EMPLOYMENT TRIBUNALS

Claimant: Ms C Lowe

Respondent: South Cambridgeshire District Council

Heard at: Bury St Edmunds

On: 22, 23, 24, 27, 28, 29, 30 January 2025
6 February 2025 (in chambers)
3 April 2025 (by video)

Before: Employment Judge Graham

Members: Mrs A Buck
Mr C Grant

Representation
Claimant: Ms J Learmond-Criqui, Solicitor
Respondent: Ms L Halsall, Counsel

JUDGMENT having been sent to the parties on 9 May 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Introduction

1. ACAS Early Conciliation took place between 15 August and 18 September 2023. The Claimant filed her ET1 on 3 October 2023 and the Respondent filed an ET3 on 11 December 2023 denying the complaints.

2. Case management took place on 10 May 2024 before Employment Judge Mason. The issues were clarified and the Claimant was given permission to amend her claim to include complaints of whistleblowing detriment and automatic unfair dismissal. The complaints of constructive unfair dismissal and disability discrimination were dismissed upon withdrawal.

3. The final hearing took place before us in person, however the oral reasons were delivered by CVP.

4. At the start of the hearing, we were provided with a hearing bundle of 727 pages and a witness statement from the Claimant, as well as statements on

behalf of the Respondent from Eddie Spicer, Jon Hall, Peter Campbell and Jeff Membery.

5. During the hearing the Claimant suggested she may have made a comment in an investigation meeting on 16 February 2023 that she had made a protected disclosure. This did not appear in the contemporaneous written account. A statement was therefore produced part way through the final hearing from Chloe Whitehead (from Human Resources) on behalf of the Respondent, limited to confirming the accuracy of investigation meeting notes on 16 February 2023. We accepted this into evidence however Ms Whitehead did not attend to give evidence as she is on maternity leave and the issue arose at very short notice. Given that Ms Whitehead did not attend to be challenged on her evidence we placed less weight on it, but we did not disregard it.

6. The Claimant has a mild cognitive impairment which has impacted her memory to some degree. We took into account the Claimant's medical evidence and guidance in the hearing bundle, and also the Equal Treatment Benchbook, in particular Appendix B.

7. We made allowances for this when reading the Claimant's witness statement, when listening to her evidence, and in making our findings of fact. We made adjustments for the Claimant, in particular we granted frequent breaks, slowing down proceedings, and Ms Halsall also asked her questions in an accessible way taking account of the Claimant's impairment.

8. At the start of the hearing the Claimant applied to strike out the Response on the basis of alleged unreasonable conduct by the Respondent by sending the Claimant a cost warning letter on 20 January 2025. We refused that application as having read the letter we did not find the contents to be unreasonable. In addition, the Claimant has the benefit of professional legal representation in Ms Learmond-Criqui who is able to advise her on the discretionary nature of costs in this jurisdiction.

9. The Claimant also applied to make an electronic recording of the hearing. This was proposed to be done using an app which would upload the recording elsewhere for processing and then produce a transcript. This was requested due to the Claimant's impairment and to allow her to follow proceedings. The Respondent objected and raised concerns about where this data was being uploaded to – the location of the app's servers were unknown.

10. We refused the application. We are familiar with the guidance in the case of ***Heal v The Chancellor, Master and Scholars of the University of Oxford and others*** **UKEAT/0070/19**. The Recording of court or tribunal proceedings requires permission, and is granted only in exceptional cases. It may be a reasonable adjustment to grant permission where it is necessary to help alleviate or minimise a substantial disadvantage to the person's ability to participate in proceedings.

11. There is no doubt that the Claimant has some memory issues caused by her mild cognitive impairment. The Claimant's ability to recall things said and done in the hearing may be impacted. However, the Claimant, like most

people who come to this jurisdiction, was able to take a note of the contemporaneous evidence and discussions. The Claimant's memory issues did not impact her ability to make a contemporaneous note of the proceedings and therefore we did not consider that there was a substantial disadvantage to the Claimant in that regard. We made available an extra table and materials for the Claimant to use and the proceedings progressed at a reasonable pace.

12. In addition, the Claimant had the benefit of Ms Learmond-Criqui a professional legal representative acting on her behalf. The Claimant had the opportunity to confer with Ms Learmond-Criqui to check her understanding and we gave breaks for her to do so. We did not see that there was any prejudice to the Claimant's ability to take part in nor to follow proceedings.

13. We were presented with written and oral closing submissions from Ms Learmond-Criqui which were thorough and which demonstrated to us that the Claimant had been able to follow the proceedings, she had been able to fully participate, and to provide instructions to her lawyer. We are satisfied that any disadvantage arising out of the Claimant's impairment was ameliorated by the adjustments we made for her together with the helpful approach of both Ms Learmond-Criqui and Ms Halsall.

Issues

Protected disclosure

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

1.1.1 The claimant says she made disclosures on 7 February 2023 when she sent a witness statement to the Cambridge County Court in which she says she made the following disclosures: *"I first attended the property (a semi-detached house) on Wednesday 22 June 2022 (at approx.. 15.00) following a complaint passed to me by my Line Manager regarding the state of the kitchen and bathroom (see Appendix 1). At no point did I smell cannabis on [The Resident] or her daughter, or in the property.*

Whilst I have been advised by the council that I cannot attend the court case, I wanted to give my personal and supportive statement for [The Resident] that at no point at any of the five visits, two of which were unannounced, to [The Resident's address] have I smelt cannabis in the home or on other persons there in.

At the first visit I also went upstairs to inspect the issues with the bathroom and was shown windows within the property as [The Resident] had some concerns. Again, no smell of cannabis nor any suggestions of cannabis use.

The second visit, Friday 24th June 2022 (at approx. 14.00) was with the project officer at Mears, Senior Supervisor of Foster Building Services (contractor carrying out the work) and Surveyor from the kitchen supplier. Again, no smell of cannabis or any equipment related to cannabis."

1.1.2 Did they disclose information?

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

1.1.4 Was that belief reasonable?

1.1.5 Did she believe it tended to show that:

1.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.1.5.2 a miscarriage of justice had occurred, was occurring or was likely to occur;

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

1.1.6 Was that belief reasonable?

1.2 If the claimant made a qualifying disclosure, was it made:

1.2.1 to the claimant's employer?

1.2.2 or to any of the categories of people listed in sections 43C to 43H ERA 1996 ERA?

If so, it was a protected disclosure.

2. **Detriment (Employment Rights Act 1996 section 48)**

2.1 Did the respondent do the following things:

2.1.1 Suspend the claimant on 9 February 2023;

2.1.2 Investigate her actions;

2.1.3 Make allegations against her?

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

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

3. **Time limits**

3.1 Were the PID detriment complaints made within the time limit? The Tribunal will decide:

3.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the detriments complained of?

3.1.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation

extension) of the last one?

3.1.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

3.1.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

4. **Remedy for Protected Disclosure Detriment**

4.1 What financial losses has the detrimental treatment caused the claimant?

4.2 Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

4.3 If not, for what period of loss should the claimant be compensated?

4. 4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

4.6 Is it just and equitable to award the claimant other compensation?

4.7 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

4.8 Was the protected disclosure made in good faith?

4.9 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

5. **Unfair dismissal**

5.1 It is accepted that the claimant was dismissed by the respondent.

5.2 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

5.3 If the reason or principal reason was not that the claimant made a protected disclosure, what was the reason or principal reason for dismissal? The respondent says the reason was conduct which is a potentially fair reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

5.4 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair

must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

5.4.1 there were reasonable grounds for that belief;

5.4.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

5.4.3 the respondent otherwise acted in a procedurally fair manner;

5.4.4 dismissal was within the range of reasonable responses.

6 **Remedy for unfair dismissal**

6.4 The claimant does not seek reinstatement or re-engagement.

6.5 If there is a compensatory award, how much should it be? The Tribunal will decide:

6.5.1 What financial losses has the dismissal caused the claimant?

6.5.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.5.3 If not, for what period of loss should the claimant be compensated?

6.5.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

6.5.5 If so, should the claimant's compensation be reduced? By how much?

6.5.6 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

6.5.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

6.5.8 Does the statutory cap apply?

6.6 What basic award is payable to the claimant, if any?

6.7 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Findings of fact

14. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

15. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

16. The Respondent is a local authority and we find that the Claimant's employment commenced on 28 July 2014 as that is the date relied upon by the Claimant in the ET1 and the Respondent in the ET3.

17. At the time of her dismissal on 1 June 2023 the Claimant was employed as a Planned Maintenance Contract Surveyor. The Claimant's responsibilities included managing the inspection, maintenance and repair of the Respondent's housing stock.

18. The Respondent uses a database called Anite where this work is uploaded and can be accessed by staff. Other data can be logged on Anite, including records of anti-social behaviour ("ASB") complaints. The Respondent has a data protection policy which sets out the rules with respect to using personal data. Data protection training is mandatory and is left to individuals to complete online, however despite working for the Respondent for nine years the Claimant did not complete it, nevertheless the Claimant had a general understanding of data protection.

19. The Respondent has a detailed contractual disciplinary policy with clear guidance as to unacceptable conduct which separates out misconduct into three levels, minor, serious and gross misconduct. Examples of behaviour which may fall into each band are provided but are merely illustrative and it is intended that each case will turn on its own facts depending upon the severity and whether it is repeated. The policy provides that staff may be suspended as a neutral following HR advice.

20. The Respondent also has a whistleblowing policy which encourages staff to report their concerns, and it sets out how concerns may be raised.

21. The Claimant was managed by a Mr Newman and at some point she made him aware that she was acting as an informal support officer for some residents and discussing their housing concerns with them. This was outside of her job role however Mr Newman was not initially concerned by this.

22. As part of her role the Claimant attended a property within the district to carry out her surveyor duties. The tenant will be henceforth referred to as the Resident. The Council had obtained a suspended possession order for the Resident's property due to drug use and complaints of anti-social behaviour. The Claimant also attended the property and discussed the eviction proceedings with the Resident. This was outside of her role.

23. On 3 August 2022 at 4:07pm the Claimant sent a long email to Claire Gilbey the Respondent's Housing Enforcement Team Leader and Anthony Marriott

in the Respondent's housing department. Within that email the Claimant said she was hoping they could help the Resident with issues she was having with her neighbour as it was affecting her mental health and wellbeing. The Claimant said that the Resident felt that no one was listening or wanted to listen to her side of the situation and the Claimant said:

"I have suggested that [the Resident] *requests an in person meeting at her home so that you can visit to get the full facts of the ASB case that is against her, so that you have all the information and to look at this from both sides to get the full picture."*

24. The Claimant said she had done some research and had gone on to Anite to look at the neighbour's previous property and she said:

"For the record I have not disclosed any of this information as am fully aware it is private and confidential, and feel the snippets may give you some useful background information to the situation. I feel that if you read the full ASB case notes there is some information in there that may give you a fuller picture of why this is happening to the Resident."

25. The Claimant then included entries from the Respondent's Anite system and pasted them into her email together with her own commentary and said that the Resident felt like people had not been listening to her. The Claimant concluded that she was not a Housing Officer and she did not know the law but she asked if Ms Gilbey could visit and listen as the Resident was anxious.

26. The response from Ms Gilbey was sent at 8:43am on 4 August 2022 in which she said it was one of the highest profile cases, it was important not to engage in conversation about the case without the facts, what they say as council representatives could be detrimental to the case, and the ASB notes contained sensitive information about police warrants so should only be accessed on a need to know basis. Whereas the Claimant says that Ms Gilbey was not her manager, we find that repossessions were within her remit, and it was a management instruction from Ms Gilbey not to get involved.

27. On 17 October 2022 the Claimant spoke to Eddie Spicer, Service Manager, Housing Assets at an informal meeting to discuss the Resident's case. Mr Spicer was in her line management chain as he managed Mr Newman who was the Claimant's line manager. During the discussion, the Claimant reiterated that the Resident faced eviction proceedings and felt unheard. Mr Spicer acknowledged the Claimant's motives but again instructed her to stay out of the case due to her lack of background knowledge and experience.

28. The eviction proceedings were due to go to court on 8 February 2023 and at some point prior the Resident asked the Claimant to attend and to give evidence in support of her. The Claimant discussed this with her manager Mr Newman on 7 February who then contacted the Service Manager Tenancy and Estates, Geoff Clark, and he told her that Mr Clark had said she should not do so. Mr Clark was the line manager of Ms Gilbey who was

leading on the eviction. This was a management instruction not to attend court.

29. The Claimant asked to discuss this with Mr Clark and they took part in a Teams call on 7 February 2023 which the Claimant joined from home. Mr Clark explained to the Claimant that it would be extremely inappropriate for her to attend court in support of the Resident as she was not aware of the full facts of the case and also it could undermine the Respondent's case. This was another management instruction not to get involved and specifically not to attend court.

30. On or around 7 February the Claimant spoke to Ian Higham a Senior Supervisor working for an external contractor and she asked him if he had ever smelled cannabis whilst working at the property. Mr Higham sent an email to the Claimant dated 7 February 2023 in which he confirmed that in the three weeks he and his staff had worked there they had not smelled any.

31. At 6:47pm on 7 February 2023 the Claimant sent an email to the Peterborough County Court with the subject line "CONFIDENTIAL: Evidence for Case ID [Redacted]." In the body of the email the Claimant wrote:

"Please can the attached documents be sent to the judge for this case being heard Wednesday 8th February 2023 at 2pm, thank you. I do apologise for the lateness of these being sent over, I had hoped to be able to support the Resident *(as she has not had anyone to talk to about the case) but have been advised by colleagues that it would not be advisable. This is my personal statement of what I have witnessed at the property, and been advised of by [*the Resident]."

32. The email was sent from the Claimant's work email address and the signature included her job title as Project Manager Planned Maintenance with the Operations Housing Team at the Council.

33. The Claimant included various attachments. One of which was a witness statement from her which is relied upon as the protected disclosure in this case. In her statement the Claimant listed the times she had visited the property and had not smelled cannabis at the property. The Claimant said:

"Whilst I have been advised by the Council that I cannot attend the court case, I wanted to give my personal and supportive statement for that at no point at any of the five visits, two of which were unannounced, have I smelt cannabis in the home or on the persons therein."

34. The Claimant added:

"I then carried out a welfare visit on Tuesday 24th January 2023 as I'd spoken to [the Resident] *for 54 minutes on Monday 23rd January 2023, and I could tell she was not coping with all the accusations and harassment she was receiving, plus all the paperwork from the Council for the Court Case. We went through some of the documents, and I informed* [the Resident] *to contact Citizens Advice for legal advice and support, to ensure she*

documented all the facts, dates and times, who visited, Ring Camera evidence so that she would have all the correct information for the Court Case."

35. There was no express mention of any failing on the part of the Respondent contained anywhere within that witness statement. There was no reference to legal obligations, nor a miscarriage of justice, nor health and safety. At the very most the Claimant was saying she had not smelled cannabis at the address and the Resident was not coping.

36. The Claimant now argues that she reasonably believed that the Respondent had failed or was failing to comply with multiple obligations concerning fairness in eviction proceedings and disclosure of relevant information to the court. The Claimant says that these are:

    i. Housing Act 1996, Part VII – Local authorities must act fairly and proportionately when making decisions affecting tenants' homes.

    ii. Human Rights Act 1998, Article 8 – Protects the right to respect for one's home, requiring any eviction to be lawful, necessary, and proportionate.

    iii. Localism Act 2011, Section 149 – Imposes a duty on local authorities to exercise their powers fairly, transparently, and in a way that upholds tenants' rights.

    iv. Common Law Duty of Fairness (*R (Khatun) v Newham LBC [2004] EWCA Civ 55*) – Requires public authorities to base decisions on full and relevant facts when making housing-related decisions.

    v. Senior Courts Act 1981, Section 6 – Requires public authorities to make full and fair disclosure in legal proceedings (*R v Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941*).

37. The Claimant made no mention of these legal obligations at the time of sending her witness statement, nor in the subsequent disciplinary process addressed below.

38. A number of other attachments were included. These attachments were other emails. The Claimant now says that she did not intend to include all of them as she had forgotten that some of them contained further attachments of their own. These attachments included the email from Mr Highham of the same date together with other emails about maintenance works being undertaken at the Resident's address. The attachments also included the Claimant's earlier email of 3 August 2022 to Ms Gilbey and Mr Marriott.

39. Within that email of 3 August the Claimant had pasted extracts she had taken from Anite about the Resident's neighbour, including her previous address, details of visits from the Respondent's officers, sensitive personal information about the neighbour's health and references to her family members, as well as the comments the Claimant had included about her own view of the situation and her request for Ms Gilbey to visit the Resident

and to listen to her side of the situation. All of these documents were included unredacted.

40. The eviction hearing took place on 8 February 2023. At 4:06pm Ms Gilbey called Mr Clark and informed him that she had been at the eviction proceedings and she informed him about the contents of the Claimant's email and that it had left the Council with no option but to withdraw its case. Ms Gilbey said it had caused reputational damage to the Respondent and undermined her team's work. Mr Clark passed this on to Peter Campbell, the Head of Housing. Mr Campbell is the most senior officer in the Housing Department and is the line manager of Mr Spicer.

41. Mr Campbell said due to the seriousness of the situation he would pass it to the CEO and seek advice from HR. It was clear that by drawing this to the attention of the CEO Mr Campbell was concerned about the potential reputational damage to the Council of what had occurred. We also heard that this was necessary from a political aspect as the Claimant is an elected councillor in another authority.

42. Mr Campbell then raised the matter with Mr Spicer and told him to take HR advice. Mr Spicer then spoke to Helen Cornwell and Chloe Whitehead in the Respondent's HR department and he was advised that it would be necessary to suspend the Claimant pending an investigation to establish the facts.

43. Whereas in his oral evidence Mr Spicer initially had difficulty recalling specifically which documents he looked at prior to suspending the Claimant, having heard his oral evidence together with the contemporaneous emailed documents, we were satisfied that Mr Spicer approached the suspension with an open mind, and that the purpose of the suspension was to protect both sides and to allow an investigation to be undertaken.

44. At 5:39pm on 8 February Ms Ronta, the Respondent's Senior Litigation Lawyer, emailed Ms Gilbey to provide a written attendance note of the eviction proceedings. Ms Ronta expressed surprise and concern about the Claimant's intervention but explained that there had not been evidence of drug usage at the premises and the Council therefore withdrew its eviction application. The Claimant has accepted in her oral evidence that her email to the Court was a reason, but not the only reason, for the Council withdrawing the application.

45. A meeting took place between Mr Spicer and the Claimant on Teams at 9am on 9 February where the Claimant was informed that the decision had been made to suspend her pending an investigation into an allegation that she had acted in an unprofessional manner not in line with the Officers Code of Conduct; failed to follow a manager's instruction; she had undermined a council process resulting in significant costs to the Council; and potentially bringing the Council into disrepute. A letter was sent to the Claimant on the same date confirming the decision and the reason why.

46. On 9 February 2023 Jon Hall (Environment Service Manager) wrote to Claimant to invite her to an investigatory interview. The Claimant was told again what the four allegations against her were, although it did not specify

it related to the email to the court from 7 February. The Claimant was told what the potential outcomes might be such as no case to answer or a formal disciplinary process. The Claimant was advised that she could provide her own evidence and details of her witnesses.

47. An investigation commenced swiftly afterwards and statements were provided from Mr Clarke, Mr Marriott and Ms Gilbey on 9 February and from Mr Spicer on 15 February. Ms Gilbey's statement repeated much of what she had already told Mr Clark and she expressed concern that the Claimant had accessed the neighbour's data on Anite, and she said the incident had a severe knock on effect to the neighbour who was now being offered to move home and this involved uprooting a family and produced a cost to the housing department. Finally Ms Gilbey made reference to feeling highly concerned if the Claimant were to meet any other tenants where enforcement action was being considered and that she previously strongly advised her of the risks of getting involved in the case.

48. The Claimant also provided a brief emailed statement on 9 February where she said she had a vague recollection of the neighbour from her previous role and confirmed she had checked Anite. The Claimant said she had nothing to hide and felt that the information needed to be shared, but she had no idea if the judge saw the information and she felt that the Resident had not received any support from the Council, and the Resident said she was the only one who had listened. The Claimant said she felt it would have been an injustice if the Resident had been evicted from her home for something that her son was responsible for previously and she said *"I again state that I am content with my actions."*

Disciplinary investigation

49. An investigation meeting took place swiftly on 16 February chaired by Mr Hall. The Claimant attended with a trade union representative, and Ms Whitehead from HR took notes. This was a thorough investigation meeting which lasted for just over forty minutes and Mr Hall explained to the Clamant the purpose of the interview and he repeated each of the four allegations against her. The Claimant asked if she could record the meeting as she has difficulty retaining information however this was declined but she was allowed to take notes and Mr Hall indicated he would speak slowly so she could keep up.

50. Mr Hall clarified the Claimant's role and her involvement with the Resident and she was asked why she had written to the court to which she replied she felt that the Resident wasn't being listened to, she had not smelled or seen any drug use, and she wanted to tell the facts as she saw them. The Claimant confirmed approaching Mr Higham, that she had used her work email address, but had not thought about obtaining permission to share the data, nor had she asked her line manager for permission to send her statement as it was a spur of the moment thing.

51. The Claimant said she had forgotten about Ms Gilbey's email of 4 August, she confirmed she had been told not to attend court, and when asked if she saw any conflict of interest with her actions she replied that she thought that if the Council had a strong case it wouldn't matter. The Claimant confirmed

accessing Anite to look at the neighbour's details and acknowledged it was not part of her role but she was going above and beyond, and she said that she had been trained on GDPR at the Council and in a previous role. It was only later, after the investigation, that the Claimant confirmed that she had not been trained. As far as Mr Hall knew from the Claimant she had been trained. The Claimant made reference to her memory issues and the need to write things down.

52. When asked if with hindsight the Claimant would do this again she replied that she would. Ms Whitehead asked the Claimant if she realised that she had included the ASB log of the neighbour with her email and she replied no. The Claimant was asked if she knew that the information she sent could be shared with the Resident and her legal team, and the Claimant again said no.

53. The Claimant said that she had done what she had done and would do it again before stating she did not really understand what she was being accused of and she asked which part of the Officers' Code of Conduct she had breached. Mr Hall explained that the purpose of the investigation was to find out what happened and to cross reference it with the Code to see if any wrongdoing had occurred. Mr Hall clarified the amount of the time the Claimant was spending dealing with the Resident and it was confirmed that this included a 54 minute telephone call followed by a welfare visit afterwards which was not part of her role.

54. Following the interview with the Claimant, Mr Hall made further enquiries with Mr Newman after which he produced 13 page investigation report, the conclusion of which was that there was a disciplinary case to answer by the Claimant. This was a very thorough report which set out the Claimant's job description, the background to the matter and chronology, and it went through each of the four allegations against the Claimant.

55. We noted that there was a detailed analysis of each allegation, in particular with respect to acting in an unprofessional manner not in line with the Officer's Code of Conduct. Whereas it was clarified that this was based upon the first three allegations with respect to not following a manager's instruction, undermining a Council process and bringing the Council into disrepute, it was recorded that other matters had come to light in the process which were further instances of potentially breaching the Code. These were:

    i. Misuse of IT systems
    ii. Breach of data confidentiality
    iii. Use of position in the Council for the advantage of another individual
    iv. Breach of the duty of mutual trust and confidence

56. The report concluded that whereas there did not appear to be any obvious malicious intent by the Claimant nor any evidence to suggest a personal relationship with the Resident, there was a case to answer with respect to each of the four allegations, together with the other four matters which had also come to light during the investigation. Mr Hall made repeated reference to the seven overarching principles of public life, also known as the Nolan

Principles, and he indicated under each allegation where he considered that these principles had been breached. These included selflessness, integrity, and objectivity. Mr Hall recorded that given the gravity and number of issues identified the case should be heard at level three of the Respondent's disciplinary policy which concerned matters of gross misconduct.

57. During the hearing before us the Claimant suggested in her oral evidence that she may have said during the investigation that she had been whistleblowing. The Respondent denies this, it points to the investigatory minutes where there is no mention, and it produced a brief witness statement from Chloe Whitehead from HR who prepared those minutes but did not give oral evidence, confirming that the minutes were correct and that there was no such comment made at the time. We noted that the Claimant was equivocal about this, she did not challenge it at the time, nor has she produced a witness statement from her representative who was with her confirming she had said it. We therefore find on the balance of probabilities that the comment was not made.

Disciplinary hearing

58. On 22 February 2023 the Claimant was invited to a disciplinary hearing to take place on 8 March chaired by Peter Campbell. The Claimant was provided with a copy of the investigation report and annexes on 28 February 2023 including the witness statements and she would have been well aware of the allegations and the evidence. The invitation letter repeated the same four allegations as had been relied upon for the suspension and had been considered in the investigation. The Claimant was notified of her right to be accompanied and also that hearing was considering the matter as a gross misconduct offence and that dismissal was a potential outcome.

59. Immediately prior to the hearing the Claimant provided numerous pieces of medical evidence, some of which was historic occupational health advice personal to her, and some of it was general material from the internet. The Claimant also produced a five page written document for use at the hearing which appeared in our bundle, however the Claimant could not remember when or if she sent it to the Respondent, and Mr Campbell could not remember seeing it. We place only limited weight on it as it is unclear if it was seen or when, nevertheless its contents are consistent with what the Claimant said in the disciplinary hearing.

60. The disciplinary took place in two parts. The first was on 8 March where the Claimant was represented by a trade union representative and the management case was presented by Mr Hall, and Mr Campbell chaired the hearing. The notes of the hearing are not verbatim but they demonstrate a thorough discussion of the four matters the Claimant was accused of. Whereas at the start of the meeting in the morning the Claimant indicated she was not 100% sure why she was there, there was a detailed discussion of the allegations with her and by the afternoon she was again asked if she understood to which she replied that she thought so.

61. There was examination of the Claimant's duties as surveyor and she explained that she had been undertaking welfare visits in addition to her role which included checking on residents, popping in to see them whilst in the

area, speaking them on the telephone and recommending them to the Citizens Advice Bureau or to get legal advice. There was also discussion about how the Claimant had come to send her email to the court, starting with how she had accessed the neighbour's details on Anite. The Claimant explained that their name rang a bell, she checked her emails and recalled them, and then looked on Anite and she agreed she had found information on there about the neighbour in the logs which she included in her email to Ms Gilbey which she subsequently attached to her email to the court.

62. There was also a discussion about the events leading up to the Claimant's email, including her discussions with Ms Gilbey, Mr Newman, Mr Spicer and ultimately Mr Clark. The Claimant acknowledged that she had been told she should not attend the court hearing and she was asked why she therefore sent her email to the court. The Claimant's explanation was that she believed that if the Council had a strong case she did not think that her statement would make a difference, she wanted to provide the evidence and factual information of what she had witnessed whilst at the Resident's address and that she had no intention to stop anything happening.

63. There was discussion of the data protection impact of sending the email and attachments to the court and the Claimant explained she did not realise she attached the email from Ms Gilbey and had not read it when she emailed the court.

64. The Claimant had raised the issue of not having received the witness statements and documents at the time of her interview with Mr Hall, although it was confirmed she had a copy of her email to court provided to her at home by Ms Whitehead. The Claimant said she did not have Ms Ronta's email at the time of her interview and Mr Campbell asked her if that would have made a difference to her interview answers to which she said she did not know but she would have commented on it, and she said that it was not just her email which caused the case to fail.

65. Mr Campbell spent considerable time exploring with the Claimant the impact of her health issues on her work including whether her memory issues were there all the time or had specific triggers. The Claimant confirmed that she had not recalled the email from Ms Gilbey of 4 August at the time of sending her email to the court but she remembered distancing herself from the Resident at the time.

66. When asked if she would do the same thing again the Claimant said not exactly, she would insist on meeting the enforcement team to explain what she had witnessed or had been told and to see if she could engage in any way. Mr Campbell specifically asked the Claimant if it was 6:30pm would she still email the court, to which the Claimant replied that she would call to speak to someone.

67. It was confirmed during that hearing that the Claimant had not attended the formal GDPR training and she was therefore asked about her understanding it to which she said in a nutshell it was not to discuss personal details with other tenants or sharing information between tenants or to give out personal information and not to speak to spouses unless they give permission and someone should be the account holder or lead tenant.

Mr Campbell said that the Claimant had demonstrated an understanding of GDPR.

68. The Claimant summed up that she had no previous disciplinary or capability issues and this was an innocent regrettable error of judgement and she was just stating the facts about when she visited the Resident and she did not see or comprehend what the impact would be.

69. The hearing was adjourned in order to obtain Occupational Health advice on the impacts of the Claimant's memory issues and whether they had contributed to the allegations of gross misconduct. The Claimant was swiftly referred and advice was obtained which confirmed that the Claimant's cognitive ability was *"only slightly impaired"* but there was no suggestion that this had contributed to the allegations against her.

70. On or around this time the Claimant submitted an online whistleblowing referral to the Respondent. The Claimant does not rely upon this as a protected disclosure in these proceedings and there was no evidence before us that Mr Campbell or the appeal chair Mr Membery were aware of this report by the Claimant at the material times.

71. The disciplinary hearing was not reconvened until 1 June 2023 due to the Claimant's sickness absence due to stress and the subsequent referral to Occupational Health for advice on that condition. On 21 March 2023 the Respondent wrote to the Claimant to advise that it had added a further allegation for consideration which was an alleged breach of the GDPR. This already appeared as an allegation within Mr Hall's investigation report but it had not been listed as a freestanding allegation until this time. A breach of the GDPR is a specific act of potential misconduct under the Respondent's policy. The Claimant was given the opportunity to provide additional information in advance of the reconvened hearing and she provided further material concerning her medical conditions.

72. On 1 June 2023 the Claimant tendered her resignation and provided two months' notice. The Claimant provided different reasons in her email to her manager Mr Newman and in her email to HR. In any event the Claimant confirmed in her oral evidence to us that she was intending to leave her role in two months irrespective of the outcome of the disciplinary.

73. The disciplinary proceeded on 1 June and the Claimant was accompanied by her trade union representative. The Claimant received the questions in advance as a reasonable adjustment for her. We have been provided with a copy of this written exchange which sets out fully what it was that the Claimant was accused of and she was given the opportunity to explain what impact she said her impairment had on her actions. The Claimant provided a very detailed reply and she also alluded to the menopause having an impact on her memory due to brain fog and forgetfulness, and that she can become side tracked.

74. As regards the Claimant sending her email, she confirmed in writing that her only intention had been to send her statement to the court, she had not checked what she sent and she was distracted at the time of sending. The Claimant said she had wanted to speak to Mr Clark as she only wanted to

support the Resident at a court case which would be extremely nerve wracking and an anxious time for them. The Claimant said she had forgotten the email from Ms Gilbey and that she was a caring person who cannot bear to see another person in distress and will help where she can.

75. The Claimant was permitted to record the reconvened hearing as another reasonable adjustment. There was further consideration of the impact of the Claimant's health condition on her actions, and there was also a discussion about the Claimant going beyond the terms of her role.

76. Following an adjournment the Claimant was informed that the allegation of failing to follow a management instruction had been upheld, and that this included from Ms Gilbey, Mr Newman, Mr Spicer, and Mr Clark. Furthermore Mr Campbell said that the Claimant had been told not to get involved and not to attend court and also the reason why, and by providing her statement she had gone beyond the spirit of the instructions to her.

77. As regards undermining a council process resulting in significant cost to the council, Mr Campbell noted that it was not guaranteed that the Council would have obtained the eviction order in any event but the Claimant's letter had undermined that process. To that end Mr Campbell disregarded the costs associated with the court case but nevertheless found there were some costs attributable to the time the Claimant had spent navigating the Anite system, and the time spent visiting and being involved in the support work however he made no attempt to quantify this.

78. As regards bringing the Council into disrepute, Mr Campbell recorded that there had been damage to the Council's reputation by the Claimant's actions, and there remained a significant risk that the neighbour could choose to complain, go to the press, contact their MP or the Ombudsman and that it was through luck that it had not happened.

79. With respect to acting in an unprofessional manner and not in line with the Officers Code of Conduct, Mr Campbell determined that the Claimant had inappropriately accessed the Anite system to look for historic information about the neighbour, and this was an abuse of the system as she had no legitimate reason to access those records. It was recorded that the Claimant had disclosed information and breached data confidentiality and whereas the Claimant had not attended the GDPR training she demonstrated when questioned that she had an understanding of it. Mr Campbell recorded there were two issues, firstly sharing confidential information about a tenant without their permission and secondly not paying sufficient care with that personal data.

80. Thirdly it was recorded that the Claimant's email to the court was intended to favour one client over another and that the Claimant had used her position in the Council for the advantage of another, and whilst it was not done for a malicious purpose, nevertheless there were consequences and she ignored advice and instructions as well as other guidance including regarding GDPR.

81. With respect to breach of trust, Mr Campbell recorded that the Claimant had not said she would not do it again but rather her position was she would do

it differently which he took to be little or no acceptance that she had done anything wrong or did not recognise the wider impact of her actions. Mr Campbell recorded there was no reassurance that there would not be a repeat which represented a significant risk to the Council in particular the Housing Department where many of the clients are vulnerable.

82. The fifth allegation about GDPR had already been addressed under the Code of Conduct. It was recorded that there were several instances where the Claimant had behaved in a way that constituted gross misconduct and whereas her health issues had some relatively minor impact, nevertheless given the number of instances and severity of those, Mr Campbell determined that the appropriate outcome was immediate dismissal. The Claimant was notified of her right to appeal and was provided with the notes of the hearing.

83. The Claimant's employment terminated on 1 June 2023. The decision was confirmed by letter dated 2 June 2023 which largely reflected the oral decision given to the Claimant the day before.

84. During the hearing before us, Mr Campbell was referred to a key paragraph within his outcome letter where he said that *"individually each allegation in isolation may not meet the required definition of gross misconduct"* it was put to Mr Campbell that this was different to his oral reasons where he had said that *"it is clear to me that there have been several instances where the Claimant has behaved in a way that constitutes gross misconduct."* We noted that the disciplinary policy provides that failure to comply with a reasonable instruction and also failure to comply with the terms and conditions of employment are recorded as level 1 minor misconduct which could attract a level 1 warning. Likewise breach of GDPR and also causing loss to the Council and use of Council position for the advantage of another described as a serious misconduct which could attract a level two warning.

85. Mr Campbell referred us to the Respondent's disciplinary policy where it was made clear that the levels of misconduct were merely examples and that each case would depend upon the severity of the offence whether it was a first offence or a repetition of something which had already been dealt with. In addition Mr Campbell referred to the definition of gross conduct within the policy which provides that this was any act serious enough to breach the duty of mutual trust and confidence between employee and employer making any further working relationship impossible. Mr Campbell provided us with the example of failing to photocopy a 10 page document which could amount to failure to comply with a management instruction which may attract a warning, however he said it was very different to ignoring instructions not to take part in court proceedings.

Appeal

86. The Claimant filed an appeal against dismissal on 13 June 2023 and this was heard on 5 July 2023 by Jeff Membery (Head of Transformation, HR and Corporate Services). The Claimant was notified in advance that the appeal would not be a re-hearing unless it was based upon new evidence that had not been available before or if there had been an unfairness in the process. The Claimant was again notified of her right to be accompanied,

however as there were scheduling issues with her representative, the Claimant was informed that she could bring her husband as a support and that she could record the hearing as a reasonable adjustment. The Claimant confirmed at the hearing that she was content to proceed unaccompanied.

87. Whereas the Claimant's grounds of appeal disputed much of the allegations against her, by the time of the appeal the Claimant's position had changed and she accepted that she had committed misconduct and said that she had "fucked up" which she described as a genuine mistake, she said she had been compassionate and this was not a heinous act, there was no pre-meditation and she was trying to help someone vulnerable who was not being treated fairly, and that she had not been as diligent as she should have been and ought to have removed the attachments.

88. The crux of the Claimant's appeal was that she felt the penalty was harsh and should be downgraded to serious misconduct, and she sought an agreed reference and her notice pay.

89. The management case was presented by Mr Campbell who said he accepted that there was no intention or malice in the Claimant's intention which had been to care for somebody but she had become blinkered and there had been an impact on other council activities, she caused damage to the Council in a number of ways with unintended but serious consequences. Mr Campbell said he acknowledged the Claimant's many years of service however there had been a series of serious allegations and within their own right the severity of the elements could be construed as gross misconduct and his decision to dismiss was based on the cumulative impact of the findings of the investigation.

90. Mr Membery asked relevant questions of Mr Campbell, including whether there had been an attempt to calculate the alleged loss to the Council, and whether Mr Campbell would have still dismissed the Claimant had the loss been small. The response from Mr Campbell was that the loss had not been calculated but he would still have dismissed the Claimant as it was one of a number of grounds. Mr Membery went on to question whether dismissal was the appropriate sanction and Mr Campbell explained that it had been due to an accumulation of the allegations.

91. There was again consideration of the Claimant's memory problems and mild cognitive impairment as well as the menopause which she said had an impact on her memory.

92. Mr Membery advised that there was no new evidence presented to alter the original decision, he considered the correct process had been followed, and he found that the Claimant's medical condition had been taken into account. Having concluded that there was nothing raised in the appeal that would have resulted in a different decision the Claimant was informed that her appeal had been dismissed. As the Respondent had concluded that the Claimant's acts had not been malicious it indicated a willingness to agree wording for a reference for the Claimant. The decision was confirmed by letter dated 7 July 2023.

Law

93. The Employment Rights Act 1996 provides:

S. 43B(1) Disclosures qualifying for protection.

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

(a) 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,

…

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

…

S. 43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer,

…

S. 43G Disclosure in other cases.

(i) *A qualifying disclosure is made in accordance with this section if—*

(a) …

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) *The conditions referred to in subsection (1)(d) are—*

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) *In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to –*

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) *For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about*

action taken or not taken by any person as a result of the previous disclosure

S. 43H Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(a) …

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made

94. In ***Williams v Michelle Brown AM*** **UKEAT0044/19/00**, HHJ Auerbach set out the test for identifying whether a qualifying disclosure has been made. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. The EAT in ***Blackbay Ventures Ltd v Gahir*** **[2014] ICR 747** endorsed the same approach.

95. First there must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld*** **[2010] IRLR 38**, the EAT held that to be protected, a disclosure must involve giving information and must contain facts, and not simply voice a concern or raise an allegation.

96. However, in ***Kilraine v London Borough of Wandsworth*** **[2018] ICR 1850** the Court of Appeal held that we should not introduce a rigid dichotomy between information on the one hand and allegations on the other, what matters is what information was conveyed or disclosed and:

"Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

97. A communication asking for information or making an inquiry is unlikely of itself to be constitute conveying information.

98. It is possible for several communications together to cumulatively amount to a qualifying disclosure even where each communication is not a qualifying disclosure on its own - ***Simpson v Cantor Fitzgerald Europe*** **[2020] EWCA Civ 1601.** Here the Court of Appeal agreed with the approach of the EAT in ***Norbrook Laboratories (GB) Ltd v Shaw*** **UKEAT/0150/13** where it was held that three emails taken together amounted to a qualifying disclosure even where the last email did not have the same recipients as the first two, as the former emails had been embedded in the final email. It will be a question of fact for the tribunal to decide whether two or more communications read together may be aggregated to constitute a qualifying disclosure on a cumulative basis:

"An earlier communication can be read together with a later one as "embedded" in it rendering the later communication a protected disclosure even if taken on their own they would not fall within section 43B(1)(d) (Goode paragraph 37). Accordingly two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact." [22]

99. As regards the Claimant's belief about the information disclosed, the question is whether the Claimant believed **at the time** of the alleged disclosure that the disclosed information tended to show one or more of the matters specified in section 43B(1). Beliefs the Claimant has come to hold **after** the alleged disclosure are irrelevant. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1) and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs. It is important for a tribunal to identify which of the specified matters are relevant, as this will affect the reasonableness question.

100. Account should be taken of the worker's individual circumstances and the focus is on the worker making the disclosure and not on a hypothetical reasonable worker. Workers with a professional or inside knowledge may be held to a higher standard than lay persons in terms of what it is reasonable for them to believe.

101. Whereas the test for reasonable belief is a low threshold, it must still be based upon some evidence. Unfounded suspicions, rumours and uncorroborated allegations are insufficient to establish reasonable belief.

102. The belief must be as to what the information **tends** to show, which is a lower hurdle than having to believe that it **does** show one or more of the specified matters. There is no rule that there must be a reference in the disclosure to a specific legal obligation or a statement of the relevant obligations nor is there a requirement that an implied reference to legal obligations must be obvious. However, the fact that the disclosure itself does not need to contain an express or even an obvious implied reference to a legal obligation does not dilute the requirement that the Claimant must prove that he had in mind a legal obligation of sufficient specificity at the

time he made the disclosure - ***Twist DX and others v Armes and others*** **UKEAT/0030/30/JOJ**.

103. In ***Darnton v University of Surrey*** **[2003] IRLR 133** it was held by HHJ Serota that:

"In our opinion, it is essential to keep the words of the statute firmly in mind; a qualifying disclosure is defined, as we have noted on a number of occasions, as meaning any disclosure of information which in the reasonable belief of the worker making the disclosure tends to show a relevant failure. It is not helpful if these simple words become encrusted with a great deal of authority…" [28] and

"We agree with the learned authors that, for there to be a qualifying disclosure, it must have been reasonable for the worker to believe that the factual basis of what was disclosed was true and that it tends to show a relevant failure, even if the worker was wrong, but reasonably mistaken." [32].

104. The issue of reasonable belief was considered by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4** by using the example of a surgeon working in a hospital compared to that of a lay observer:

".... So in our judgment what is reasonable in s.43B involves of course an objective standard – that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure. To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their 'reasonable' belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing." [62]

105. As regards the public interest, the Court of Appeal in ***Chesterton Global Ltd v Nurmohamed*** **[2017]** **EWCA Civ 979**, identified the following principles:

i. There is a subjective element - the Tribunal must ask, did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest?

ii. There is then an objective element - was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest.

iii. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. As per Underhill LJ:

"That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable." [29]

iv. The reference to public interest involves a distinction between disclosures which serve only the private or personal interest of the worker making the disclosure, and those that serve a wider interest.

v. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest. In such a case it will be necessary to consider the nature of the wrongdoing and the interests affected, and also the identity of the alleged wrongdoer. These are also referred to as the four factors in ***Chesterton***.

106. It is not for the Tribunal to determine if the disclosure was in the public interest. Rather the question is (i) whether the worker considered the disclosure to be in the public interest; (ii) whether the worker believed the disclosure served that interest; and (iii) whether that belief was reasonably held.

Breach of a legal obligation

107. As regards legal obligation, in ***Boulding v Land Securities Trillium (Media Services)*** **Ltd (2006) UKEAT/0023/06** HHJ McMullen QC held the following:

"… the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

"Likely" is concisely summarised in the headnote to Kraus v Penna plc [2004] IRLR 260, EAT Cox J and members:

"In this respect 'likely/ requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the Claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply."" [24 and 25].

108. In ***Eiger Securities LLP v Korshunova*** **[2017] ICR 561**, Slade J held:

"In order to fall within ERA s.43B(1)(b)… the ET should have identified the source of the legal obligations to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation…

The decision of the ET as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the claimant's belief that a legal obligation has not been complied with" [46 and 47].

109. Accordingly, whilst the identification of the legal obligation does not need to be precise or detailed, it has to be more than a belief that what was being done was wrong.

Endangerment of health and safety

110. As regards endangerment of health and safety, the term "health and safety" is a generally well understood phrase and it will usually be clear whether the subject matter of a disclosure could fall within its scope. It was confirmed in the case of ***Hibbins v Hesters Way Neighbourhood Project*** **[2009] ICR 319**, that the health and safety matter does not necessarily have to fall under the direct control of the employer in order for protection to apply. A disclosure of this nature will require sufficient detail of the perceived risk to health and safety. A risk to mental health can fall within this definition.

Miscarriage of justice

111. The term miscarriage of justice is not defined in the Act but it is a matter of common sense that it could extend to disclosures about perjury, deliberate failure to comply with disclosure obligations, and covers both criminal and civil proceedings.

Detriment

112. S. 47B Employment Rights Act 1996 sets out the right not to be subjected to a detriment (or deliberate failure to act) by the employer done on the ground that the worker has made a protected disclosure. Detriment has the same meaning as in discrimination law, meaning that someone is

put to a disadvantage – ***Ministry of Defence v Jeremiah*** **[1980] ICR 13 CA**.

113. In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] EWCA Civ 73** clarification of the term "detriment" was provided by Elias LJ who held:

"In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases…" [27]

And

"Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective." [28].

Causation

114. As per Linden J in ***Twist DX***:

"…even where the worker has made a qualifying disclosure which is protected, they will not succeed unless the ET concludes that the disclosure of the qualifying information was a, or the, reason for the treatment complained of…" [105].

115. As to the issue of causation the court in ***Jesudason*** summarised the relevant authorities including ***Manchester NHS Trust v Fecitt*** **[2011] EWCA 1190; [2012] ICR 372** where it was held that:

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower." [45].

116. In ***Jesudason*** the Court endorsed a reason why test as opposed to a but for test for detriment claims and held:

"Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B." [31].

117. In ***Kong v Gulf International Bank (UK) Ltd (Protect (the Whistleblowing Charity) intervening)*** **[2022] IRLR 854**, the court examined the process for determining the reason for impugned treatment. Simler LJ made reference to the "separability principle" whereby it is possible to distinguish between the protected disclosure of information on

the one hand, and conduct associated with or consequent on the making of the disclosure on the other. It is possible that the protected disclosure is the context for the impugned treatment, but it is not the reason itself. It was held:

"The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will 'cry out' for an explanation from the employer, as Elias LJ observed in Fecitt, and tribunals will need to examine such explanations with particular care." [59-60].

Burden of proof in whistle-blowing detriment claims

118. Section 48(2) Employment Rights Act 1996 provides that it is for the employer to show the ground on which any act, or deliberate failure to act was done. The Employment Appeal Tribunal in ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust*** **UKEAT/0047/19/BA** held:

"…Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under Section 48(2) . The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation.

Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense." [33 and 34]

Automatic unfair dismissal

119. Section 103A of the Employment Rights Act 1996 provides:

"A*n 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."*

120. As set out above, the statutory question is what motivated a particular decision maker to act as they did – ***Kong***.

121. The reason or principal reason for the dismissal means the employer's reason. This can be the reason of the dismissing officer, but it may be necessary to look beyond that decision. In ***Royal Mail v Jhuti*** **[2019] UKSC 55** (at paragraph 60), the Supreme Court held that where the reason for dismissal is hidden from the decision maker behind an invented reason, it is for the Tribunal to look behind the invention rather than to allow it to infect its decision, and provided the invented reason belongs to a person placed in the hierarchy of responsibility above the employee, there is no difficultly attributing that person's state of mind to the employer, rather than that of the decision maker.

122. As regards the burden of proof, in ***Kuzel v Roche Products Limited*** **[2008] IRLR 530**, the Court held:

"The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason." [59 and 60]

123. A case of whistleblowing dismissal is not made out simply by a "coincidence of timing" between the making of disclosures and the termination of employment - ***Parsons v Airplus International Ltd*** **[2017] UKEAT/0111/17** [43].

Ordinary Unfair Dismissal

124. Where dismissal is admitted, the first question for the Tribunal is to identify the real reason for the dismissal (as per the Employment Rights Act

1996 (ERA) s 98). The burden is on the employer to show what that reason was (ERA s 98(1)(a)).

125. As held in ***Abernethy v Mott, Hay and Anderson*** **[1974] ICR 323**:

"*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*".

126. The second question for the Tribunal is whether the real reason for the dismissal was a potentially fair reason within the categories set out in ERA s 98(2) or as some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The burden is on the Respondent to show this - s. 98(1)(b) ERA.

127. The third question is whether the dismissal for that reason was fair or unfair, which depends upon whether in all the circumstances (including the size and administrative resources of the Respondent) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. That question is to be determined in accordance with the equity and substantial merits of the case (ERA s 98(4)). Here the burden of proof is neutral.

128. The proper approach in answering the third question under s. 98(4) ERA was summarised in ***Iceland Frozen Foods v Jones*** **[1982] IRLR 439** (confirmed in ***Foley v Post Office*** **[2000] IRLR 827),** and ***HSBC Bank plc v Madden*** **[2000] IRLR 827**:

i. the starting point should always be the words of s 98(4) themselves;

ii. in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;

iii. in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

iv. in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another might quite reasonably take another;

v. the function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

129. In determining the fairness of the dismissal, procedural fairness and substantive fairness should be viewed in the round, and this includes the appeal stage. It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the

employer's process. It will be for the Tribunal to evaluate whether that is so significant as to amount to unfairness.

130. In relation to conduct dismissals, in assessing fairness under s. 98(4) ERA it is well established that a tribunal must consider the factors set out in ***British Home Stores Ltd v Burchell*** **[1980] ICR 303**, namely:

i. Did the Respondent have a reasonable suspicion amounting to a belief that the Claimant was guilty of the misconduct at the time of dismissal;

ii. Were there reasonable grounds in the Respondent's mind to sustain the belief in the misconduct; and

iii. Had the Respondent carried out as much investigation as was reasonable in the circumstances.

131. In ***Quintiles Commercial UK Ltd v Barongo*** **UKEAT/0255/17/JOJ** and also ***Hope v British Medical Association*** **[2022] IRLR 206** the EAT held that for the purposes of a claim of unfair dismissal (as distinct from wrongful dismissal) our consideration should be on the statutory wording under s. 98(4) rather than the labels attached to such conduct within an employer's dismissal procedure and the real question is and remains the statutory one of whether the employer acted reasonably or unreasonably in all the circumstances in treating the conduct as sufficient reason to dismiss.

Time

132. S. 48 Employment Rights Act 1996 provides that a tribunal shall not consider a complaint of detriment unless it is presented within three months of the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

133. S. 111 Employment Rights Act 1996 provides that a tribunal shall not consider a complaint of unfair dismissal unless it is presented within three months of the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Submissions

134. The parties provided very helpful oral and written closing submissions. To avoid duplication, we have addressed the relevant parts in the conclusions and analysis below.

Conclusions and analysis

Whistleblowing detriment and automatic unfair dismissal

135. We will start by considering first whether the Claimant has made a protected disclosure under s. 43B. The information disclosed within the Claimant's statement to the court of 7 February 2023 was that the Claimant had visited the Resident's property a number of times both announced and unannounced, and on no occasion did she smell drugs nor did she observe drug paraphernalia on site. This was the conveying of information and facts.

136. We will now consider the Claimant's belief in what this information tended to show. It is alleged that this disclosure tended to show either a breach of a legal obligation, miscarriage of justice, or the endangerment of health and safety.

137. There is both a subjective and an objective element to this question. We start by examining whether the Claimant believed that the information tended to show one or more of these things.

138. The Claimant places reliance on ***Norbrook*** and says that this is authority for the proposition that a disclosure does not need to explicitly allege wrongdoing to qualify and that it is sufficient that it provides facts that raise concerns about a legal or procedural failure. The Claimant tells us that we should look at the wider context of what was going on at the time.

139. With all due respect to the Claimant that is not precisely what ***Norbrook*** is authority for. The point is therefore more nuanced that the Claimant suggests, and whereas ***Norbrook*** allows for two or more communications to cumulatively amount to a protected disclosure, there still needs to be sufficient factual content and specificity in them to be protected. This case is not authority for conducting a wider inquiry into the wider context going on around the time of the disclosures, we must still look at what information was being conveyed.

140. If we look at the email dated 3 August 2023 from the Claimant to Ms Gilbey, that information was largely a request for Ms Gilbey or others to speak to the Resident. The factual information disclosed in that email was that the Resident told the Claimant that she did not think that people were listening to her. That is the totality of the information disclosed.

141. Moving on from that, the belief must be as to what the information tends to show which is a lower hurdle than having to believe that the disclosure does show one or more of those specified matters. There is no requirement that there must be a reference in the disclosure to a specific legal obligation nor is there a requirement that the legal obligation must be obvious but nevertheless the Claimant must prove that she had in mind a legal obligation of sufficient specificity at the time she made the disclosure - ***Twist DX.*** We remind ourselves that for there to be a qualifying disclosure, it must have been reasonable for the worker to believe that the factual basis of what was disclosed was true and that it tends to show a relevant failure, even if the worker was wrong, but reasonably mistaken – ***Darnton.***

142. We will start with the alleged failing of a breach of a legal obligation. It is quite clear that there is no reference at all to a legal obligation anywhere within the Claimant's alleged protected disclosure nor her email to Ms Gilbey. The Claimant now relies upon various statutes and caselaw she

says she had in mind at the time although none of them were referenced in her statement to court at the time, none were referenced in any of her correspondence at that time, nor were they referenced at any time in the disciplinary process. The information disclosed does not say anything about any failing on the part of the Respondent at all, it is a bare statement that she did not observe drug usage at the premises. In the hearing before us the Claimant makes repeated reference to a legal duty on the Council to act fairly in its dealings with residents, however there was no reference to that at the time nor can it even be implied as the statement simply recorded that she had not observed drug usage. We of course recall that the Claimant said in her email to Ms Gilbey of 3 August 2022 that she did not know the law. There is no suggestion that in the period between and 7 February 2023 the Claimant had acquired that knowledge. If the Claimant had any of those legal obligations in mind at that time that she relies on now we consider she would have mentioned them, however she did not do so.

143. The email to Ms Gilbey which is not relied upon as a protected disclosure does not help remedy what is lacking from the Claimant's witness statement to the court. That email simply asked Ms Gilbey or a colleague to speak to the Resident who did not think she was being listened to. Reading them both together does not take the alleged disclosure any further.

144. The same is true with respect to a miscarriage of justice and endangerment to health and safety. There was no express nor implicit reference to any of these matters anywhere within that statement to court. There is a total absence of any alleged failing on the part of the Respondent in the statement the Claimant sent to the court. We put out of our minds the attachments included in that email to court as the Claimant tells us they were uploaded by accident. As such we agree with the Respondent that the attachments cannot form part of the Claimant's belief, nor part of the disclosure, if the Claimant never intended to include them in the first place.

145. The Claimant says that ***Ibrahim v HCA International Limited*** **[2020] IRLR 224** confirms that disclosures about risks to mental health or well-being can falling within the meaning of "health or safety." Whilst we agree that disclosures about mental health can of course fall within that definition, depending upon the contents of what information was specifically conveyed, that case is not authority for that specific point. The focus must always be on what information was conveyed. In any event, the Claimant was not conveying information about failings with respect to that matter within the witness statement she relies upon as her disclosure.

146. We do not find that the Claimant therefore believed at the time that the disclosure tended to show any of the three failings relied upon given the absence of any reference to any failing at all. Even if the Claimant did believe that it tended to show any of these things, we find that objectively such a belief was unreasonable for the reasons we have already given – there was a lack of any reference at all to any failing on the part of the Respondent. This was simply a statement about the Resident and not about the Respondent. We have also taken into account the Claimant's expressed desire to help the Claimant which is not the same thing as raising concerns with the Respondent about alleged failings.

147. Nevertheless, we will move on to consider the public interest remembering that it is not for us to decide what is in the public interest. The statutory question is both a subjective and an objective one. We ask ourselves did the Claimant believe it to be a disclosure in the public interest and if so, was that belief reasonable? We look to what the Claimant was saying at the material time and during her disciplinary process. The Claimant invites us to consider the wider context and we find it helpful to do so. The Claimant was expressing that the Resident had told her she did not feel that she was being listened to by the Respondent, and the Claimant wanted to state the facts as she saw them, and what she had witnessed which was that she had not noticed any drug usage at the premises. There was no more to it than that.

148. In our view the Claimant did not at the material time believe that this was a disclosure in the public interest, she made her statement because she had been asked to do so by the Resident. It was a request she complied with for the Resident. The disclosure simply concerned what she had witnessed at the Resident's address.

149. That said, we are mindful of the guidance in ***Chesterton***. In that case the court said that tribunals should be cautious when deciding whether a worker reasonably believed that the disclosure was in the public interest and we must be careful not to substitute our own view of the public interest. The court reiterated that the necessary belief is simply that the worker believes that the disclosure is in the public interest, however the reasons why she believes it to be so are not of the essence and further a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to matters not in their mind at the time they made it.

150. Therefore, if we are wrong about what the Claimant subjectively believed we will still go on to determine whether objectively that was a reasonable belief. We again find assistance in ***Chesterton*** which urges us to consider four factors. We note that ***Chesterton*** related to a disclosure about a worker's own contract, but nevertheless those principles are of assistance in this case. We record that the number of the group whose interests the disclosure served was two, the Resident and her daughter. There was no reference in the disclosure to some wider group generally who might be impacted. The nature of the interest affected was their home. As to the nature of the wrongdoing disclosed, there was no disclosure about any wrong doing at all, it was simply a statement of fact about not having observed drug usage. Finally, we note the identity of the Respondent which is a public authority which has legal obligations and powers with respect to housing and dealing with anti-social behaviour.

151. Taking all of those factors into account, we nevertheless find that even if the Claimant did have a belief that the disclosure was in the public interest it was not a reasonable one given that the number of those affected was limited to two people and the information disclosed did not make reference to any wrongdoing at all and there is no reference to any failings on the part of the Respondent. The Claimant was simply stating that she had not smelled any drugs or seen any drugs paraphernalia at the address. We also note that at the material time the Claimant was asked why she had sent

her email and her repeated response was that she did not think it would make any difference if the Council had a strong case.

152. We therefore find that the Claimant's statement to the court of 7 February 2023 was not a protected disclosure. Accordingly, the complaints of detriment and automatic unfair dismissal inevitably fail and are dismissed.

153. Nevertheless, we have gone on to the look at the matter of causation and will explain why the detriments and automatic unfair dismissal complaints would have failed in any event.

154. We find that the suspension, the investigation and allegations of misconduct were detriments to the Claimant as a reasonable worker in these circumstances would also take the view that in doing these things that they have been put to a disadvantage.

155. However, as is clear from the case of ***Fecitt*** for a detriment complaint to succeed the protected disclosure must have been a material influence in the decision to do those things. Similarly with respect to automatic unfair dismissal, the protected disclosure must have been the reason or the principal reason for dismissal. We have also taken into account the decision in ***Kong*** and the "separability principle" whereby it is possible to distinguish between the protected disclosure of information on the one hand, and conduct associated with or consequent on the making of the disclosure on the other. It is clear that in this case, even if the Claimant had made a protected disclosure, the information conveyed by her was not the cause of the impugned treatment, it was the release of the data from Anite, the failure to comply with management instruction, the risk of damage to the Respondent's reputation, and the fact of working outside of her role which was the cause. There was a clear distinction between the doing of these acts on the one hand, and the contents of the witness statement on the other.

156. Our view is not altered due to the proximity between the alleged disclosure and the decision to suspend and investigate the Claimant. We note that Ms Gilbey did not take action when she was first aware of the Claimant accessing Anite, but she warned or cautioned her not to get involved. Moreover, it is clear that a case of whistleblowing dismissal is not made out simply by a "coincidence of timing" between the making of disclosures and the termination of employment.

157. The Respondent's witnesses have given honest and reliable evidence to us and we believed them. We find that the reason for the three detriments and the dismissal was due to the Claimant accessing and disclosing the data from Anite and then involving herself in the proceedings that she had effectively been told not to get involved in on numerous occasions. The Respondent did not tell the Claimant not to give a statement but that is because the Claimant did not ask the Respondent. We also find that the Respondent genuinely believed that the Claimant was using her time at work on matters outside of her job role, and that there had been some cost to the Respondent from the time the Claimant was spending on this, and also some unquantified cost from the aborted eviction proceedings.

158. Mr Campbell was also honest and credible when he explained to us that there was no guarantee that the eviction proceedings would succeed anyway, nor did he blame the Claimant solely for the withdrawal of that application to the court. We believed Mr Campbell. It was abundantly clear to us that Mr Campbell did not put the blame onto the Claimant for what happened in court, his concern, and that of the Respondent's other witnesses, was the Claimant had not stayed out of the process as she had been directed to do.

159. Mr Campbell also gave us very convincing evidence on his concerns about reputational damage and the risk of complaints from the neighbour whose data the Claimant had shared. Mr Campbell told us about the type of complaints the neighbour could have made and that it was fortuitous this had not occurred. We believed Mr Campbell that this was part of his genuine concerns about what had transpired.

160. Accordingly, even if the Claimant had made a protected disclosure this claim would have failed due to lack of causation – there was a clear separation between the contents of the Claimant's witness statement and the reasons for the detriments and dismissal.

161. As the disclosure was not made out we do not need to go on to consider the requirements of s. 43G and s.43H ERA 1996 in any detail however for the sake of completeness we observe that we were not provided with evidence which would suggest that the Claimant had a reasonable belief that she would be subjected to a detriment if she had disclosed the information to her employer, nor that the relevant failure would be concealed, and further we were not satisfied that she made a disclosure of substantially the same information to her employer. The contents of the witness statement to the court and the email of 3 August 2022 are not synonymous. The Claimant's witness statement records what she observed or did not observe at the Resident's property, whereas the email of 3 August 2022 is about what the Resident told her and what she had extracted from the Anite system.

162. Whereas we agree that the Claimant's alleged disclosure was clearly not made for personal gain, the contents of the Claimant's witness statement to the court does not contain a reference to a failing of an exceptionally serious nature – no failing at all is identified therein. We did not consider that it was therefore reasonable for the Claimant to have made the disclosure to the court under either s. 43G or s. 43H ERA 1996. As the Respondent highlights to us, the Claimant could have, and indeed did later raise the issue confidentially with the Respondent once she had been suspended and was part way through the disciplinary process. We record for the sake of completeness that this was after, not before, the Claimant sent her statement to the court.

Unfair dismissal

163. The first issue is whether the Respondent had a potentially fair reason for dismissal. We have looked to identify what was the principal reason for dismissal and we find that the reason for dismissal operating in the Respondent's mind at the time was conduct. The specific conduct was

initially the act of the Claimant sending her email and witness statement to the court on 7 February 2023 unbeknown to the Respondent. This led to a wider investigation which identified the Claimant had accessed Anite to look for data as regards the neighbour, extracting that and pasting it into an email to Ms Gilbey which was then subsequently sent to the court on 7 February 2023 without authority to do so.

164. It was clear also from the investigation witness statement Ms Gilbey and the outcome letter from Mr Campbell that the Respondent's officers were concerned about the damage or potential to the Council's reputation from the Claimant's action which the Respondent says could have brought it into disrepute, either by way of complaints to her MP, the Ombudsman, or criticism in the press due to the Respondent having to withdraw the eviction proceedings and the neighbour's data having been accessed and released in the way it was.

165. The conduct also included failing to comply with the management instructions from Ms Gilbey, Mr Newman, Mr Spicer and Mr Clark not to get involved in the eviction proceedings, and then submitting a statement to court when told she could not attend in person, and also but to a lesser extent the time the Claimant spent on duties outside of her role.

166. We therefore find that the reason for dismissal operating in the mind of the Respondent was conduct which is a potentially fair reason for dismissal under s. 98(2)(b) ERA 1996.

Fairness and the Burchell test

167. As the Respondent had a potentially fair reason for dismissal we have gone on to consider the issue of fairness under s. 98(4). We will consider the procedure adopted and will apply what is known as the ***Burchell*** test.

168. We have examined whether the Respondent had a reasonable and a genuine belief in the Claimant's culpability based on a reasonable investigation. Here the burden of proof is neutral, and we remind ourselves that we must not substitute our own view for that of the employer. We will avoid the substitution mindset. The Respondent needs only to show that the investigation came within a band of reasonable investigations available to a reasonable employer in the circumstances. This is referred to as the band of reasonable responses test.

169. Mr Hall took statements from Ms Gilbey, Mr Clark, Mr Spicer, the Claimant, and he engaged with Mr Newman and had the email from Ms Ronta in front of him when conducted his investigation. This was a particularly thorough investigation, the Claimant knew the allegations against her, and whilst she was not initially referred to a specific breach of the Officer's Code, she was aware of the factual allegations. The Claimant was not provided with a copy of the witness statements at the investigation stage, however there was no policy or legal requirement to do so as this was purely an investigation to establish whether there was a case to answer and we found that this was within the range of reasonable responses. We found no breach of natural justice as the Claimant knew the allegations

against her. We do not agree that Mr Hall failed to follow up any reasonable lines of inquiry.

170. The Claimant was advised of her right to be accompanied and she exercised her right. The Claimant asked to record the hearing, this was not agreed but the process was slowed down so that she could take a note and moreover she had a trade union representative with her. We found that this was a reasonably fair investigation.

171. The Tribunal then considered whether this investigation led to a reasonable and genuine belief in the Claimant's culpability. The reasonableness of the Respondent's belief is also subject to the band of reasonable responses test. The Tribunal must determine if the belief of the Respondent came with a range of beliefs available to a reasonable employer in the circumstances. We again remind ourselves of the need to avoid the substitution mindset.

172. The key facts were not in dispute. The Claimant did not dispute accessing Anite nor taking the data about the neighbour, pasting it in an email to Ms Gilbey and then forwarding this externally to the court. It was not in dispute that the information about the neighbour included her name, details of her address and previous involvement with the Council, her health and details of her family. It was not disputed that the Claimant had been told not to get involved in the eviction and not to attend court. The issue was that the Claimant said she had forgotten Ms Gilbey's email of 4 August, the Respondent took this into account and noted that she had received both repeated and also recent instructions not to get involved. There was consideration that the Claimant had not been told she could not send a statement but it was determined that she had not asked either and in any event it was within the spirit of the previous instruction.

173. It was also not disputed that the Claimant's email had been a factor, but not the only factor, in the decision to withdraw the eviction application, nor that the Claimant had been spending a significant part of her time on matters beyond her role. Whereas the Respondent considered that the Claimant had caused a cost to the Respondent it decided not to include the costs arising out of the court case as this was not guaranteed to succeed. Rather the Respondent determined that there was a cost to the Council of the Claimant spending a significant amount of her time on duties outside of her role, and it had been established that one phone call alone took up 54 minutes of her time.

174. Whereas the Claimant did not agree that she had brought the Council into disrepute or potentially done so, the Respondent clearly formed that view as it referred to the risk of potential complaints about the failed eviction proceedings and negative publicity, including complaints about releasing the neighbour's personal information by the Claimant who had no reason for accessing it and no lawful reason for disclosing it.

175. Mr Campbell also recorded that whereas the Respondent provides and mandates data protection training, the Claimant had not undertaken it, but she still displayed an understanding of the essential requirements of GDPR.

176. We find that it reasonable for the Respondent to believe all of these matters and as such we find that the Respondent had reasonable and a genuine belief that the Claimant committed the numerous acts of misconduct.

177. We must also consider whether the Respondent otherwise followed a fair procedure. The Tribunal must not substitute its view of what constitutes a fair procedure. The question is whether the procedure adopted by the Respondent came within the range of procedures available to a reasonable employer in the circumstances. The Claimant knew the case against her, she was given the opportunity to respond, she was aware of the seriousness of the allegations against her and that dismissal was a potential outcome.

178. The Respondent took into account the Claimant's own version of events and it paused proceedings to obtain Occupational Health advice and it provided the Claimant with its questions in writing and allowed her to respond in writing which it also considered. The proceedings were slowed down for the Claimant to take notes and she was allowed to record the reconvened hearing and the appeal. We did not consider that the act of suspension, or any other matter we were referred to, was indicative of any pre-determination on the part of the Respondent.

179. We note that the Claimant now alleges that the Respondent, in particular Mr Campbell, ignored her medical evidence and further that failures on the part of the Respondent impacted the Claimant's ability to participate in the process. We do not agree. The Occupational Health advice was obtained as the evidence provided by the Claimant was historic or generic and not specific to her, the advice was not challenged by the Claimant at the time, it was taken into account and weight was placed upon it by Mr Campbell and Mr Membery, and the Claimant did not argue, and does not argue now, that the conduct she was accused of was due to her medical condition.

180. The Claimant was advised of her right to be accompanied and she was permitted an appeal. It matters not whether the appeal is a review or a rehearing, what matters is the overall fairness.

181. We have also taken into account that Ms Gilbey took no formal action on 4 August 2022 when she was aware of the Claimant accessing the ASB data on Anite. We find that the decision to rely on that matter in February 2023 and to investigate and discipline the Claimant about it once her email to the court was revealed, was nevertheless still within the range of responses open to a reasonable employer in circumstances such as these where the email was then forwarded externally in an unredacted form without consent.

182. We have therefore found that the disciplinary procedure adopted was compliant with the provisions of the ACAS Code of Practice and was within the range of reasonable procedures open to a reasonable employer.

Fairness and sanction

183. We must then go on to consider the sanction, and the question is again did the sanction of the dismissal fall outside a range of sanctions available to a reasonable employer in the circumstances. The Claimant's repeated argument during the process and before us was about the level of sanction applied and she made numerous references to the Respondent's contractual disciplinary policy which sets out levels of misconduct. The Claimant is arguing that it was not reasonable to have dismissed her and that a lesser sanction should have been applied, with potentially moving her to another role, removing her access from Anite and providing her with guidance.

184. We remind ourselves to avoid the substitution mindset. The test is not whether we would have dismissed the Claimant or not. The statutory question is whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that must be determined in accordance with equity and the substantial merits of the case.

185. We asked the parties to address us on ***Quintiles Commercial UK Ltd v Barongo*** and also ***Hope v BMA*** which are authorities we identified. As indicated above, the EAT held that for the purposes of a claim of unfair dismissal (as distinct from wrongful dismissal) our consideration should be on the statutory wording under s. 98(4) rather than the labels attached to such conduct within an employer's dismissal procedure and the real question is and remains the statutory one of whether the employer acted reasonably or unreasonably in all the circumstances in treating the conduct as sufficient reason to dismiss.

186. In this case the Claimant had nine years' service with the Respondent, she had a clean disciplinary record, she did not seek to dispute the acts she was accused of and instead argued that she merely sought to tell the facts as she had witnessed them. Whereas at the investigation stage the Claimant said she would do the same again, by the disciplinary stage she said she would do things differently in future. It was not disputed that the Claimant had not acted for personal gain.

187. We have taken into account the Respondent's disciplinary policy, noting of course the decisions in ***Quintiles*** and ***Hope***, and we noted that the policy provides that the levels of misconduct were examples and that anything could amount to gross misconduct if it was sufficiently serious enough. The fact that the Respondent had not disciplined the Claimant in August 2022 when she put Ms Gilbey on notice that she had accessed Anite to look at the neighbour's data and pasted it to her, was not indicative to us that the Respondent did not consider her conduct to have been sufficiently serious, nor that the Clamant was entitled to assume it was resolved. The Claimant's email to the court whereby the data was released outside of the Respondent and could have reached the Resident and others, was clearly a factor which escalated the Respondent's concerns about the Claimant's conduct.

188. The question for us to determine is whether the decision to dismiss was outside of the band of reasonable responses. It was appropriate to take into account the Claimant's length of service and clean disciplinary record, and we note that the Respondent did so. Mr Campbell in particular, but also Mr Membery as well, both gave credible evidence about a lack of reassurance that this would not happen again. The Claimant's position gradually shifted from she would it again, to she would do things differently in future. There was a genuine concern about what would happen if the same or similar circumstances were to arise again, noting that many of the Respondent's clients are vulnerable and the Respondent viewed the Resident as the perpetrator of anti-social behaviour and the neighbour as the victim.

189. We therefore conclude that the decision to dismiss the Claimant rather than to take some other form of action fell within the band of reasonable responses. Accordingly the claim of unfair dismissal also fails and is dismissed.

190. Given that the complaints have not succeeded it was unnecessary for us to deal with any issues over time limits.

191. We repeat our gratitude to Ms Learmond-Criqui and Ms Halsall for their valuable assistance throughout this hearing, noting the high quality of the closing submissions from both of them.

Approved by:

Employment Judge Graham

Date: 16 May 2025

JUDGMENT SENT TO THE PARTIES
ON 28 May 2025

FOR THE TRIBUNAL OFFICE