

Neutral Citation Number: [2026] EAT 39

Case No: EA-2023-001455-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 March 2026

Before :

HIS HONOUR JUDGE AUERBACH

Between :

THE LAURELS FAMILY ASSESSMENT LIMITED

Appellant

- and -

MISS M Y KAY

Respondent

Lorraine Mensah (instructed by Forbes Solicitors LLP) for the **Appellant**
The **Respondent** in person

Hearing date: 22 January 2026

JUDGMENT

SUMMARY

PROTECTED DISCLOSURES

The employment tribunal decided, by a majority, that the claimant was automatically unfairly dismissed for making protected disclosures. She claimed to have made such disclosures on two occasions. There were factual issues before the tribunal as to whether the first claimed conversation had taken place at all, as to what had been said on the second occasion, and as to the reason or principal reason for the dismissal, which took place on the same day as the second conversation.

The majority's conclusions on all of these issues, and overall, were not perverse, nor was their reasoning flawed or insufficiently explained. The employer's appeal was accordingly dismissed.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The respondent in the employment tribunal appeals from the reserved decision of the tribunal arising from a hearing at Manchester (held by CVP). By a majority (Mr G Pennie and Dr B Tirohl) the tribunal upheld the claimant's complaint that she had been unfairly dismissed contrary to section 103A **Employment Rights Act 1996** and that she had been subjected to a detriment within the meaning of section 47B in relation to her attempt to appeal against dismissal. Those sections are concerned with what the **1996 Act** calls protected disclosures – what is commonly referred to as whistleblowing. EJ Porter, in the minority, would have dismissed both complaints.

2. The tribunal also unanimously found that the respondent failed to comply with its statutory duty to provide a written statement of particulars of employment. That decision is not challenged.

3. To avoid confusion, I will refer to the parties hereafter as the claimant and the company. At the hearing in the employment tribunal the company was represented by a solicitor, Mr Halpin. The claimant represented herself. At the hearing of this appeal Ms Mensah of counsel appeared for the company and the claimant again appeared in person.

The Facts – Overview

4. The tribunal heard evidence from the claimant and, for the company, from Helen Wilkinson and Craig Duxbury. All of them had produced written statements, and were cross-examined, questioned by the tribunal, and, where appropriate, re-examined. There was a bundle of documents.

5. The tribunal's findings of fact contain a section in which it made unanimous findings, a section setting out further factual findings of the majority, and a section setting out further factual findings of the minority. I draw the following overview from the unanimous findings of fact.

6. The company provides support services to vulnerable families who are subject to court direct

placement orders. It is governed by OFSTED. It provides 24/7 care to vulnerable parents and children undergoing local authority assessment. Some parents may be vulnerable, and placement orders may have been made, because the parents are drug users.

7. The company's directors are Mr Duxbury and Tracy Hartland. Care is provided at the Laurels. Ms Wilkinson is the registered service manager. She is responsible for day-to-day management, including recruitment, managing the team, working with social workers and managing any safeguarding concerns. She reports to the two directors, as well as to OFSTED. Ms Hartland is designated as the responsible person to whom staff should report any safeguarding concerns.

8. The claimant started as a Family Support Worker (FSW) at the Laurels in around October 2021, initially as a bank worker, then, from March 2022, as an employee, working three days per week. FSWs support residents, including overseeing their taking medication.

9. On 25 August 2022 Ms Wilkinson held a routine supervision meeting with the claimant. Ms Wilkinson raised a few concerns regarding the way the claimant spoke with residents, reminding her that FSWs are not there to be friends. The claimant confirmed that she had no personal issues, required no additional support and had no issues with any other staff members.

10. On 7 September 2022 Ms Wilkinson met with the claimant and raised a concern about her not having recorded the administration of medication. The claimant confirmed that she had not signed the record and said she had been busy. Ms Wilkinson said this was an integral part of her role and care was needed. It was agreed that the claimant would undertake further medication training.

11. The tribunal made the following unanimous findings about events on 13 September 2022:

“29. On 13 September 2022 AC, referred to by the respondent as an independent visitor, visited the respondent's premises to talk to staff and prepare a report to the respondent and OFSTED about his findings. AC conducted these visits on a regular basis. It was his duty to report any safeguarding concerns to both the respondent and OFSTED. Staff, including the claimant, were aware of this and could meet with AC to voice any concerns.

30. The claimant had a meeting with AC on 13 September 2022. AC verbally reported to Hazel Wilkinson that he had had a meeting with the claimant. Hazel Wilkinson then went to find the claimant to discuss what she had been told by AC. Hazel Wilkinson could not find the claimant, who had gone out of the building with residents. On the claimant's return to the building she was called into a meeting with Hazel Wilkinson and Tracy Hartland. She was not told that this was a disciplinary hearing.

31. The claimant was summarily dismissed by Hazel Wilkinson at the meeting on 13 September 2022.

32. By email dated 13 September 2022 the claimant was sent a letter of dismissal (page 55) which stated as follows:

I am writing to inform you that your employment... has been terminated, with immediate effect, as of the date of this letter.

The reasons for this include:

- **incorrect recording of medication administration**
- **failing to follow guidance regarding a planned resident activity. Putting yourself, other staff and residents at potential risk**
- **leaving the Laurels Family Assessment centre, without authorisation from a manager**
- **failing to obtain authorization to attend an unplanned meeting. Leaving staff and residents vulnerable**

If you would like to appeal this decision, please contact Craig Duxbury director (telephone number provided which is not repeated in these reasons)."

12. Over the next couple of days the claimant called the number given and the office number. She was unable to speak to Mr Duxbury but spoke to Ms Wilkinson. On 15 September 2022 she emailed Ms Wilkinson that she was "still waiting for the paperwork I have requested in regards to being able to appeal my termination with the seven days you have stated." On 16 September she emailed Mr Duxbury, headed "Appeal meeting", seeking a meeting. That evening she emailed him again stating that "I intend to appeal" the dismissal, that the seven days was "insufficient for me to respond in full" and that she would provide a substantive response to the dismissal letter no later than 27 September.

13. The tribunal said that Mr Duxbury did not reply to those emails, nor did he inform the claimant that her 16 September email was not a valid appeal, nor inform her that she must provide full grounds within the seven days; nor did he reply to her application for further time to present her appeal.

14. On 22 September 2022 the claimant emailed a response to each of the points in the dismissal

letter. She complained that the respondent has not followed a fair procedure. It did not investigate the incidents thoroughly nor give her the chance to respond before dismissing. She continued [37]:

“Having been afforded the time to review matters following 13 September 2022 I believe the decision to immediately terminate my contract was a kneejerk response to my meeting with Adam that day, essentially for whistle blowing. Terminating my employment for whistleblowing is automatically unfair dismissal, and this claim is open to me even though I have not been employed for two years.”

15. The letter said that because of how she had been treated the claimant did not wish to remain in employment; and she put forward settlement proposals. She requested an appeal hearing. The tribunal observed that the claimant obtained legal advice before sending that letter.

16. By a letter of 28 September 2022 Mr Duxbury stated that the claimant was “provided with 7 days as a right of response.” She had not provided an adequate response within the allotted time. “Therefore I uphold the decision relating to the termination of your employment.” The tribunal observed that he did not call a meeting, nor seek any further information in relation to her allegation that she had been dismissed as a kneejerk reaction to her meeting with AC and for whistleblowing.

17. The claimant presented her claim form on 24 October 2022, acting in person. The tribunal set out the particulars that she gave in box 8.2. This was also in my bundle. They referred to the dismissal without any warning on 13 September. The claimant wrote that “[t]his came to termination” as she had spoken to AC on 13 September regarding “a safeguarding issues (whistleblowing) of an employee.” AC “spoken to Hazel Wilkinson on this same day about my concerns. I was taken into the office without warning by Hazel Wilkinson and Tracy Hartland and my employment was terminated.” In box 15 she referred to her attempt to appeal and other background matters.

18. The tribunal noted that the claim form did not provide details of the whistleblowing to AC, nor refer to any whistleblowing to Ms Wilkinson on 12 August 2022. The tribunal continued:

“44. On 6 January 2023 Hazel Wilkinson sent an e-mail to AC (page 71) stating:

I have attached your report from September 2022. I just wondered if you could have a read over it, and confirm that the details documented from your meeting with staff member

MK are correct and that no further issues were raised with you.

Shortly after your visit, MK's employment was terminated with the Laurels and MK has stated, in an employment tribunal, that she raised concerns to you in September 2022, because there were issues that she had raised to me and that I had failed to address them

MK is the claimant.

45. AC responded by e-mail dated 6 January 2022 (pages 72-73) extracts from which read as follows:

I can confirm that MK raised no significant safeguarding concerns about the safety of the residents and no had no specific evidence or detail to substantiate what concerns she was raising. I felt the severity of what she was raising was not urgent safeguarding at that time.

To be clear. What she raised was.

That her performance as a family support worker has been questioned in the few weeks prior to this particular visit I made (which also coincided with yourself becoming the acting manager). MK felt that this was unfair as she has never had the quality of her work questioned before but could not be specific or give examples. In terms of the remit of my role, this is not something I could comment on further as this needs to be addressed by a manager first. I therefore brought this to your attention.

MK also felt that a male member of staff was being given preferential treatment with regards to allocations of shifts and that in terms of her own needs for childcare and other family commitments, this is not considered. She went on to say that the same male member of staff leads a lifestyle outside of the home she deemed not appropriate for a family support worker (i.e. a late night "partying" lifestyle) but based this on what she has seen on social media and was said to me in a way that was speculation and hearsay. Again, within the remit of my role, this is something that only a manager can take action on so I brought this to you as part of our feedback at the end of my visit. This point I was maybe not too clear on in my report. MK made no allegations of him being under the influence during shifts or that he has put the residents at any specific risk."

19. The tribunal noted that AC's report, referred to in that exchange, had not been disclosed.

20. On 8 February 2023 the respondent sought further particulars of the claim. The tribunal said:

"48. The claimant attended a preliminary hearing before EJ Yale on 24 February 2023. At that hearing the claimant provided further information about her claim. In the record of that preliminary hearing a case summary is provided which includes the following:

The claimant says that there was an employee working at the organisation as a family support worker. As such he would support families including mothers. He would help with bathing, feeding etc. The claimant says it came to her attention that that individual would come to work whilst on drugs. The claimant said she raised the issue with the deputy manager around 22nd / 23rd August 2022 but nothing was done. On 13 September 2022 she reported her concerns to the responsible individual. She says within two hours of doing that she was dismissed.

49. On 10 March 2023 the claimant provided the further information requested by the respondent (pages 40-41), which includes the following:

1.By reference to the fact set out in your ET1 what alleged protected disclosures do you contend that you made?

I was made aware that [SW], one of the family support workers, was returning to work for The Laurels Family Assessment Ltd after being dismissed. I didn't believe that management were aware of his drug use and I thought this was important information for them to be aware of prior to his reinstatement. I spoke with Hazel, the deputy manager, to report [SW] was taking recreational drugs in August 2022. No action was taken as a result of this disclosure and [SW] was re- employed as planned. I therefore spoke with [AC], Responsible Individual, to make the same disclosure when he attended to do his monthly regulation visit in September 2022

.....

[AC] is the responsible individual who undertakes the regulation 25 visits and reports to Ofsted that the facility is operating appropriately.

50. In her witness statement the claimant states: On 22nd August 2022 I had returned from annual leave and discovered that GS had given his notice and a new deputy Hazel Wilkinson (HW) has been employed. It was also known that a member of the staff (SW) who left the company whilst I was on annual leave was being reemployed. I took this opportunity to have a 1:1 word with HW regarding the staff member in question having chaotic lifestyle which is not suitable when working with such vulnerable families. I left this information with HW to investigate further. During my discussion with AC in the office I explained to him about how I feel I did not have a support from management now GS has left. AC explained that it was not in his job role to resolve conflict of interest and for myself to have another conversation with HW on moving forward. I then explained to him regarding the member of staff in question SW has been reemployed regardless of the information I had with HW 22 August 2022 to which mi feel was disregarded.

51. If the claimant had told Hazel Wilkinson and/or AC that SW was a recreational drug user and that she had witnessed SW being on a comedown at work, they would each have been duty bound to report this information to OFSTED.

[This is the clear evidence of each of the respondent's witnesses]"

Further Findings of Fact by the Majority and by the Minority

21. The tribunal's decision sets out the further findings of fact made by the majority. They were presented by setting out, in respect of each particular factual issue, first the factual finding, and then the majority's reasoning process supporting that finding, rendered in square brackets and in italics. Because of the nature of the appeal I need to cite a number of passages in full.

22. The majority accepted the claimant's oral evidence, that she had followed SW on social media, from which she was aware that he had a "chaotic and partying lifestyle" and took recreational drugs. They accepted her evidence that in July 2022 she had witnessed him attending work on what she called a "come down" from the use of recreational drugs at a festival over the weekend, but she did not raise it with anyone at that time. The majority did not accept the company's submission that the failure to record this "detail" in the claimant's letter of appeal, claim form, further particulars or

witness statement showed that the claimant's evidence on this was unreliable.

23. The majority's findings of fact continue:

“54. On 22 August 2022 the claimant returned from annual leave and discovered that Hazel Wilkinson had been employed as a new deputy manager. She also discovered that SW, who had left the respondent company whilst she was on annual leave, was going to be re-employed by the respondent. The claimant decided to have a word with Hazel Wilkinson to raise her concerns about SW. In a private meeting the claimant informed Hazel Wilkinson that SW had a “chaotic and partying lifestyle”, that “he takes recreational drugs”, which in the opinion of the claimant was “not suitable when working with such vulnerable families.” The claimant informed Hazel Wilkinson that she had seen SW come in to work on a “comedown.” She left this information with Hazel Wilkinson to investigate further.

[On this the majority accepts the evidence of the claimant as given during the course of giving her evidence. The majority accept the claimant's explanation that, as a litigant in person, she did not understand the importance of providing the full details of this conversation prior to the hearing. The majority does not accept the respondent's assertion that the failure of the claimant to record her concerns about SW at the supervision meeting on 25 August 2022 (see paragraph 26 above) shows that the claimant had no concerns about SW and that the conversation on 22 August 2022 did not take place. The majority accepts the claimant's explanation that she did not raise the issue at the supervision meeting with Hazel Wilkinson on 25 August 2022 because she had disclosed the information about SW only a few days before the meeting and she was giving Hazel Wilkinson time to investigate.]

55. On 8 September 2022 the claimant attended work. The claimant was surprised to note that SW was also at work. The claimant was concerned that her disclosures to Hazel Wilkinson had been ignored.

56. On 13 September 2022 the claimant had a private meeting with AC. She did not need express authority to have this meeting with AC. There were other members of staff on duty who could provide the appropriate cover while the claimant had her meeting.

[On this the majority accepts the evidence of the claimant. The respondent has failed to provide satisfactory evidence to support its assertion that express authority was needed and that the attendance of the claimant at that meeting put the safety of residents and/or staff at risk.]

57. At that meeting with AC on 13 September 2022 the claimant explained to AC that she felt that she did not have support from management after the previous manager, GS left. She explained to him that SW had been reemployed regardless of the information she had given Hazel Wilkinson about him on 22 August 2022, which made the claimant feel disregarded. She told AC that SW had “a chaotic and partying lifestyle”, that he took recreational drugs and that she had seen SW come into work on a “comedown”. She told AC that she knew this because she followed SW on social media. AC told the claimant that he would report her concerns to management.

[On this the majority accepts the evidence of the claimant, noting that AC has not been called to give evidence. The majority does not accept that AC's email dated 6 January 2023 (see above paragraph 45) is an accurate reflection of what the claimant said to him at that meeting. The point which AC wished to make in his email “MK made no allegations of him being under the influence during shifts” is consistent with the claimant's evidence that she did inform AC that SW used recreational drugs. It is not clear why AC should choose to make this point if he was unaware of the claimant's statement that SW was a recreational drug user. AC did not appear before the tribunal or provide a witness statement. Accordingly his actions / inactions have not been subject to cross examination.]

58. AC did report to Hazel Wilkinson the concerns that the claimant had raised in the meeting with him, including the information about SW, that he was a recreational drug user and that the claimant had witnessed him at work on a comedown.

[The majority rejects the evidence of Hazel Wilkinson that she was not given this information by AC.

The majority accepts the evidence of the claimant that AC told her that he would report her concerns to Hazel Wilkinson, who accepts that she did have a meeting with AC after he had seen the claimant. No notes have been provided of the meeting between Hazel Wilkinson and AC. AC's report of his 13 September 2022 visit has not been disclosed. The majority again notes AC's email dated 6 January 2023 in which AC states "MK made no allegations of him being under the influence during shifts or that he has put the residents at any specific risk." This makes it clear that the use of recreational drugs by SW was known to both, and discussed between, AC and Hazel Wilkinson before the claimant raised the allegation of recreational drug use at the preliminary hearing in February 2023 and in her Further Information in March 2023.]"

24. The majority's findings continue that Ms Wilkinson immediately went to find the claimant, but she had left on a planned work outing. The claimant had informed the shift lead that she was doing so, but did not sign the staff register. That would, however, have been recorded in the log book, which was not adduced in evidence. The majority accepted the claimant's evidence on this. They did not accept that she had left without authority. The majority's findings of fact continued:

"60. On the claimant's return to the premises, she was called into a meeting with Hazel Wilkinson and Tracy Hartland. During that meeting Hazel Wilkinson made allegations against the claimant, who was not given the opportunity to provide a response. After a few minutes Hazel Wilkinson informed the claimant that she was summarily dismissed and was escorted from the building.

[The majority accept the claimant's evidence on this point. The majority rejects the evidence of Hazel Wilkinson that each of the allegations set out in the dismissal letter was put to the claimant, that the claimant was given opportunity to respond, that the claimant refused to answer questions. The majority notes that Tracy Hartland was in attendance at the meeting but has not been called to give evidence.]

61. Craig Duxbury was aware of the information disclosed by the claimant to Hazel Wilkinson on 22 August 2022 and to AC on 13 September 2022.

[The majority rejects the evidence of Craig Duxbury on these points. This is a very small company, with Craig Duxbury and Tracy Hartland as directors, Hazel Wilkinson as manager. It is simply not credible that the disclosures made by the claimant were not discussed between them. Tracy Hartland was present at the meeting on 13 September 2022; she clearly, as director, had a position of authority over Hazel Wilkinson. It is more likely than not that Hazel Wilkinson discussed with Tracy Hartland the disclosures made by the claimant and the real reason for the summary dismissal of the claimant. Tracy Hartland was the responsible individual to whom safeguarding concerns were reported. It is not credible that Hazel Wilkinson would not have reported to Tracy Hartland the information received from the claimant that SW was a recreational drug user. It is not credible that Craig Duxbury was unaware of the disclosures of information made by the claimant to Hazel Wilkinson and AC.]

62. Craig Duxbury, on receipt of the claimant's appeal letter, was aware of the disclosures of information to Hazel Wilkinson on 22 August 2022 and to AC on 13 September 2022. He rejected the claimant's appeal without questioning the claimant about the alleged whistleblowing referred to in her appeal letter.

[It is not credible that Craig Duxbury, if he had been unaware of the disclosures, would have confirmed the decision to dismiss without investigating the claimant's allegation that the real reason for dismissal was a knee jerk reaction to the claimant's meeting with AC, was whistleblowing. In evidence Craig Duxbury stresses that the respondent must investigate and report safeguarding concerns to OFSTED or run the risk of losing their business. His conduct in dealing with the claimant's appeal is consistent with him being fully aware of the disclosures, of what was said by the claimant at the meeting with AC.]"

25. The tribunal then set out the additional findings of fact of the judge in the minority. In summary, the judge found that: the claimant did not in July 2022 witness SW having a “comedown” at work following drug use outside work; she did not meet with Ms Wilkinson on 22 August 2022 and raise concerns about SW; she needed, but did not get, authorisation to meet with AC on 13 September 2022; when she met with AC on 13 September she referred to SW’s partying lifestyle outside work, but not to drug use, nor to her having witnessed a “comedown” at work; SW reported to Ms Wilkinson the claimant’s comments to him about a partying lifestyle, which he said were based on speculation; the claimant left for the planned activity on 13 September 2022 without authorisation, and Ms Wilkinson was genuinely concerned that her having done that put residents at risk.

The Conclusions and Decisions of the Majority and the Minority

26. The tribunal set out a (unanimous) detailed self-direction as to the law, both as the statutory provisions and relevant authorities. It is not criticised by this appeal, and was entirely sound.

27. The tribunal then set out the conclusions and decision of the majority.

28. The majority first concluded that the claimant’s communication, which they found *had* taken place, with Ms Wilkinson on 22 August 2022, including as to SW having a “partying lifestyle”, and her having witnessed a “comedown” at work, was a disclosure of information. They went on to find that the claimant believed, reasonably, that this disclosure was in the public interest and that it tended to show that the health or safety of an individual had been, was being, or was likely to be, endangered. This was a qualifying disclosure to her employer and therefore also a protected disclosure.

29. The majority then found that the communication with AC on 13 September 2022, covering essentially the same ground, was also a disclosure of information in relation to which the claimant had the same two requisite reasonable beliefs. This was therefore also a qualifying disclosure.

30. The majority went on to hold: that, while AC was not employed by the company, as he would be bound to report any disclosure to him raising a safeguarding issue to the employer, a disclosure to him of such information was a disclosure to the employer (section 43C of the **1996 Act**), and, hence, a protected disclosure. Alternatively, as AC would also be bound to report it to OFSTED, a disclosure to him was a disclosure to OFSTED, which was a prescribed body for the purposes of section 43F of the **1996 Act**. So, they concluded, it was, alternatively, a protected disclosure through that route. Alternatively, the disclosure to AC was a qualifying disclosure which met all of the conditions in section 43G, and hence it was a protected disclosure through that route.

31. I have not set out the majority's detailed reasoning on each of these routes to the qualifying disclosure to AC being also a protected disclosure, as there is no challenge by this appeal to any part of that reasoning. I note also that it would in any event have been sufficient had the qualifying disclosure been properly found to be protected through any one of the three routes considered.

32. The majority noted that the claimant did not have qualifying service, and that, for the purposes of her unfair dismissal claim, the burden fell on her to show that the reason or principal reason for her dismissal was her having made a protected disclosure or disclosures.

33. The majority first noted that (as it had found) Ms Wilkinson was made aware by AC on 13 September 2022 that the claimant had reported to him the same concerns about SW which she, the claimant, had expressed to Ms Wilkinson on 22 August. The majority continued:

“115. The majority does not accept the evidence of Hazel Wilkinson as to the reason for dismissal. The majority notes the letter confirming the termination of the claimant's employment (see paragraph 32 above) and in particular the reasons for dismissal said to include:

99.1 Incorrect recording of medication administration. The tribunal accepts the evidence of the claimant and finds that this problem had been dealt with prior to 13 September 2022 and had been treated as a training issue. No satisfactory evidence had been presented by the respondent that this remained an outstanding issue at the time the decision to dismiss was made;

99.2 Leaving the work premises without authority. However the respondent knew full well where the claimant was on 13 September 2022 after her meeting with AC: she was outside the work premises on a planned outing with residents that afternoon. The majority accepts

the evidence of the claimant and finds that she did inform Helen Allen, shift lead that day, that she was leaving the building on the planned outing. The claimant may not have signed the staff register to confirm that she had left the building. However, her leaving the building would have been recorded in the log book, which has not been adduced in evidence;

99.3 Failing to obtain authorisation to attend an unplanned meeting. Leaving staff and patients vulnerable. This is a reference to the claimant's meeting with AC. The majority accepts the evidence of the claimant that authorisation for a meeting with the independent visitor, AC, was not necessary. The majority further accepts the evidence of the claimant that she did not leave the residents unattended during the course of her meeting with AC. There were sufficient members of staff on duty to provide cover for her temporary absence. The respondent has failed to provide satisfactory evidence in support of its assertion the claimant needed to obtain authorisation before having a meeting with AC. The respondent has failed to supply satisfactory evidence to support its assertion that staff and residents were left vulnerable. No satisfactory evidence has been provided as to the number of residents requiring care that afternoon, the number of staff on duty, and the required resident: staff ratio.

116. The evidence of Hazel Wilkinson to the reason for dismissal is unsatisfactory. The tribunal has considered all the circumstances of the case including:

100.1 the manner of dismissal. The majority accepts the evidence of the claimant that she was not given the opportunity to answer the allegations made against her in the dismissal letter;

100.2 The meeting was not called as a disciplinary hearing but by the end of that short meeting the claimant had been summarily dismissed;

100.3 The majority notes that Tracy Hartland has not been called to give evidence although she was in attendance at that meeting;

100.4 The timing of the dismissal - the claimant was dismissed without notice on the same day she made her disclosure to AC;

100.5 AC has not been called to give evidence. The majority does not accept that the e-mail dated 6 January 2023 (paragraph 45 above) is an accurate record of what was said by the claimant to AC on the 13 September;

100.6 Hazel Wilkinson has not been truthful in her evidence – she denies that the claimant made a disclosure of information to her on 22 August 2022, she denies that AC told her that the claimant had told him about her concerns about SW.

100.7 The claimant did tell AC that SW was a recreational drug user, that she had witnessed SW being on a comedown – that is from the effect of drugs – while on shift. AC reported that back to Hazel Wilkinson the same day.

117. In all circumstances the majority finds that the reason for dismissal was that the claimant had made the protected disclosures both to Hazel Wilkinson and AC. The majority finds both disclosures, taken as a whole, was the reason uppermost in Hazel Wilkinson's mind for dismissal. Hazel Wilkinson's evidence is that she is acutely aware that she must disclose safeguarding concerns to OFSTED. The claimant had raised safeguarding concerns – the disclosure – on 22 August 2022 and Hazel Wilkinson had done nothing about it. SW had been re-employed. When she saw the claimant in the meeting with AC she took steps to discuss with AC what the claimant had said to him. As soon as she was aware that the claimant had provided AC with the same information she herself had received on 22 August 2022, Hazel Wilkinson took immediate steps to find the claimant. As soon as the claimant returned to the building from a planned outing Hazel Wilkinson called the claimant to a meeting and summarily dismissed her. The majority does not accept Hazel Wilkinson's evidence that any of the issues set out in the dismissal letter played an active part in the decision to dismiss. The reason uppermost in the mind of Hazel Wilkinson was the protected disclosures made by the

claimant and the likely consequences for both Hazel Wilkinson and the respondent's business of Hazel Wilkinson's failure to address them and report them to OFSTED.

118. The claimant was automatically unfairly dismissed."

34. The majority went on to hold that what it described as the mishandling of the appeal amounted to detrimental treatment. The majority continued:

"120. The respondent has failed to provide a satisfactory explanation for its failure to consider the claimant's appeal. The respondent's assertion that the appeal was out of time is completely without merit. The respondent has failed to provide its disciplinary procedure. There is no satisfactory evidence to support the respondent's assertion that an appeal can only be a valid appeal, can only be considered, when the full grounds of appeal are provided. The respondent can provide no satisfactory explanation as to why it did not acknowledge that the claimant had exercised her right of appeal within the seven days stipulated in the dismissal letter, but instead insisted that the claimant provide the full grounds of her appeal before it could be considered. The dismissal letter does not state that. The respondent did not reply to the claimant's e-mail dated 16 September 2022 (see paragraph 35 above) to say that this was insufficient, that she would have to provide the substantive grounds of appeal within the stipulated 7 days before the appeal could proceed.

121. Craig Duxbury was aware of the two disclosures to Hazel Wilkinson and AC.

122. In all circumstances, the majority finds that the reason for the detrimental treatment, for its refusal to allow the claimant's appeal, was because of the protected disclosures. It is simply not credible that a respondent in this line of business would not, upon receipt of an appeal letter containing allegations of whistle blowing related to a meeting with the independent visitor AC, have taken the opportunity to consider the appeal, to obtain further information about the alleged whistleblowing unless it already knew about the alleged whistle blowing and did not want to give the claimant the opportunity to make further representations, to make further disclosures.

123. The claim of detrimental treatment under section 47B Employment Rights Act is well founded."

35. The conclusions of the judge, in the minority, were shortly stated. The judge found that the claimant did not make a protected disclosure to Ms Wilkinson on 22 August 2022. What the claimant said to AC on 13 September 2022 was "devoid of specific factual content" and not a disclosure of information, tending to show the requisite state of affairs relating to health and safety. It was not a protected disclosure. The judge said that both claims "do not succeed."

The Grounds of Appeal

36. The notice of appeal, presented by the company's solicitors, contains two grounds of appeal, set out at [9.1] and [9.2]. The first ground begins as follows:

"9.1 Ground of Appeal 1 -Perversity

9.1.1. It is the Appellant's case that the express and/or implicit findings made by the Majority [Mr G Pennie and Dr B Tirohl] in connection with:

- (i) Examining whether the disclosure identified and relied upon by the Claimant amounted to a protected disclosure;**
- (ii) Considering the 'principal reason' for the Claimant's dismissal as required by section 103A of the Employment Rights Act 1996.**

were unsustainable and perverse; having no foundation or support in the evidence before the Tribunal or the findings of fact identified in the course of the judgment itself (3.9.2(a) and 3.9.2(b) Practice Direction of the Employment Appeal Tribunal 2023)

9.1.2. The Majority [Mr G Pennie and Dr B Tirohl] has substituted its own view in reaching this decision and they are at odds with facts of the case and the unanimous findings of fact.”

37. Para. [9.1.3.] cites an authority, and advances an argument, which Ms Mensah told me during this appeal hearing was no longer relied upon. This ground continues as follows:

“9.1.4. The Majority [Mr G Pennie and Dr B Tirohl] does not attach any weight to the Claimant's failure to detail her protected disclosure in her appeal letter and claim and detailing for the first time in cross examination affecting the Claimant's credibility. Rather the Majority [Mr G Pennie and Dr B Tirohl] accepts that the Claimant used synonyms to concepts that were similar in descriptions [53]. This is despite a unanimous finding of fact that the Claimant obtained legal advice prior to submitting her appeal letter [39].”

38. Para. [9.1.5.] refers to aspects of the reasoning of the minority, that it was not credible that, if the claimant had witnessed a “comedown”, and was concerned about that, she would not have raised it sooner. Para. [9.1.6.] contends that no reasonable tribunal could have made the findings of fact made by the majority on the basis of this evidence. Para. [9.1.7.] refers to the conclusion of the judge in the minority, about what the claimant said to AC on 13 September, which was said by the judge to have been devoid of factual content and not to have amounted to a protected disclosure.

39. The second ground is expressed as follows:

“9.2 Ground of Appeal 2 – Misdirection

9.2.1. In the Tribunals examination of whether the Claimant's alleged protected disclosure was the 'principal reason' for the Claimant's dismissal as required by section 103A, the Tribunal has excluded from its consideration the determination on the Claimant's act of gross misconduct, namely the Claimant's failure to record medication correctly, despite the unanimous finding of fact to this regard [27]. Had the Tribunal examined the Claimant's gross misconduct and reached a determination on this factor, this would dispute the Tribunals determination of the 'principal reason' for the Claimant's dismissal.

9.2.2. As set out [81] in *El-Megrissi v Azad University (IR) in Oxford* EAT 0448/08 when faced with a case in which the Claimant alleges that he or she had made multiple protected disclosures, a Tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal.

9.3.3. The Appellant submits that the Majority [Mr G Pennie and Dr B Tirohl] has misdirected itself or misunderstood the issues to be determined when reaching its conclusion on the Claimant's disclosure amounting to a protected disclosure and this being the principal reason for the Claimants dismissal.”

40. The grounds of appeal were considered on paper by Eady P (as she then was) not to be arguable. However, at a rule 3(10) hearing at which the company was represented by Ms Mensah, the appeal was directed to proceed to a full appeal hearing.

Discussion and Conclusions

41. As I have set out, ground 1, as framed, is a pure perversity ground. It contends that the majority made findings of fact, or reached conclusions, which had *no* support in the evidence, and/or *no* support in the facts found. It is well-established that the bar which such a challenge must surmount is very high. Ms Mensah acknowledged this, and herself cited **Yeboah v Crofton** [2002] EWCA Civ 794; [2005] ICR 1664. In that case, Mummery LJ said at [93] that a perversity appeal:

“... ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", *British Telecommunications PLC –v- Sheridan* [1990] IRLR 27 para 34.”

42. In **Commissioners of Inland Revenue v Millar**, UKEATS/0003/08, 4 November 2008 at [58] the EAT (Elias P and members), when citing that passage in **Yeboah**, put it this way:

“... it is not enough that this Tribunal may raise an eyebrow - or even both eyebrows - at some of the conclusions reached by the Employment Tribunal in the light of the evidence that it has heard.”

43. Further, what weight to attach to different parts of the evidence when making its findings of fact is a matter for the tribunal. Where there is conflicting evidence on a factually disputed matter, some pointing one way, and some the other, it is not a basis for an appeal that a party disagrees with how the tribunal weighed the conflicting evidence, when coming to its factual finding.

44. In the present case there was some evidence to support all of the findings of fact made by the

majority which the company seeks to challenge by this appeal. The claimant gave evidence that she was aware from seeing posts by SW on social media that he had what she called a chaotic and partying lifestyle and took recreational drugs. She gave evidence that she had seen him on a “comedown” at work from the use of recreational drugs at a weekend festival. She gave evidence that she had had a conversation with Ms Wilkinson on 22 August 2022, when she returned from leave to discover that SW was going to be re-employed, and about what she said in that conversation. She gave evidence about what she had told AC when she spoke to him on 13 September 2022. She gave evidence about how she said the meeting with Ms Wilkinson and Ms Hartland that same day had gone.

45. There was also a proper basis in the facts found by the majority (factual findings which themselves had some evidence to support them) for the majority, as they did, then to draw the inference, and reach the conclusion, as set out very fully at [115] – [118], that what they had found were the protected disclosures that had in fact been made by the claimant were – contrary to Ms Wilkinson’s evidence – uppermost in her mind, and hence the sole or principal reason for the dismissal. There was also a proper and sufficient evidential and factual basis for their inference, and conclusion, at [120] – [122], as to why Mr Duxbury declined to entertain the appeal.

46. In Ms Mensah’s skeleton argument for this appeal the arguments advanced in support of ground 1 put the challenge in a different way. It was said that the findings of fact made by the majority were not “rationally supportable” or not adequately or sufficiently reasoned. Citing the authority, familiar to lawyers, of **Meek v City of Birmingham District Council** [1987] EWCA Civ 9; [1987] IRLR 250, it was contended that the majority’s reasoning was not “*Meek*-compliant.”

47. This way of putting the challenge was first advanced by Ms Mensah at the rule 3(10) hearing, and appears to have been what persuaded the judge at that hearing to permit the appeal to proceed. But I raised with Ms Mensah that there had been no application to amend the grounds of appeal in this respect, made or granted. She submitted that this line of argument was an expansion of the

original grounds; but if it required an amendment, she so applied. I decided that the best way to proceed, would be not to deal with that as a preliminary issue at the outset, but to hear argument on all aspects before deciding this appeal as whole, including, as necessary, the amendment issue.

48. In developing her argument, Ms Mensah noted that, as the tribunal recorded at [48], the claimant had identified at the Preliminary Hearing that had preceded the full merits hearing, that it was her case that it had come to her attention that SW “would come to work whilst on drugs”. Her case was that she “raised the issue” with Ms Wilkinson in August and then “reported her concerns” to AC on 13 September. This, submitted Ms Mensah, was the basis on which the claimant contended that what she had said on each occasion amounted to a protected disclosure.

49. Ms Mensah then contended that there was a flaw in the majority’s reasoning supporting their findings at [57] about what the claimant had told AC, and, specifically, that this included that she had seen SW come in to work on a “comedown”. In the course of their reasoning the majority questioned why, in his email of 6 January 2023, AC would have said that the claimant had made no allegation of SW being “under the influence during shifts”, had he been “unaware of the claimant’s statement that SW was a recreational drug user.” Ms Mensah submitted that this reasoning was flawed, because there was no issue about whether the claimant told AC that she believed SW was a recreational drug user. The only issue whether she had said that she had seen SW under the influence at work.

50. I am not persuaded by this line of argument. That is for the following reasons.

51. As I have set out, the claimant’s case, which the majority accepted, was that she had seen evidence on social media that SW was a recreational drugs user, and that she had observed him on one occasion, following a weekend, still under the influence at work, and that she had shared her concerns with Ms Wilkinson 22 August 2022. Her case, accepted by the majority, was that, because she was concerned that it appeared that Ms Wilkinson had taken no action thereafter, she then shared

the same information and concerns with AC on 13 September 2022.

52. As I have set out, at [57] the majority identified that the claimant's evidence was that she had told AC that SW had a "chaotic and partying lifestyle", and that SW "took recreational drugs" and that she had seen SW come into work on a "comedown". The tribunal did not hear witness evidence from AC. Nor did it have a copy of the report that he had sent to the company in September 2022. So it did not have evidence from him personally, nor of what he may have written in that report, by way of *his* account of what she had told him about SW and/or as to his understanding of what she may have said, or why he considered that it did not give rise to any risk issue within his brief.

53. The email sent by Ms Wilkinson on 6 January 2023 only asked in general terms for confirmation that the details of AC's meeting with the claimant given in that report were correct and "that no further issues were raised with you"; and it referred in general terms to the claimant's case, in a tribunal claim, that she had raised "issues" with him that she had previously raised with Ms Wilkinson, but which she had been concerned that Ms Wilkinson had failed to address. It therefore, in and of itself, cast no further light on what the claimant had said to AC, or what he had made of it.

54. Given the absence of direct evidence from AC, or of his report, I do not agree that the majority was bound to have considered that the *only* issue for them, when considering AC's reply, in terms of what AC had understood from the claimant, was whether she said she had actually seen SW under the influence at work. AC's reply stated that she had told him that the colleague had a "late night 'partying' lifestyle" that she "deemed not appropriate for a family support worker", and that he considered this not within his remit. He also added that she "made no allegations of him being under the influence during shifts or that he has put the residents at any specific risk." AC's email did not, in the first part, expressly state that, as well as referring to a "partying lifestyle", she had specifically referred to SW using recreational drugs (nor that he understood her to mean that). I do not, therefore, accept that this part of the majority's reasoning was inherently and fatally flawed and illogical.

55. The members of the tribunal were also entitled to weigh what they made of the content of AC's email, in the context of its being a response, sent the following January, to the email from Ms Wilkinson; and they had to weigh its content against the witness evidence given by the claimant in person on the issue. I consider that the majority were entitled to, and properly did, conclude that the account of that conversation given in AC's email was, in the relevant respect, "not an accurate reflection" of the 13 September 2022 conversation, and to prefer the claimant's evidence about that.

56. Ms Mensah also sought to rely on passages in **Linfood Cash & Carry Ltd v Thomson** [1989] ICR 518 (EAT). In particular she referred to the EAT's observation in that decision, at 523G, that: "If a tribunal is to say that this employer could not reasonably have accepted a witness as truthful, it seems to us that the decision must be based on logical and substantial grounds – good reasons." Examples were then given by the EAT of the sort of thing that might suffice. A little further on in discussing this point, at 524A, the EAT said: "For the tribunal merely to prefer one witness to another might well not be sufficient, as this could be to substitute their own view."

57. I do not think that this authority offers any assistance. These passages concerned the basis on which a tribunal might or might not properly reject an employer's evidence, in a case where there was an internal disciplinary process in which there was a factual dispute between internal witnesses, as to whose account the employer had believed. The context in the present case was one in which the tribunal had to make findings of fact for itself about what had or had not been said on different occasions. The majority did not resolve the evidential disputes merely by a bald statement that they preferred one witness to another, but by a careful and close analysis of all the relevant evidential material before them. Their conclusions were not inadequately reasoned.

58. As to ground 1 at [9.1.4.] the majority were plainly aware of what level of detail about her claimed whistleblowing the claimant had provided at different stages. The fact that she had had *some*

legal advice before sending her letter of 22 September 2022, and appreciated by that point (if not before) that, despite her short service, she had the right not to be unfairly dismissed for whistleblowing, does not mean that the majority therefore erred as alleged there. Nor does the fact that the claimant, a litigant in person in the tribunal, gave only brief particulars in the claim form.

59. Both the letter that the claimant wrote following her dismissal and her claim form made clear that her case was that what had immediately precipitated her dismissal was her reporting her concerns about SW to AC earlier the same day. As the tribunal recorded, when asked at a preliminary hearing, she gave more particulars of her factual case, including that it had “come to her attention” that a colleague “would come to work whilst on drugs”, and that she had first raised her concern in August with Ms Wilkinson. The tribunal also had Ms Wilkinson’s email of 6 January 2023, which was evidence that the claimant had, by that time, identified that it was her case that she had raised concerns with AC because “there were issues that she had raised to me and that I had failed to address them.”

60. Nor does reliance on the minority’s reasoning on these aspects assist the company in this appeal. What to make of aspects such as these was a matter for the appreciation of the tribunal members. The fact that the judge took a different view of the evidence, or how the claimant put her case at different points, does not demonstrate that the majority’s assessment was perverse. It was not.

61. As to the part of ground 1 that relates to the majority’s conclusion as to the reason or principal reason for dismissal, and the challenge by ground 2 to that conclusion, the majority reached a clear conclusion that the reason or principal reason for the dismissal was the protected disclosures that the claimant had made. The majority did not ignore the company’s case as to the reasons, being those given in the dismissal letter. They engaged with it, point by point, at [115], and gave further reasons for rejecting Ms Wilkinson’s evidence, at [116]. Although the ground characterises the medication-recording issue as one of gross misconduct, the majority were entitled to rely on the finding that this had been dealt with prior to 13 September 2022 and treated as a training issue. The majority’s

conclusion on the reason for dismissal was properly and sufficiently reasoned. It was not perverse.

Outcome

62. For all of these reasons ground 1 fails, both on the basis originally framed, and (whether or not permission to amend was required in order to do so) on the wider basis on which Ms Mensah advanced it in her skeleton and oral argument for this appeal hearing. Ground 2 also fails for the reasons that I have given. The appeal is accordingly dismissed.