was in fact designed to mislead.

22. In that regard, during our reading in it became clear that the Claimant had written her witness statement in direct response to the Respondent's witness statements. The Claimant maintained when asked about that that she had not known that she was not to do that. We did not accept that explanation, the Tribunal's Orders had been clear and even taking into account that the Claimant was a litigant in person it would be apparent that that was an improper course to take. We were left with the impression that it was done to seek to obtain an unfair advantage as with the issue of the submissions. Nevertheless, as the Claimant's submissions were received before the Tribunal began our deliberations we determined that we would read them and take them into account despite her further non-compliance with Orders made.

23. Returning then to those submissions, they were not on point on either side and did not address many of the issues that the Tribunal had to determine and which we had directed them to address in accordance with the list of issues. We did not consider that it was necessary or indeed practicable to get the parties back for oral submissions as even with targeted questions we were not confident that it would be of any greater degree of assistance. We had the evidence and could deal with the issues.

24. We should observe that the Claimant's submissions also sought to introduce new protected disclosures about sharps which did not form part of her pleaded case or the issues identified by Employment Judge Brewer. No application to amend the claim has been made and accordingly we have confined our determination of the claim on the pleaded case and the issues identified by Employment Judge Brewer.

25. We concluded our deliberations on 17th March 2025. However, given the gaps in hearing time and the time over which the hearings had proceeded the Judge considered that it is important to have the input of the non-legal members in approving a draft of the Judgment and Reasons to ensure that they were both happy with it and were able to review it alongside their notes. A further hearing was therefore arranged for the Judge and non-legal members in chambers to deal with that. Unfortunately, the earliest date that all members of the Tribunal panel were able to convene again to deal with this was 7th May 2025 as a result of periods of leave and other sitting commitments for all concerned.

26. We should finally observe that during one of the hearing dates there was an incident involving the Claimant and Mr. Kiani. The Claimant effectively complained that she had been harassed by Mr. Kiani in and outside the hearing centre. We were not present or able to say what had happened but simply directed that the parties not have any contact with each other outside the hearing room. We did not understand there to be any further incidents and we did not have any impression that this affected the fairness of the hearing.

## WITNESSES & PRELIMINARY MATTERS

27. On commencement of the evidence, we heard from the Claimant in person and on her own behalf.

28. On behalf of the Respondent, we heard from the following witnesses:

    28.1. Emma Smith – an Operations Manager at the Respondent; and

    28.2. Keisha Brophy – a manager at Sycamore Care home where the Claimant was employed and the Claimant's direct line manager;

## CREDIBILITY

29. We now turn to our assessment of credibility of the witnesses of whom we heard given that it has invariably informed our findings of fact in the case where there are a number of disputes as to events and in some instances where we are not assisted by way of the existence of any documentary evidence or at least any documentary evidence to which we were taken to support one side or the other.

30. With regard to credibility, we begin with our assessment of the Claimant. We did not find the Claimant to be a credible, reliable or impressive witness. Firstly, we have already observed above that the Claimant has in our view attempted to take unfair advantage in these proceedings in respect of the issue of witness statements and submissions and we did not accept her explanations on those matters which we considered an attempt to mislead.

31. Moreover, the Claimant had clearly advanced an allegation before Employment Judge Brewer which she knew had no basis because she had asserted that she made a protected disclosure to a Mrs. Lucas when she accepted before us that she had no idea who Mrs. Lucas was and could not reasonably explain why she had not corrected any alleged error on Employment Judge Brewer's Orders in accordance

with paragraph 12 of the same. Indeed, she had continued to maintain that allegation, including in a later agreed list of issues with the Respondent, until the first day of the hearing despite the fact that she must have known that it had no foundation.

32. However, the more concerning issues to the Tribunal were those matters which emerged during the Claimant's evidence. She frequently failed to answer the question that was asked of her and we considered her evidence to be evasive on more than one occasion. She frequently lapsed into evidence which had absolutely nothing to do with the question that she was being asked despite it having been explained clearly to her by the Tribunal before her evidence commenced that she should not do that because it may be that we would otherwise view her evidence as being evasive. The general impression that we had was that the Claimant was seeking on those occasions to address the gaps in her witness evidence that we had identified at the outset and overall appeared to be making things up as she went along.

33. There were also elements of the Claimant's oral evidence which directly contradicted the case that she was seeking to advance in the list of issues. We deal with a few examples of those inconsistencies below:

    33.1. The issues set out at 7.2.1 of the Orders of Employment Judge Brewer set out that the Respondent failed to allow the Claimant to take breaks during work. That was said to be an act of direct discrimination on the grounds of the Claimant's religion because she needed time to pray. That conflicted with the Claimant's oral evidence which was that she had had breaks to go and pray but she had been questioned as to her whereabouts when she returned. Those two things were inconsistent and again the Claimant had the opportunity – and the Orders of Judge Brewer made that clear – to amend anything that was incorrect in his case management summary. The Claimant did not do so and carried the allegation as it was over into the list of issues;

    33.2. The Claimant's evidence before us was that she had concerns about a close relationship between Ms. Brophy and Ms. Smith. She was asked if she had raised those concerns with anyone and she said that she had had no opportunity to do so. That was not accurate. The Claimant had had plenty of opportunity to do so. She was aware of who the Respondent's then Human Resources Manager was and how to make contact with her and as we shall come to she also raised issues with a member of the recruitment team, Amos. She had ample opportunity and ability to raise and concerns and we did not accept her evidence to the contrary;

    33.3. Her evidence was that she had asked Ms. Brophy on every shift that she undertook about the provision of Halal food and utensils but that directly contradicted her evidence that she had not escalated the matter to Emma Smith because she was giving Ms. Brophy time to put arrangements in place. If that was the case, there would be no need to raise the matter on each shift;

    33.4. The Claimant's oral evidence before us was that she had overheard Ms. Brophy telling Ms. Smith about her complaints about a door to Sycamore Lodge being

left open and that she felt that her concerns were not taken seriously. There was nothing of substance before us of the allegation recorded at 5.1.1 of the issues identified by Employment Judge Brewer about the Claimant being belittled and indeed she was not a part of that conversation;

33.5. The only part of the Claimant's evidence that came remotely close to that was that Ms. Brophy had said that sometimes the door would stick. That is an explanation and a far cry from someone being belittled about something; and

33.6. The Claimant's oral evidence before us was that Ms. Brophy had told her in her supervision that she would look into her concerns about the door being left open and that she had no reason to disbelieve her. That directly contradicted her earlier evidence that she was being belittled about those matters as if that had genuinely occurred she would have had no reason to trust that the matter would be looked into.

34. Those are examples only and are not an exhaustive list of the reasons that we found the Claimant's evidence to be less than satisfactory.

35. We turn then to the evidence of the Respondent's witnesses and begin with Emma Smith. We considered her on the whole to be a credible witness who tried to give us an accurate account of what she could recall. However, she could only in reality give most of her evidence in very general terms as we accept that she was not frequently at Sycamore Lodge and did not come across the Claimant frequently so that matters were not particularly memorable and she was giving evidence from events which took place some considerable time ago.

36. Finally, we turn to the evidence of Ms. Brophy. We did not consider her to be a particularly reliable witness. Her oral account differed from her witness statement on more than one occasion. That was despite Ms. Brophy having been told before she commenced her evidence that it was important that her statement was correct and asking her if she wanted to make any changes. Most notably that was in relation to an assertion at paragraph two of that statement that the Claimant had not raised any issue about safeguarding which she accepted was incorrect when looking at the supervision notes which had late been disclosed by the Respondent. A similar issue arose in respect of assertions about the Claimant's sickness record and reporting which were not supported by the supervision notes.

37. However, in relation to the former point it was submitted that Ms. Brophy had been mistaken about that matter. We did form the view that Ms. Brophy was very badly prepared for the hearing. She was clearly unfamiliar with her witness statement and her evidence was that she had not seen the bundle before the commencement of the hearing so it was unclear how she could have prepared a witness statement which made direct reference to it. The impression that we were left with was that it was unlikely that she had prepared the statement herself – something which is not unusual where there is a representative, even a lay representative, taking up the case preparation – but that had clearly not read it either at all but certainly not with the requisite amount of care that she should have. As such, we viewed her evidence at best as being unreliable.

## THE LAW

38. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be below.

Protected Disclosures

39. In any claim based upon "whistleblowing" (whether for detriment or dismissal) a Claimant is required to show that firstly they have made a "protected disclosure".

40. The definition of a protected disclosure is contained in Section 43A Employment Rights Act 1996 and which 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 sections 43C to 43H*."

41. Section 43B provides as follows:

> *"In this part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is 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 and 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 one of the preceding paragraphs has been, or is likely to be deliberately concealed.*
>
> *For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is of the United Kingdom or of any other country or territory.*
>
> *A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*

> *A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice."*

42. An essential requirement of a disclosure which qualifies for protection is that there is a disclosure of information. A disclosure is more than merely a communication, and information is more than simply making an allegation or a statement of position. The worker making the disclosure must actually convey facts, even if those facts are already known to the recipient (See **Cavendish Munro Professional Risks Management Ltd v Geluld [2010] IRLR 38 (EAT)**) rather than merely an allegation or, indeed, an expression of their own opinion or state of mind (See **Goode v Marks & Spencer Plc UKEAT/0442/09**).

43. A disclosure need not be embodied in one communication and it is possible, depending upon the content and nature of those communications, for more than one communication to cumulatively amount to a qualifying disclosure, even though each individual communication is not such a disclosure on its own (**Norbrook Laboratories (GB) Ltd v Shaw UKEAT/0150/13**.)

44. It is not necessary for a worker to prove that the facts or allegations disclosed are true. Provided that the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is objectively reasonable, it matters not if that belief subsequently turns out to be incorrect (See **Babula v Waltham Forest College [2007] IRLR 346 (CA)**.

45. A worker must establish that in making their disclosure they had a reasonable belief that the disclosure showed or tended to show that one or more of the relevant failures had occurred, was occurring or was likely to occur. That reasonable belief relates to the belief of the individual making the disclosure in the accuracy of the information about which he is making it. The question is not one of the reasonable employee/worker and what they would have believed, but of the reasonableness of what the worker himself believed.

46. However, there needs to be more than mere suspicion or unsubstantiated rumours and there needs to be something tangible to which a worker/employee can point to show that their belief was reasonable.

47. The questions for a Tribunal in considering the question of whether a protected disclosure has been made are therefore firstly, whether the Claimant disclosed "information"; secondly, if so, did he or she believe that that information was in the public interest and tended to show one of the relevant failings contained in Section 43B Employment Rights Act 1996, and, if so, was that belief reasonable.

48. In order for a disclosure to be a protected disclosure it must also be the case that the worker making it reasonably believed that the disclosure was in the public

interest and not only serving the interests of that worker. However, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest, as well as in the personal interest of the worker (see **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2015] I.C.R. 920**). In this regard, the following factors might be relevant:

(a) the numbers in any 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;
(c) the nature of the wrongdoing disclosed, and
(d) the identity of the alleged wrongdoer.

Automatically unfair dismissal – Section 103A Employment Rights Act 1996

49. Section 103A ERA 1996 provides that one category of "automatically unfair" dismissal is where the reason or principle reason for the dismissal is that the employee has made a protected disclosure.

50. Section 103A 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."*

51. A Tribunal therefore needs to be satisfied that a Claimant bringing a successful claim under Section 103A ERA 1996 has firstly been dismissed and, secondly, that the reason or principle reason for that dismissal is the fact that he or she has made a protected disclosure.

52. The burden of proving the 'whistleblowing' reason for dismissal under s.103A Employment Rights Act 1996 lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal (see **Ross v Eddie Stobart UKEAT/0068/13/RN**).

Detriment contrary to Section 47B Employment Rights Act 1996

38. If a worker can demonstrate that they have made a protected disclosure, then in order to succeed in a complaint under Section 47B Employment Rights Act 1996, they must also demonstrate that they have suffered "detriment". In this regard, Section 47B(1) Employment Rights Act 1996 provides as follows:

*"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."*

39. A worker must therefore prove that they have made a protected disclosure and, further, that there has been detrimental treatment. The term "detriment" is not

defined within the Employment Rights Act 1996 but guidance can be taken from discrimination authorities and, particularly, from **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.** In this regard, for action or inaction to be considered a detriment, a Tribunal must consider if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. However, an "unjustified sense of grievance" is not enough to amount to a detriment.

40. If the worker satisfies the Tribunal that he has both made a protected disclosure and suffered detriment, the employer then has the burden of proving the reason for the treatment pursuant to the provisions of Section 48(2) Employment Rights Act 1996. If the employer fails to prove an admissible reason for the treatment, a Tribunal must conclude that it is because of the protected disclosure.

41. In a case of a detriment, a Tribunal must be satisfied that the detriment was *"on the ground that the worker has made a protected disclosure"* and there must be found to be a causative link between the protected disclosure and the reason for the treatment. The test to be considered if whether "*the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment*" of the Claimant (see **NHS Manchester v Fecitt & Others [2012] IRLR 64**). It follows that unless the individual who is said to subject the worker to detriment (or, in the case of a claim of automatically unfair dismissal, the person who takes the decision to dismiss) knows that the employee/worker has made a protected disclosure, their decision cannot be said to have been materially influenced by it (see also **Anastasiou v Western Union Payment Services UK EAT/0135/13/LA**).

Discrimination complaints under the Equality Act 2010

53. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13 and 39.

54. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

> *(1) An employer (A) must not discriminate against a person (B)—*
>
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
>
> *(b)as to the terms on which A offers B employment;*
>
> *(c)by not offering B employment.*
>
> *(2)An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a)as to B's terms of employment;*
>
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*

*(c)by dismissing B;*

*(d)by subjecting B to any other detriment.*

*(3)An employer (A) must not victimise a person (B)—*

*(a)in the arrangements A makes for deciding to whom to offer employment;*

*(b)as to the terms on which A offers B employment;*

*(c)by not offering B employment.*

*(4)An employer (A) must not victimise an employee of A's (B)—*

*(a)as to B's terms of employment;*

*(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*

*(c)by dismissing B;*

*(d)by subjecting B to any other detriment.*

*(5)A duty to make reasonable adjustments applies to an employer.*

*(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—*

*(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or*

*(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.*

*(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—*

*(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);*

*(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.*

*(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.*

Direct Discrimination

55. Section 13 EqA 2010 provides that:

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

56. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

57. If a Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

58. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

59. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246:**

*"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.*

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

60. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious, but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**).

The EHRC Code

61. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

## FINDINGS OF FACT

63. We ask the parties to note that we have only made findings of fact where those are necessary for determination of the issues which are before us. We have not therefore made findings on each and every area where the parties are in dispute with each other where it is not necessary for us to do so. These findings of fact should be read in conjunction with the Orders of Employment Judge Brewer which identified the issues to be determined save as for the identified disclosure to a Mrs. Lucas which was abandoned by the Claimant as described above.

The Respondent and the commencement of the working relationship

64. The Respondent provides residential care for children and operates a number of care homes including Sycamore Lodge which is based in Bradford in West Yorkshire. The Claimant was employed by the Respondent as a Team Leader. At the time of the Claimant's employment the Respondent was known as Haven Care Group Ltd.

65. The Claimant commenced employment on 24th February 2022 and continued in employment until her dismissal which was with effect from 14th April 2022. The Claimant's line manager was Keisha Brophy who was the Registered Manager at Sycamore Lodge. Ms. Brophy was in turn line managed by Emma Smith, Operations Director with the Respondent. Ms. Smith would visit Sycamore Lodge but unlike the Claimant and Ms. Brophy she was not based there.

66. The Respondent has two directors, one of whom is Mr. Kiani. Both directors are of the Muslim faith as is the Claimant. We understand that at the material time there was also one other member of staff who was Muslim.

67. Food is prepared at Sycamore Lodge for the young people in the Respondent's care and members of staff were also able to prepare their own food. That was important as shifts would be long and on occasions require overnight stays.

68. Due to her faith the Claimant can only eat Halal food and cannot risk cross

contamination with utensils that have been used to prepare non-Halal food. We accept that the Claimant raised with Ms. Brophy that she would need separate utensils to prepare Halal food. We are not able to say precisely when that was because the Claimant was not able to supply a date but we find that she raised it only once not on every shift as the Claimant claimed in her evidence and we have already made observations about that in respect of credibility above.

69. We are satisfied that the Claimant was told that that would have to be arranged from the Respondent's budget. We do not find that unreasonable and would observe that the situation had not occurred previously. There was one other Muslim member of staff at the time and some young people at Sycamore Lodge who were also of the Muslim faith but who did not mind sharing pots and pans. We make absolutely no criticism of the Claimant for not wanting to do so, that is perfectly understandable, but merely to observe that there was nothing already in place and no spare immediately available budget to deal with this issue.

70. There was a delay in that taking place and the Claimant raised the matter with a gentleman called Amos who we understand to work in recruitment who had called her whilst she was out of the home fetching a jacket potato from a local shop. He had asked her why she was not eating in the home and she had raised the issue of utensils.

71. That was subsequently relayed to Ms. Brophy who discussed the matter with the Claimant in a supervision which we come to further below. The budget was subsequently supplied and the Claimant went out to purchase around £65.00 worth of equipment for her use on 30th March 2022 (see page 111 of the hearing bundle).

Breaks

72. The Claimant needed to take breaks during her shift to pray because of her faith. Others working for the Respondent also took breaks for things such as smoking or vaping. Breaks in that regard were only to be short breaks and there is no evidence of anyone taking long smoking, vaping or other breaks.

73. However, we accept that there was a concern for management at the Respondent that the Claimant either appeared to be taking very long breaks or they otherwise did not know where she was and that was raised with her. There was also concern, as we shall come to further below about the Claimant spending time in the office when she should have been interacting with and supporting the young people in the setting.

74. Although she was spoken to about the length of her breaks, the Claimant was never refused a break and that was the case even on her own evidence.

Reports of doors being left unlocked

75. The Claimant's evidence was that she raised with Ms. Brophy on two occasions between 10th March 2022 and 21st March 2022 that the main door to Sycamore Lodge had been left unlocked. The first occasion where this had happened was when the Claimant returned to Sycamore Lodge and found the door unlocked and that the person who should have been present there had gone to buy cigarettes. The

second occasion was when the Claimant returned back from taking one of the young people to football practice and the staff had gone out leaving the door unlocked. It was said that that had been done because the staff did not know the Claimant's contact details, when she would be back and whether she had any keys with her.

76. We could not obtain a straightforward answer from the Claimant as to precisely what she said to Ms. Brophy on those occasions. We are satisfied that she did raise with Ms. Brophy that the door had been left unlocked on each of those occasions but we did not accept her evidence that she had gone into detail about safeguarding risks and the possibility of the public gaining access to Sycamore Lodge and effectively lying in wait for staff or the young people. That evidence became embellished in her oral evidence as to the dangers posed by the particular area of Bradford in which Sycamore Lodge was based and our conclusion was that this was an issue which took on new significance after the Claimant's dismissal.

77. We find that on those occasions nothing further was said other than the doors had been left unlocked and open as a matter which Ms. Brophy should be aware of. Ms. Brophy had given an explanation in the former case for that possibly happening because the door stiff and difficult to lock. We do not accept that that belittled or dismissed the Claimant's concern but was simply to give context.

78. The matter was also discussed in the Claimant's supervision on 22nd March 2022. This was not in relation to a new incident but the ones previously mentioned. We deal with what was said in respect of that issue below.

Alleged treatment by Ms. Brophy and Ms. Smith

79. We do not accept the Claimant's evidence that in March 2022 she was ignored by Ms. Brophy and Ms. Smith. That allegation was couched in only general terms and it was not dealt with in the Claimant's witness statement. Her oral evidence was that she had sought to make suggestions for processes at Sycamore Lodge and there was no engagement with that. We did not accept that evidence and considered again that this was an instance of the Claimant making things up as she was going along because she had not really engaged with the allegations that she was making, other than with regard to the doors and provision of Halal food. Indeed, the Claimant made it plain when discussing the issues at the outset that those were the key complaints but nevertheless other than the "Ms Lucas" issue determined to pursue all others even where they were not addressed in the evidence.

Supervision meeting

80. On 22nd March 2022 Ms. Brophy had a supervision session with the Claimant. We do not accept that this was arranged as any form of retaliation as the Claimant suggests for her having raised the issue of Halal cooking utensils with Amos although understandably as recorded in the supervision record Ms. Brophy indicated to the Claimant that she should raise matters directly with her. We accept that the reason that Ms. Brophy did the supervision at the time that she did was because she was due to go on holiday and the Claimant had not yet had a supervision.

81. At the supervision meeting the Claimant did raised the matter of the doors being unlocked previously. The part of the supervision record which deals with that recorded as follows:

*"Farzana raised that on one occasion the door being left unlocked and that the door was wide open. This occurred on Thursday – no one in the home all went out, concerning that door was unlocked and wide open".*

82. We are satisfied that that was the context to what was said by the Claimant and that she did not go further as she now asserts to suggest any risk to staff or young people by anyone potentially gaining access. We would note that this was discussed specifically in response to a question about stress management/personal issues and particularly feelings, concern and stress of the role and not in response to health and safety concerns which immediately preceded that topic.

83. As we have already observed, Ms. Brophy initially denied that the Claimant had mentioned anything about doors being left unlocked on that occasion until the Claimant pressed the Respondent to provide a copy of the supervision record which we added into the bundle along with a number of other documents provided at the outset of the hearing. We do not see the late disclosure of those notes as something from which we should draw a negative inference. The Respondent was not professionally represented and both parties continued to disclose documents outside the terms of the Orders made.

84. When the Claimant asked for the notes they were provided to her. Whilst she points to the fact that one sentence is incomplete, there is a clear reference to the issue of the door being unlocked. Had the Respondent been doctoring the notes as appears to be suggested then no doubt that would have been left out or the position maintained that they could not be found. Whilst they should have been disclosed earlier, in our experience it is not uncommon for a document to be discovered on a further search when one side or the other asks for disclosure to be specifically revisited.

85. We do not accept that either Ms. Brophy or Ms. Smith belittled and ignored the Claimant's concerns. Had they done so we are entirely satisfied that she would have raised the matter with Amos or HR and she had both of their contact details to do so. As we shall come to, the Claimant was not slow to contact them when she required cover for an accident at work and we are satisfied that had she genuinely been belittled and dismissed in connection with concerns that she had then she would have raised the matter further. The allegation and indeed that of her being ignored and excluded do not fit with the supervision notes which we shall come to further below in which the Claimant made plain that she found Ms. Brophy approachable.

86. The supervision also discussed the issue of the purchase of Halal food and utensils which followed on from issues that the Claimant had raised with Amos in the context of him asking why she had not been eating at Sycamore Lodge. The relevant parts of the supervision record said this:

*"KB had spoken to Farzana in relation to going out and purchasing a couple of pots and pans that she would need and some cutlery so that she felt comfortable eating*

*in the home. KB spoke about how staff are to ensure that some halal foods and halal meats are purchased to enable Farzana to eat on shift with the young people and explained that she is happy for Farzana to go out and purchase items that she needs. Farzana agreed with this."*

87. Shortly after that the Claimant purchased the utensils that she needed on 30th March 2022. Although that was only a short time before the termination of her employment, that was not something that was known at the time and it would have been envisaged by all concerned, the Claimant included, that they would have been there for her to use as and when required.

Complaint by a parent of a young person

88. It does not appear to be disputed by the Claimant that there had been a complaint by a parent of one of the young people at Sycamore Lodge. We do not know the date on which that complaint was made. That had involved the parent wanting to speak to the young person and the Claimant having refused because it was bedtime. We do not need to deal with whether the Claimant was justified in refusing that contact but we accept that a complaint was made about her.

89. It also appeared from the dismissal letter which we come to below that the complaint was more the manner in which the Claimant had communicated the refusal. As we observed for ourselves during the hearing the Claimant has what might best be described as a forceful communication style which included rapid fire patterns of speech, talking over people and a raising of tone of voice to try to get a point across. Whilst we acknowledge that the stress of a hearing can have those effects which would otherwise not manifest themselves in day to day work, it does also chime with concerns of Ms. Smith which we shall come to about the Claimant's communication style with her.

Issue about stacking products

90. The Claimant contended before Employment Judge Brewer that she had had a conversation with a Ms. Lucas in mid-March 2022 over the telephone that staff were being expected to stack heavy products which she relied upon at that time as being a protected disclosure. As we have observed above, the Claimant abandoned reliance on that at the commencement of the hearing.

91. The Claimant also relied when she was before Employment Judge Brewer on what was also said to be a protected disclosure to Ms. Brophy towards the end of March 2022. It is worth setting out in full what was recorded – and which was not amended by the Claimant either in accordance with paragraph 12 of the Orders of Employment Judge Brewer or in the agreed list of issues – in the case management summary. It said this:

*"towards the end of March 2022 in a conversation with Keisha Brophy the claimant told her that the situation with regards to stacking heavy products alone was getting worse".*

92. The Claimant abandoned this allegation when discussing the issues at the outset of

the hearing saying that she did not know anything about stacking issues. However, she sought to resurrect this allegation during the course of her evidence and so we have dealt with it. It is an example, however, of the Claimant having something of a lack of knowledge and thought of what her claim actually was. That was not an isolated incident given the issue with regard to the "Ms. Lucas" allegation and the Claimant seeking to introduce new protected disclosures regarding sharps in her final submissions.

93. The Claimant had also abandoned this issue as being a protected disclosure in discussion at the outset of the hearing. However, she then sought to resurrect it in her evidence. The Claimant relied upon what she says, in vague terms, was said during the supervision with Ms. Brophy and which she says had been omitted from the notes at page 116 of the hearing bundle. There is in that regard a sentence which is missing an ending about organisation in the kitchen.

94. Given the fact that the Claimant had abandoned reliance on this, that it still remained unclear exactly what she had said and the fact that this was said to follow on from a conversation that she now firmly denied ever having taken place with Ms. Lucas, we do not accept that the Claimant said anything to Ms. Brophy about the position with lifting heavy weights having "got worse".

Lack of positive leadership allegation

95. The final matter which the Claimant relies on as a protected disclosure is said to be in the same conversation the Claimant alleging that there was a lack of positive leadership of staff members leading to staff breaking the law. The Claimant relied upon what was said in the supervision record at page 119 of the hearing bundle. It is worth setting that passage out in full:

> *"KB reassured Fazana that she could speak with KB should she have any concerns. Fazana feels that KB is quite approachable and understands that she can speak with her should she have any concerns. Fazana states that we are adults and feel we are able to talk about things".*

96. Nothing in that paragraph comes anywhere close to the Claimant having raised concerns about a lack of positive leadership and staff members breaking the law. In fact, it is quite to the contrary. This is in our view again indicative of the fact that much of this claim appeared to be ill thought out and did not engage with whether there was evidence to support the complaints.

Telephone conversation with Emma Smith

97. In or around March 2022 it is common ground that there was a telephone conversation between the Claimant and Ms. Smith. We do not accept the Claimant's evidence that during that telephone call Ms. Smith said to her words to the effect of

"I will make you leave like I made others leave, don't think just because we are short staffed, I will keep you and won't get rid of you". We considered that this allegation had no substance and that it had been included to bolster the Claimant's contention that there had been some campaign on the part of Ms. Brophy supported by Ms. Smith to remove her from the Respondent.

98. We prefer the evidence of Ms. Smith that this did not occur and that in fact it was the Claimant who was raising her voice and was in effect shouting at her or at the very least that is how she perceived matters. Indeed, the Claimant in cross examination of Ms. Smith appeared to accept that there was some issue that she may have spoken loudly to try and be heard. We accept that she raised her voice towards Ms. Smith who perceived her to be shouting and having had the experience of the Claimant loudly talking over others, including on occasions the Tribunal, in the hearing and taking into account her forceful presence we are not surprised that she had that perception. The Claimant talks extremely quickly and passionately and we can well see how that would have spilled over into coming across in a combatative way to a member of management.

Events of 5th April 2022

99. On 5th April 2022 the Claimant reported to Ms. Smith that she had suffered an injury at work and that she was in pain. That came from a report that the Claimant had been pushed by one of the young people in the home. Ms. Brophy was not at Sycamore Lodge at that time or in the immediate aftermath of the incident.

100. Ms. Smith sent an email to Ms. Brophy and Ms. Magwenjere who was the Respondent's then HR manager. Ms. Smith raised with them both that she had spoken to the Claimant about concerns that she had that she and another member of staff had been in the office and not supporting the young person in question at the time. The obvious inference was that that had at the very least contributed to what had happened (see page 54 of the hearing bundle).

101. The issue of the Claimant being in the office was not, we accept, a one off issue as there had been concern previously about where she was and that she was spending time other than supporting the young people. Whilst the Claimant's position is that she was justified on those occasions in spending time in the office, that is not the point as we are not assessing whether the Respondent's concerns were reasonable only whether they were genuinely held. We accept that they were.

102. The Claimant raised in evidence and cross examination on a number of occasions the fact that there was a delay in obtaining cover to enable her to go off shift when she needed to go home because she was in pain. It does not appear to be disputed, however, that there were difficulties in phone connection between herself and Ms. Brophy and others that the latter was also trying to care for her son and was not at Sycamore Lodge. We do not find that it was a matter of deliberately obstructing the Claimant and indeed, Ms. Magwenjere set out the difficulties that there were in contacting the Claimant and that steps were being taken to look for cover at short notice (see page 55 of the hearing bundle).

103. In all events nothing turns on this issue for the purposes of this claim although we

would observe that the Claimant also contacted Amos and Ms. Magwenjere of HR about the matter (see page 122 of the hearing bundle). We are satisfied that having made that contact about that issue, if the Claimant's issue about the doors been belittled and ignored then she would have also escalated those matters.

The Claimant's dismissal

104. The Claimant was sent an invitation for a probationary review meeting by Teams. This meeting took place when the Claimant had been in employment for just over two months. The probationary period was six months (see page 41 of the hearing bundle) but of course such meetings can take place earlier than that where there re concerns. We come to the timing of that review meeting following the supervision meeting below.

105. The attendees at the meeting were to be on the Respondent's side Loren Magwenjere who was the then HR Manager and Emma Smith. The Claimant was by that stage off sick as a result of the injury at work and so the invitation was sent to her personal email address rather than a work address.

106. The Claimant's evidence was that she did not access her emails at all whilst she was off sick. Given that in present times checking of emails is a daily occurrence and a primary method of communication we were very doubtful that what we were told in that regard was truthful. Nevertheless, whatever the position the Claimant did not attend the meeting.

107. A decision was therefore taken in the Claimant's absence to terminate her employment. This of course came very soon in time after the Claimant's supervision at which she had received positive feedback from Ms. Brophy.

108. The relevant parts of the dismissal letter which was sent by Ms. Magwenjere said this:

*"I am writing to you further to the probationary period review meeting you failed to attend on Monday 11/04/2022 at 11 am. As you are aware, your employment with the company was subject to a probationary period.*

*The purpose of the meeting was to discuss your suitability for ongoing employment with the company in light of the following matters:*

- *Complaint from OM's mum in relation to how she was spoken to*
- *Complaint from AW regarding being denied breakfast before school on your shift as you were not awake at that time.*
- *Complaint from an agency staff member regarding your conduct towards her*
- *Leaving shift without authorisation for over and* (sic) *hour on numerous occasions to get yourself some food.*
- *Bullying and intimidating behaviours towards a colleague following on from concerns being raised by the Regional Service Manager whereby young*

*people could hear you shouting at this staff member.*

- *Leaving young people OM and GW unsupervised whilst you remained in the staff office.*
- *Inappropriate comments being made regarding your line manager in the presence of Residential Support Workers.*
- *Not following sickness/absence protocol and high level of sickness and absences*
- *Lack of professional conduct throughout a discussion with Senior Management on the phone.*

*After careful consideration to all of the issues of concern was given and it is a reasonable belief that you are unable to perform the role to the standard that is required by the company. I am therefore writing to confirm the decision taken by Haven Care Group that your employment is terminated with immediate* (sic) *effect*".

109. The Claimant was wished every success for the future and advised of her right to appeal her dismissal which was to be to a Senior Manager, Laura Dingle.

Appeal against dismissal

110. The Claimant appealed against her dismissal on 25th April 2022. The relevant parts of her appeal letter said this:

*"I am writing to you to appeal the decision of my employment being terminated with immediate effect.*

*I believe this was unfair and unjust.*

*I was on sick leave and during my sick leave an email was sent to me to join an online meeting for a probationary review. I was unwell I was not at home checking my emails. Hence I didn't see the email or attend the meeting. I received a miscall (sic) from Haven Care Group a few days later. I returned the call and was informed by Loreen that she has emailed me another email regarding termination of employment.*

*Also, every single point that was mentioned as the matters of concern are untrue – following the sickness protocol may be somewhat true on 1 occasion but everything else on that list is false and I am being wrongly accused.*

*I feel I am being pushed out my (sic) management at Haven because I challenged them on certain matters.*

*I have concerns about how Sycamore Lodge is being managed and subsequently the low retention rate of staff at the home".*

111. We should observe that the Claimant's stance that all of the matters of concern were untrue save as for the issue of sickness absence was not accurate given that

she accepted before us that the complaint had been made by OM's mother.

112. We should also observe that whilst the Claimant mentioned grievances in her appeal she at no point utilised the Respondent's grievance procedure of which she was aware from her contract of employment. We are satisfied that the Claimant's personality is such that she would have had no qualms about raising a grievance if she genuinely felt that she had cause to do so.

Appeal outcome

113. The Claimant was not offered an appeal hearing and the matter was determined by Laura Dingle who is referred to as a Senior Manager at the Respondent. The appeal was dealt with in short terms with Ms. Dingle concluding that there was not sufficient cause to reverse the termination of employment. The appeal grounds were not addressed and as we comment below had things being dealt with more comprehensively and those matters engaged with the appeal grounds this claim might have potentially been avoided.

114. Ms. Dingle indicated that "other issues and concerns raised" would be looked into internally but we do not have anything before us to suggest that that was in fact done.

115. The Claimant emailed Ms. Dingle on 19th May 2022 suggesting for the first time that she had been dismissed because she "raised whistle-blowing and discrimination concerns with the management". No specifics were provided.

116. She asked that the matter be looked into and Ms. Dingle's decision reconsidered so as to avoid what she referred to as the matter being escalated further. There does not appear to have been any reply to that communication and the Claimant later entered into early conciliation and presented the claim that is now before us for determination.

## CONCLUSONS

117. Insofar as we have not already done so we now deal with our conclusions in respect of the remining issues that are before us.

Did the Claimant make a protected disclosure?

118. We begin with the first disclosure relied on by the Claimant which is the comment made to Ms. Brophy about the doors being left unlocked. As we have set out above we find that that was an observation and that was the totality of what was said. We do not find that the Claimant said anything further about potential intruders to the property which would have put the staff or young people at risk of harm. The disclosure did not therefore show or tend to show any of the relevant failures required to make a disclosure a qualifying disclosure.

119. The comment about the doors therefore did not amount to the Claimant making a protected disclosure.

120. We can deal with the other alleged disclosures in short terms because we found none of them to have occurred on the facts.

121. The Claimant therefore did not make a protected disclosure in respect of any of the matters relied on.

Unfair dismissal – Section 103A Employment Rights Act 1996

122. The claim for automatically unfair dismissal for having made protected disclosures fails at the first hurdle because the Claimant did not make any protected disclosure.

123. However, we have nevertheless gone on to consider if we had found that what was said about doors being left unlocked had been a protected disclosure whether the dismissal was the reason or principal reason for dismissal and whether any act of alleged detriment had been materially influenced by that alleged disclosure regarding the doors of Sycamore Lodge having been left unlocked on two occasions. We have limited our consideration to the doors issue because all of the other alleged protected disclosures failed on their facts in that we have found that none of those things actually happened.

124. We remind ourselves that as the Claimant had less than two years continuous service with the Respondent the burden of proof is on her to show that the reason or principal reason for dismissal was that she had made a protected disclosure. It is not a matter of considering if there was justification to dismiss the Claimant or whether the Respondent operated a fair process in doing so and it is not for the Respondent to prove an alternative reason to the dismissal being because of a protected disclosure or disclosures having been made unless the Claimant can shift the initial burden on her.

125. We have thought about this part of the claim extremely carefully and weighed up all matters before us. That is because it was not clear from the evidence who made the decision to dismiss the Claimant and we have not heard from Ms. Magwenjere who communicated that decision to her.

126. However, we remind ourselves that it is not for the Respondent to prove the reason for dismissal at this stage and on the Claimant's case there is nothing of substance that could lead us to determine that any alleged disclosures about the door being left unlocked had anything to do with her dismissal. Particularly, the Claimant's case was that Ms. Brophy had not taken matters seriously saying that the door often stuck by way of an explanation for what the Claimant had told her. There is nothing to suggest that Ms. Brophy was in any way phased or aggrieved with what the Claimant had told her, even on the Claimant's own case and as we have already observed she even offered a potential explanation for what may have caused that to have happened on the first occasion. There is nothing to say that she acted negatively towards the Claimant and we do not accept that there was any belittling of the Claimant, being dismissive of her concerns or any shift in attitude towards her after being told about the doors as is alleged. We consider that those matters were raised in an attempt to bolster the unfair dismissal claim.

127. Moreover, the disclosures had already been made by the time that the Claimant had her supervision with Ms. Brophy and yet she was given a positive supervision

record. No doubt that would not have been the case if Ms. Brophy was aggrieved about what the Claimant had told her as she would have been setting up an exit from the Respondent. We do not accept that it was anything said at supervision that was the cause of the decision to dismiss because again the supervision was in positive terms and if Ms. Brophy was seeking to cover up the issue about the doors she would not have included it within the record of that session. That is not least as the Claimant alleged that another disclosure that she said that she had made (albeit partially resiled from at the outset) had not been recorded and the suggestion was that that was a deliberate failure.

128. Whilst we can well appreciate that the Claimant did not feel that a number of the allegations against her were justified and that, for example, in relation to the complaint from the parent of one of the young people felt that her actions were appropriate in the circumstances, that is not the point. This is not a claim of so called ordinary unfair dismissal where the Respondent would have needed to have had a reasonable belief in the Claimant's "guilt" in respect of those allegations after undertaking a reasonable investigation. The fact that the Claimant may, had she attended the probationary review meeting, have had an answer to some of the allegations is therefore not relevant because there is absolutely nothing to suggest that they were manufactured to bring about a dismissal because of any alleged whistleblowing.

129. This part of the claim therefore fails and is dismissed.

Detriment – Section 47B Employment Rights Act 1996

130. Like the complaint of automatically unfair dismissal, the detriment complaints all fail on the basis that the Claimant did not make a protected disclosure.

131. However, we have nevertheless gone on to consider if we had found that the Claimant had made a protected disclosure regarding the issue of the unlocked doors whether she had been subjected to detriment as a result. We have limited our consideration to this issue because all of the other matters that were said to amount to protected disclosures failed on their facts.

132. The first four acts of alleged detriment can be dealt with in short terms and together because we have found that those things did not happen and therefore those parts of the claim fail and are dismissed on that basis alone.

133. The next complaint of alleged detriment is said to be Ms. Magwenjere communicating allegations of bullying and harassment to the Claimant which were unfounded. Again, this part of the claim again fails on its facts because the allegations were not unfounded. The Claimant may have had an answer to some of them but that is not the same thing. However, even if it had not and we had found that the Claimant had been subjected to a detriment in respect of those allegations, there is no causal link whatsoever between this matter and anything that the Claimant had said about doors being left unlocked. This part of the claim therefore fails and is dismissed.

134. The next complaint of detriment is the failure to provide details of the bullying allegations made against the Claimant. Whilst this is factually accurate, the Respondent was of course expecting her to attend a probationary review meeting to discuss those matters. They were not to know that the Claimant – if that is accurate – was not reading her personal emails and would not be attending. It would plainly have been better to give further details in advance but there is nothing to say that the Claimant would not have been given those details at the meeting. In all events, however, it cannot be said to be a detriment to the Claimant not to have provided that detail ahead of the review meeting because her case is that she did not know about it and so still would not have attended. Moreover, again there is nothing to link this issue to the Claimant having raised the doors being unlocked on two occasions and as such this part of the claim fails and is dismissed for all of those reasons.

135. We can take the next two allegations in short form because they both relate to allegations of a breach of the ACAS Code of Practice on Grievance & Disciplinary Procedures. The Claimant has not identified or put to any of the witnesses what parts of the Code that she says were breached. We do not accept that the Claimant was subject to any detriment in this regard. She was not being called to a disciplinary hearing to which the Code would apply but a probationary review meeting to consider her ongoing suitability for employment. Although undesirable, in our experience employers do cut corners when an employee has less than two years service when considering termination issues and had the Claimant attended the meeting – and as above we were far from convinced that she was unaware of it – she would no doubt have been given the details if that is the basis of this part of the claim. We do not find with regard to the generality of these allegations that they amounted to detriment to the Claimant but even if we had, there is no necessary causal link between them and any disclosure made (had we found it to be a protected disclosure) about doors being left unlocked.

136. The penultimate act which is said to be one of detriment is failing to pay the Claimant her notice pay. We can make no finding about this either happening or not because we heard no evidence about it and the Claimant did not put this matter in cross examination. The only reference to notice anywhere was in the Claimant's schedule of loss where she set out that she was not paid in lieu of notice. In all events, even if this had occurred there was no causal link to any alleged protected disclosure and it was not put to any witness that it was. This part of the claim therefore fails and is dismissed.

137. The final act which was said to amount to detriment is the failure to allow the Claimant a right of appeal in respect of her dismissal. We can deal with this in short order because this is factually inaccurate as the dismissal letter offered a right of appeal and the Claimant exercised that right. Again, this was an instance of the Claimant not engaging as to whether the allegations that she was making had any basis let alone evidential basis.

138. Insofar as the Claimant may have been inferring in this allegation that she was not afforded an appeal hearing, that is not the way in which the allegation is framed. As we have already observed there has been a great deal of careful case

management of this claim and more than ample opportunity given for the Claimant to bring to the Tribunal's attention anything that had been wrongly recorded by Employment Judge Brewer but she did not do so. Even if the Claimant had put the claim that way there was nothing at all to link the failure to provide an appeal hearing with any comment that the Claimant had made about doors being left unlocked and this part of the claim also fails and is dismissed.

139. We would observe, however, that as a matter of employment relations practices it would plainly have been better to have offered the Claimant an appeal hearing, particularly as she was saying that she had not known about the probationary review meeting until after it had already taken place. We make further comment about such matters below as had a more robust procedure been adopted this claim may have potentially been avoided.

140. However, for all of the reasons given above all complaints of detriment fail and are dismissed.

Direct discrimination related to the protected characteristic of religion or belief

141. We turn then to the acts which are said to amount to direct discrimination relying on the protected characteristic of religion.

142. The first of those allegations is said to be failing to allow the Claimant to take breaks during work. This allegation fails on its facts. The Claimant was not able to point to an instance when she was refused a break and in fact her evidence was that she had taken breaks when she needed to. The real issue is that the Claimant says that when she did take breaks she was taken to task for the length of them. However, that was not the allegation as framed by the Claimant. No application to amend the claim had been made and the Claimant had had ample opportunity to amend any errors that she might now say were in Employment Judge Brewer's case summary but she failed to do so. It is not now open to her to re-frame that allegation and this part of the claim must fail on its facts.

143. However, even if it had been that the allegation was framed as being taken to task for taking breaks, we were satisfied that this was because managers considered that the breaks were excessively long and they did not know where the Claimant was. There is support for that in Ms. Smith's concerns about the Claimant being in the office when she should have been supporting the young people in the Respondent's care. The Claimant is not able to point to any other person perceived to have been taking excessive breaks who was not spoken to about that and there are no facts at all to suggest that her being of the Muslim faith had anything to do with the matter.

144. The second allegation is said to be the failure to provide the Claimant with food or drink whilst at work and it can be taken in turn with the third allegation which was dismissing the Claimant's request for a budget to purchase dishes for Halal food cooking. We would firstly note that there was no dismissal of the Claimant's request

in respect of the latter complaint although we accept that there was some delay in it being processed.

145. However, we would observe that this is not the equivalent of a complaint for a failure to make reasonable adjustments and so it is not a matter of saying that the Claimant has certain religious beliefs which make it necessary for her to have separate cooking utensils. Instead, it is a comparison with someone of a different religion who was or would have been treated more favourably and had the food and utensils provided more quickly than for the Claimant and that religion was the reason for that treatment.

146. The comparison to be made in respect of this part of the claim is with someone of a different religion or belief who also needed separate cooking utensils and separate food items so as to avoid cross contamination. The obvious comparison would be with someone who was vegetarian or vegan or had allergies to certain types of food that might be prepared.

147. There are no facts before us that suggest that anyone in those circumstances who was not Muslim would have had food and utensils provided more quickly than was the case for the Claimant. We accept the evidence of the Respondent that the delay was caused by the fact that a budget had to be put in place to purchase the utensils and as soon as that was in place the Claimant was given the monies to buy them. It had also been agreed at the supervision that Halal food would be purchased for the Claimant.

148. Even if the Claimant had been able to evidence any difference in treatment, there is still nothing to suggest that that had anything to do with the fact that she is Muslim. There is in short no evidence at all to substantiate that other than the Claimant's assertion to that end which is plainly insufficient of itself. This part of the claim therefore also fails and is dismissed.

149. The next allegation of direct discrimination is said to be failing to authorise the Claimant to purchase Halal meat from the Sycamore Lodge budget. The Claimant did not put in evidence or in cross examination that she has ever asked for authorisation to purchase Halal meat from the budget. The only time that that arose was in the supervision when it was expressly said that the Claimant could have a budget to purchase Halal produce. This part of the claim therefore fails on its facts.

150. The next allegation which was said to be one of direct discrimination is said to be Ms. Brophy removing food stickers from the Claimant's food which identified that it was Halal food and saying "if we start putting labels on fridge for vegetarian, vegans, meat eaters we will have no place left in the fridge". This allegation fails on its facts as we do not accept that Ms. Brophy said that. It was not something mentioned by the Claimant before the hearing with Employment Judge Brewer. It was not mentioned in her appeal letter where any antipathy from Ms. Brophy would clearly have been mentioned as indeed were the (albeit bare) bones of the "whistleblowing" complaints but nothing was even intimated about that.

151. Moreover, no mention was made of this to Amos when the Halal cooking issue was being discussed which would again have been an obvious issue to have raised

at that time. If the issue is said to have arisen after that point then she made no further contact with him or anyone else such as HR nor does she allege that she challenged Ms. Brophy which is in direct contradiction to her allegations in respect of whistleblowing when she contends that she challenged the explanation given about the door sticking. The Claimant has a very forceful personality and we have no doubt that if this had genuinely happened that it would have bene raised at the time and certainly before the hearing before Employment Judge Brewer. It did not even feature in the Claimant's Claim Form.

152. More importantly than all that, however, is the fact that the Claimant never put this allegation in evidence or in cross examination of Ms. Brophy. The only time that we heard anything about the Claimant bringing in her own food was when she was discussing bringing in a jacket potato that she had bought from a local food vendor. We heard nothing about labelled food brought from home or elsewhere and we had reminded the Claimant of the need to put all allegations in the claim.

153. However, even if we had accepted that Ms. Brophy had said those words the problem lies in the very way that the allegation is framed. There is no actual comparator identified by the Claimant who labelled their food but about whom it is said that no comment was made. The hypothetical comparator would be someone of a different faith who had specific dietary requirements. That again could be someone vegan, vegetarian or for example of the Jewish faith who required Kosher meat. Even on the Claimant's own case had we found it to be made out the issue was labelling of food generally and there is absolutely nothing to suggest that the fact that the Claimant was Muslim had anything to do with the matter. Had we found the allegation to be made out on the facts we would nevertheless have dismissed it as amounting to direct race discrimination.

154. The next act which is said to amount to direct race discrimination is the failure to produce a work rota one month in advance to allow the Claimant to book time off for Ramadan and Eid. We had understood initially this to be an allegation that the Claimant was singled out in relation to the production of the rota. However, the position in fact was that the rota was not available for anyone over a month beforehand because it had not been finalised and it was in fact that delay of which the Claimant complains.

155. There was no evidence that anyone else who had at any other time asked for the rota to be provided well in advance so as to be able to book leave had had their request granted.

156. The appropriate comparator would therefore be someone who was not Muslim who needed to book time off for dates that could not be specifically confirmed. There is no evidence at all that they would have been treated any differently and provided with a rota any earlier than the Claimant was. There is also no evidence that the Claimant had to work over Ramadan or Eid and such she was not in all events subject to any detriment.

157. The final act which is said to amount to direct race discrimination is that the Claimant contends that she was shouted at in a team meeting regarding the failure

to produce the rota. Again, this was not a matter that the Claimant put into evidence and there was no cross examination on the issue despite her having been informed of the need to put her case in full. We therefore do not accept that the Claimant was shouted at and this part of the claim also fails on its facts. Even if it had not and we had accepted that the Claimant was shouted at, there is absolutely nothing before us to suggest that that was because she is of the Muslim faith.

158. All acts of direct discrimination therefore fail and are dismissed.

159. For all of those reasons the claim fails in its entirety and is dismissed.

160. However, as a postscript we would say that whilst the claim has failed the Respondent did not conduct themselves in respect of the way in which they went about dealing with the process that led to the Claimant's dismissal in a manner which the Claimant might reasonably have expected. Whilst it is acknowledged that the Claimant did not have two years service to bring an unfair dismissal claim, had she had a proper explanation about the allegations against her with specifics about what she was said to have done rather than had to wait to find out in these proceedings and been given an opportunity to discuss those matters and give her account the Respondent may have potentially avoided these proceedings altogether. We hope that consideration will be given to that in the future.

Approved by:

Employment Judge Heap

Date: 09 May 2025

JUDGMENT SENT TO THE PARTIES ON

....13 May 2025.....

.....

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**Recording of the hearing and transcription**
The audio of this hearing has been recorded in accordance with the procedure now operated by the Employment Tribunals.

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/