



EMPLOYMENT TRIBUNALS

Claimant: Ms M Pessoa

Respondent: BUPA Care Homes (Ans) Limited

Heard at: London South Employment Tribunal (via CVP)

On: 9 June – 11 June 2021

Before: Employment Judge Webster
Ms F Whiting
Ms J Saunders

Appearances

For the claimant: In person
For the respondent: Ms K Hosking (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims for Whistleblowing detriment (s.47B Employment Rights Act 1996) are not upheld.
2. The Claimant's claim for automatic unfair dismissal is not upheld.
3. The Claimant's claims for disability discrimination are not upheld.

REASONS

The Hearing

4. The hearing was heard by way of CVP as this was the only way the matter could be heard at the time due to the pandemic and it was in the interests of justice for the claims to be heard.

5. We were provided with two bundles, one by the respondent and one by the claimant. The majority of the bundles were identical save that the claimant had added several pages to the end of her bundle. We spent a considerable amount of time going through the documents before we heard evidence ascertaining what documents we would and would not accept. Reasons for our acceptance or refusal were given orally at the time and will not be repeated here. However we note that one document that we refused was of particular importance to the claimant which was a list of the patient's full names. The claimant asked us to reconsider our decision regarding the refusal of this document on day 2 and we again refused. We note that it was wholly inappropriate and a breach of the Data Protection Act and the patients' rights to privacy to have this document as part of open court proceedings. The claimant appeared to have no regard for patient confidentiality whatsoever in this regard. She stated that it was in the public interest that these patients knew what was happening in the home that was looking after them and that the patients needed to know that this was about them. Those patients were not party to these proceedings and we consider that the claimant did not understand our obligation as a Tribunal, to those individuals in the context of an employment tribunal claim about her employment and not about their care.
6. We do confirm however the claimant was provided as part of the preparation for the hearing with a full list of the names of the relevant patients and the initials that would be used to refer to them during this hearing. The fact that this was done does not mean that those names ought to be part of a public hearing; in fact it was done specifically to ensure that the opposite occurred –that those individuals' names were not made public because it breached their right to privacy.
7. The claimant insisted that one particular resident had the initials BM instead of BA. The respondent witnesses disagreed. We found that nothing turns on this matter whatsoever. At all times all parties and the tribunal were aware of which resident was being referred to for the purposes of this hearing and there was no confusion. To ensure that there remains no confusion we refer to her as BM/A throughout this judgment.
8. Any other individual who is referred to in the judgment but did not give evidence to the tribunal is also referred to by initials and are identified by the role that they carried out at the respondent. This is because the Judgment will be published online and is in accordance with Presidential guidance on written Judgments.
9. The respondent also produced a document on day 2 of the hearing. We accepted that document as part of the evidence we considered and gave reasons that will not be repeated here.
10. We heard from the claimant and 4 witnesses for the respondent:

Ms Thomas – Unit Manager for Birchwood (a section within Fountain Lodge Home)
Ms Eastwood – Home manager at Fountain Lodge
Ms Yearly – Clinical Services Manager
Ms John – Regional Director
All witnesses provided written witness statements.

11. We heard evidence until the end of the second day and submissions in the morning of day 3. The claimant provided written submissions and also gave oral submissions. The respondent gave oral submissions only. We reserved our decision.

12. The issues to be decided were as set out in EJ Cheetham's Order dated 30 October 2019 as confirmed by EJ Hyde's order dated 26 October 2019. They are set out in full below. The detriments relied upon are set out in a Schedule to the Judgment as they were contained in several different documents.

The Issues

13. Whistleblowing detriment (s.47B Employment Rights Act 1996)

13.1 Did C make any protected disclosures for the purposes of s.43B ERA 1996? C relies on her Speak Up complaint on 24 February 2019 (231). She has not identified which of the categories in s.43B she says the complaint falls under.

13.2 Did C believe at the time that the disclosure was in the public interest?

13.3 If so, was that belief objectively reasonable?

13.4 If so, did R subject C to a detriment because of the protected disclosure contrary to s.47B ERA 1996?

C relies on the 27 alleged detriments numbered 1-24 and 13b, 14b and 15b in the details of claim (50), further specified in the Scott schedule (75, 99, 110A).

14. Constructive automatic unfair dismissal (s.103A Employment Rights Act 1996)

C relies on the allegations of whistleblowing detriment above as the relevant conduct by R.

14.1 Did the conduct alleged by C occur?

14.2 If so, did that conduct—taken together or singly—amount to a repudiatory breach of the employment contract?

14.3 Did C resign in response to any such breach?

15. Discrimination arising from disability (s.15 Equality Act 2010)

10.1 Did R treat C unfavourably?

C relies on the following allegations (recorded by EJ Cheetham at 50):

- a) that on 12 March 2019, C's clinical manager denied her sugar when, owing to her diabetes, she needed to consume some sugar;
- b) that subsequently the clinical manager did not allow C sufficient time to recover from the effects of her diabetes.

10.2 If so, was the treatment because of something arising in consequence of C's disability?

10.3 If so, was the treatment justified as a proportionate means of achieving a legitimate aim?

Factual findings

Overall observations

16. We have only made findings of fact that are relevant to the issues stated above. The claimant made reference to a large number of facts and incidents that were not related to the claim that we had to decide and are therefore not discussed below.
17. The claimant appeared to consider that the purpose of these proceedings included, amongst other things, an attempt to 'protect' the residents of the care home she worked at and to ensure that their 'treatment' was public knowledge. This is not correct. The purpose of the hearing was to determine the legal claims that she had brought regarding her time in employment and the termination of her employment. Since her employment has ended, the claimant has referred staff from the respondent to the NMC and the home has been inspected by the CQC and those are the appropriate forums for such issues to be considered.
18. An issue that was raised by the claimant, but not relevant to the claims brought by her, was the fact that she referred one of the nurses to the NMC. She made repeated references to this matter throughout the hearing, and made various assertions regarding the conclusion of the NMC in that case. This led the respondent to submit an additional document (a copy of the NMC's website page on investigations) which confirmed the stages which the NMC process followed. We note that the NMC concluded, at Stage 1 of their process, that there was no case to answer against that nurse (Ms Yearly) and it did not progress the matter to a fact-finding investigation.
19. The claimant was also very worried about the names of the residents and intended to use this hearing to publicise the names of the residents in order that they somehow obtain 'justice'. We did not allow that because we have an obligation to protect the right to privacy for people who are not parties to these proceedings and residents were referred to by initials and continue to be so in this judgment
20. After the hearing had been concluded and whilst the panel was making its decision, the claimant sent numerous emails to the Tribunal apparently applying for injunctions and referencing other matters. We can confirm that the panel did

not consider those documents as part of their decision making on the basis that it cannot accept evidence after the end of the hearing. It is not in the interests of justice to do so as the respondent does not have an opportunity to respond. The parties were given ample time to address us with their submissions and evidence. The claimant was informed of this matter via email by the tribunal clerk but the claimant nevertheless continued to send numerous emails which continued to be disregarded by the tribunal.

Background

21. The claimant was employed by the respondent from 11 February to 13 March 2019 as a Care Assistant. She worked in one of their care homes (Fountain Lodge) and her role was to provide care for patients with different stages of dementia. She had had very little prior experience as a carer. She had formal induction training from 11 February to 14 February at a separate BUPA home and then attended 3 buddy shifts at Fountain Lodge during the week commencing 15 February 2019 and a further 3 buddy shifts on a different ward in the w/c 22 February 2019. The buddy shifts were intended to be shadowing/ on the job training opportunities where the claimant would be shown the ropes.
22. We consider that this training was not exhaustive nor intended to be so. It was an introduction with a lot of learning intended to be 'on the job'. There was a general consensus amongst the respondent witnesses that much of the training for the role occurred on the job and that the claimant was not expected to be fully competent during her early weeks. She was expected to ask if she needed assistance and when she did, manpower allowing, assistance was provided. An example of this was that she claimant did not initially understand the pager system and therefore missed some urgent calls. She was not criticised for that and when she explained the reason for missing the calls she was given additional training on how to use the pager. On another occasion she was mistakenly about to give thickening powder to a resident but was told it was not appropriate for that resident and given training that the powder was not intended for all residents and only given by prescription. We accept that these events represented training and supervision as opposed to unnecessary or unwarranted criticism of the claimant.
23. The claimant spent a huge amount of time during the tribunal hearing asking the respondent witnesses about incidents that were not part of her claim and she focussed hugely on incidents where she had been told that she needed to do her job in a certain way or had made mistakes. We make the overall observation that the claimant seemed to interpret all corrections of her work as criticisms and allegations of wrongdoing. She ascribed all her mistakes to a lack of training and felt that any blame for the mistakes lay with the respondent. Firstly, we find that the respondent did not blame the claimant at any time during her employment for mistakes that occurred. They held her accountable when her work was not correct and provided training or guidance or told her what to do. That is very different from assigning blame. Further they did not expect the

claimant to know the role or perform the job faultlessly as she had only worked there for a short time and they were expecting to train her on the job.

Speak Up report

24. On 23 February the claimant witnessed another carer (SE) providing care to BM/A which the claimant characterised as abuse. She reported it via the respondent's internal whistleblowing process known as 'Speak Up' on 24 February. Following receipt of that report, Ms Yearly went into the home and suspended carer SE. The reason Ms Yearly undertook this role on this occasion was that SE is the daughter of Louise Eastwood the manager of the home. It was therefore inappropriate for Louise Eastwood to deal with the allegation or suspension of her daughter.
25. Once SE had been suspended Ms Yearly undertook an investigation which included speaking to the claimant about what she had seen. We consider that it was appropriate and normal that this was approached by Ms Yearly as an information gathering exercise as opposed to one in which information was provided to the claimant. It was a fact-finding exercise in which the claimant was a witness and no more.
26. We are not in a position to judge the incident itself or its severity but we note that the carer was found to have acted against best practise and was provided additional training and informed that her work had not been correct on that occasion.
27. After the report was finalised, Ms Yearly fed back the findings in the report and told the claimant that 'The findings were that there was no purposeful harm to the resident BA but lessons had been learned about best practice.'. We accept that it would not have been appropriate to share the entire report with the claimant at this point as any conclusions reached were regarding another member of staff. We accept Ms John's evidence that the family of the relevant resident were informed.
28. The claimant was then asked whether she was happy with the process and outcome of the Speak Up report. This 'feedback' was somewhat strangely done as part of a supervision type process that appeared to focus on what the claimant had learned from the situation. The form asked her what she would change about her own practice following the situation. She wrote on the form;

"_S [SE - the carer about whom the claimant had spoken up] has the drive and strength to work hard, but not in the care setting."

Ms Yearly asked her to remove that because the form was about the claimant not other members of staff and the claimant refused. Ms Yearly interpreted this

action as the claimant not being happy about the outcome and therefore Ms John attended a meeting with them both on 5 March 2019.

29. We accept that Ms John and Ms Yearly made it clear to the claimant that she had done the right thing in raising the incident and praised her for doing so and told her that she must continue to raise such issues as and when she saw them.
30. We also accept that they took the complaint seriously, processed it in accordance with their procedures and took what they felt to be appropriate remedial action in the circumstances.
31. We accept that the form that the claimant was being asked to fill in on this occasion was inappropriate in that it asked the claimant to reflect on how she would or could improve. This was clearly not appropriate when she had been the one to raise concerns and she had not been told that there were any concerns regarding her behaviour during this incident. We therefore think it is understandable that the claimant wrote something about the other carer at that time given that she was new to the role and the systems. However we also agree that it was inappropriate to write comments about another employee's performance in your own supervision notes and something that would go on your file. Comments about someone else were not the intended purpose of the form so we understand why she was asked to change it. We agree with Ms John's witness evidence to us that on reflection this was a meeting which should simply have been minuted as opposed to approached as a supervision meeting. The claimant had done nothing wrong in this instance and was being asked to reflect her 'learnings' when in fact all that was happening was that she was being given the outcome of her disclosure about another member of staff's behaviour. It is clear that this approach caused the claimant concern though we accept that the respondent via both Ms Yearly and Ms Johns did explain the situation adequately to the claimant at the time and explained why they needed her to remove the comment about SE.

Matters that arose during the claimant's shifts

32. We find that the claimant was not at work on 10 March though she was in on 11 and 12 March. The rotas we were provided with did not shed much light on this point as none of the witnesses gave evidence on how they should be interpreted. Nevertheless we find on balance that it is more likely than not that the claimant did not work on 10 March as she accepted during cross examination that her first independent shift was on 11 March.
33. We accept however that the number of staff on duty during the shifts that week was as normal. Ms Thomas gave evidence (which we accept)

"There's 37 beds on my unit (Birchwood) and the number that are occupied goes up and down. Typically on a day shift, if at full capacity we have 6 staff: the person running the shift (either the senior carer or myself) plus five carers."

34. The claimant gave no evidence that this was incorrect save that she challenged the occupancy of the ward saying that there were 37 as opposed to 27 which the respondent witnesses said. What the claimant stated was that this number of staff was insufficient for the number of patients and that she had too much work to do. Although we accept that there are probably huge workloads for carers in the home we do not find that there were, either deliberately or otherwise, a different number of staff on shift that day than on any other day with other members of staff. The claimant was not asked to work harder than other members of staff.
35. With regard to resident RS in Room 1, we accept that the care plan which we were provided with shows that carers such as the claimant were allowed to and expected to wash the wounds as part of his care and that a district nurse would professionally dress the wounds once a week. We also accept that it was part of the claimant's job description to provide such care. The claimant had not at that point received specific training on wound care; nevertheless when she expressed her concerns Ms Thomas told her that it was part of the job and told her that she needed to do it in accordance with RS' care plan. The claimant stated that she refused to do it. We saw no evidence of any negative repercussions as a result of that refusal. It isn't mentioned in any of the supervision forms we saw.
36. Ms Thomas did assess the claimant's performance on 12 March by observing her on shift. This was part of the normal induction process that the respondent operates during the first 12 weeks of someone's employment as a carer. We found nothing inappropriate about the operation of this policy or the way in which Ms Thomas carried it out.
37. The claimant states that 20 minutes before her shift ended on 27 February she was asked to go and check all the residents on her floor. It is accepted that this may well have happened. Ms Thomas explained that checking residents once they were meant to be in bed was a routine part of the role. The caring staff work very hard and are expected to continue working until the end of their shift. We accept Ms Thomas' evidence that it was not unusual for staff to be asked to do such a check even if their shift was coming to an end and that such a routine check may not take longer than 20 minutes on some occasions as the residents were all meant to be in bed at this time. We accept that it could sometimes take longer if the residents were experiencing any difficulties or were up – however we were given no facts regarding this particular shift. The claimant's allegation is simply that she ought not to have been asked to do such a check so soon before her shift ended. We find that this was a normal requirement of the role.
38. The claimant states that she was not told about a training course. She thought she had a day off and received a call from Ms Yearly enquiring where she was.

It transpired that Ms Yearly had put the details of the course and who was required to attend on a notice board where she also pinned up details of people's shifts. We accept that the claimant was unaware of this system and did not know about the course. However, on being informed, the claimant duly attended the course albeit a little late. Ms Yearly did not chastise or negatively mark the claimant down regarding this incident. The claimant was not viewed negatively for not having known about the pin board system.

Incident on 13 March

39. In or around 4 March the claimant was told that she ought not to eat food from the residents' kitchen. She told the staff there that she had diabetes and low blood sugar and Ms Anderson told her that she should carry her own food or similar with her if that was the case. This incident was communicated to Ms Yearly on or around the same date.
40. On 13 March the claimant went into the canteen and tried to take a biscuit because she felt that her blood sugar was low and she feared she was about to faint. She was told again that she ought not to be eating food from the residents' kitchen. At that point the claimant stated that she drank some milk and sugar from a trolley and then Ms Yearly asked her to go to a different room to have a private conversation.
41. Ms Yearly had been intending to speak to the claimant in any event to deal with a complaint from a resident's daughter about the claimant's care for the resident. However that intention was superseded by the incident in the kitchen. We find that Ms Yearly approached this situation by asking the claimant what her medical situation was and what her blood sugar levels had been before she drank the milk and sugar to ascertain whether she needed medical assistance. The claimant stated that she had not had time to go upstairs to obtain her glucometer or food so she did not know what her blood sugar levels had been when she started to feel unwell or at the time of the conversation. We accept that she told Ms Yearly what her levels were when she had left home that day but did not know her current sugar levels either before or after she had consumed the milk and sugar. However it was an appropriate question from Ms Yearly at the outset of the conversation as she was trying to help the claimant.
42. The claimant's response to this line of questioning was to become very upset and shout at Ms Yearly. We do not understand why. The claimant told us that it was because she felt she was not being listened to as she was telling Ms Yearly that she did not know what her glucose levels had been because she had not had time to go upstairs and measure it before needing to eat. We do not consider that her conclusion regarding Ms Yearly's intentions in this regard was objectively plausible or credible. Ms Yearly was trying to assist the claimant who had said she was feeling so unwell she was about to faint and had to take food from the canteen. It was not inappropriate for her to try to ascertain the

seriousness of that situation by trying to understand what the claimant's blood sugar levels might be.

43. Given the claimant's unpredictable response we find that it was reasonable for Ms Yearly to seek the assistance of the manager of the home and suggest that she and the claimant go and speak to her. The claimant agreed to go with her to see Ms Eastwood. We find that the claimant's manner and tone continued to be irrational and bordering on aggressive during the meeting with Ms Eastwood and Ms Yearly. She herself stated that she was 'screaming' whilst walking with Ms Yearly to Ms Eastwood's office. She said that she did this to gain people's attention and show them what was happening to her but also stated that she felt very embarrassed by the situation. It is not clear how deliberately bringing attention to yourself and your situation avoids embarrassment. The claimant denied shouting during the meeting but we prefer Ms Eastwood's and Ms Yearly's evidence in this regard as we consider that the claimant did not appear to be behaving rationally at this time. We were provided with no evidence to suggest that such a level of shouting or anger are symptoms of having low blood sugar levels. The claimant relied upon a DVLA print out about driving with low blood sugar which suggests that one symptom could be 'stoppiness and tearfulness'. We find that the claimant's behaviour in this meeting was far in excess of those possible symptoms and accept that it must have been a difficult and worrying situation for Ms Yearly and Ms Eastwood.
44. The meeting was unpleasant for everyone involved. We find that Ms Eastwood did refer to a complaint being made against the claimant which escalated the level of tension. However this occurred because the claimant was saying that there had been lots of complaints made about her and Ms Eastwood was responding to that statement by saying that she was only aware of one complaint and indicating what it was. Had she raised that allegation unprompted then we would accept that it would not have been a good way to de-escalate a fraught meeting but we accept that she only referenced it once the claimant had made comments about there being lots of complaints.
45. As an overall observation regarding this meeting, we consider that Ms Yearly and Ms Eastwood were attempting to calm the claimant down and find out what was happening for the claimant in a situation where the claimant appeared to be interpreting everything as an attempt to discipline or chastise her rather than ascertain what her state of health was. We do not agree that this was either Ms Yearly or Ms Eastwood's actual or intended approach to the meeting and that they were trying, in a difficult situation, to find out what was causing the claimant to be so upset.
46. We prefer Ms Yearly and Ms Eastwood's evidence regarding the remaining content of that meeting as we consider that even by her own account the claimant was extremely upset at the time. We do not accept therefore that the

claimant was told the residents could not understand her nor that she ought not to be doing the job if she felt faint.

47. We also observe that this all took place over a fairly short period of time (20 minutes or so for both meetings) and the claimant left at 09.25. There was therefore relatively little time for either Ms Yearly or Ms Eastwood to de-escalate the situation.
48. The claimant left the room and then left the building shortly afterwards and did not return. We consider that it was clear that she was resigning at this point from her comments and her behaviour.
49. The claimant was in further correspondence with the Speak Up complaints team on 10 March and 13 March raising issues regarding other residents and issues regarding their care. The Speak Up team responded and it is clear that they asked her to participate in various conversations. On 9 April, via email (p285), the claimant stated that she did not want to discuss the matters further with the Speak Up team by phone and asked them to put any correspondence in writing. The team duly wrote to her and asked her if she had anything to add. The claimant did not respond to that email. She has explained that she had nothing further to say to the team so she did not respond. We accept that explanation.

The Law

Automatic unfair dismissal by reason of whistleblowing (s.103A Employment Rights Act 1996 ('ERA'))

50. Section 103A ERA 1996 provides that a dismissal will be automatically unfair if the reason (or, if more than one reason, the principal reason) for the dismissal was that the employee had made a protected disclosure.

Qualifying disclosures

51. Section 43A ERA 1996 provides that a 'protected disclosure' means a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H.
52. Section 43C(1)(a) ERA 1996 provides that a qualifying disclosure is made in accordance with section 43C ERA 1996 if the worker makes the disclosure to his or her employer.
53. A 'qualifying disclosure' includes a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and 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 (43B(1)(b) ERA 1996), or

that the health or safety of any individual has been, is being or is likely to be endangered (43B(1)(d)). The claimant did not identify, as part of these proceedings, which of these (or any other part of s 43B(1)) she relied upon. However we find that the disclosure regarding SE's conduct towards the patient BM/A was a disclosure of information which the claimant reasonably believed was in the public interest and which tended to show that SE might have been about to fail to comply with the home's legal obligation to care for the resident and/or put her health and safety at risk.

Public interest

54. In relation to whether the worker reasonably believed that the disclosure was made in the public interest, the tribunal has to ask two questions: (a) whether the worker subjectively believed, at the time s/he was making the disclosure, that the disclosure was in the public interest; and (b) whether, if so, that belief was objectively reasonable: Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] ICR 731. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker: Chesterton Global.

Knowledge of disability

55. Section 6(1) Equality Act 2010 provides that a person has a disability if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities.

Discrimination arising from disability (s.15 EqA 2010)

56. Section 15 EqA 2010 provides that an employer discriminates against a disabled employee where the employer:
- (1) treats the employee unfavourably because of something arising in consequence of the employee's disability; and
 - (2) cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

Conclusions

The Speak Up Complaint – ('The disclosure')

57. The claimant asserts that she saw SE behaving in a way that caused her concerns about the care being provided to the resident and this is supported by the fact that SE accepted she had showered the resident in an armchair and the respondent felt that lessons needed to be learned and additional training provided. The claimant's concerns clearly went further than this and are

expressed in the report where she gives detail of what she says happened on this occasion. We consider that she genuinely and reasonably believed that the behaviour she witnessed was inappropriate and could reasonably have led to SE and the respondent breaching a legal obligation or endangering the health and safety of the resident.

58. We consider that the claimant did genuinely and reasonably believe that her report was in the public interest. A care home's treatment of its residents is objectively a matter of public interest given the position of trust it is placed in to care for vulnerable members of our community. The Speak Up complaint therefore amounted to a qualifying disclosure.

The detriments

59. The claimant relies on the 27 alleged detriments numbered 1-24 and 13b, 14b and 15b in the details of claim (50), further specified in the Scott schedule (75, 99, 110A). We have put them in summary form in the Schedule attached to this Judgment. In our conclusions below, we deal with in the same order and numbering. We have considered the detail of each detriment as set out in the above documents but refer to them by number and a brief summary below.

60. Whilst we address each and every one of the detriments relied upon by the claimant properly below, we make the overarching finding that nothing negative occurred towards the claimant because the claimant made the Speak Up report. The claimant's report to Speak Up was positively received, taken seriously and the claimant was assured at all stages that she had done the right thing in raising her concerns. At no point did any member of staff at the respondent treat the claimant badly because of that disclosure. The claimant provided us with no evidence to suggest that there was a link between the detriments she relies upon and her disclosure.

61. Detriment 1 – On 27 February the claimant was asked to check all the residents in their rooms before her shift ended 20 minutes or so later. We find that the claimant was just asked to do something that was part of her role. We do not accept that being asked to carry out a part of your normal role is capable of being a detriment in these circumstances. It did not occur because of the disclosure. There was no link between her disclosure and her being asked to fulfil part of her role.

62. Detriment 2 – The claimant states that she was not trained to use a pager properly resulting in her making some significant mistakes on shift on 6 March. Any failure to train the claimant regarding the pager system pre-dated her Speak Up Disclosure as her initial formal training took place before the disclosure. Subsequently, when her lack of training was realised because she mentioned to Michelle Thomas that she had not received pager training, she was provided with training without complaint or negative comment. All that happened was that her training was noted. There was no detriment and no aspect of this issue occurred because of the disclosure.

63. Detriment 3. The claimant states that at the investigation meeting she was not given time to read the report or provide her with a copy. The investigation interview with the claimant into her allegation was just that – an investigation. It is appropriate that an anonymous whistleblowing complaint is investigated by way of interview of the staff involved. The claimant appeared to believe that she was meant to be provided with information about the situation at this meeting but we do not consider that the failure to do so was anything other than as a result of the fact that this was fact finding process. Once the report had been finalised the claimant was provided with limited information about the outcome. Given that it involved potential disciplinary information about another member of staff we consider that the respondent's decision not to inform the claimant about the full report was reasonable. In any event, the decision not to provide the claimant with a copy of the report did not occur because she had been the person to make the complaint. It occurred because this is what is required by the respondent's policy and they felt that they were protecting the privacy of the other member of staff involved in this matter. It did not occur because the claimant had made the disclosure.
64. The claimant states that she was not told about a training course in advance and was only informed on the morning by Ms Yearly. The failure to inform the claimant about the training perhaps demonstrates that information about how the notice board works was not given to her as a new starter. Nevertheless, at the point at which it became clear she was not at the training all that happened was that she was told about it and arrived a little late. She was not penalised or chastised for the situation. Again, the situation had nothing to do with the disclosure in any way.
65. Detriments 5 and 6 are both about the meetings following the outcome of the Speak Up investigation. There is nothing wrong with the claimant being asked to comment on how she might change her practice in light of the situation however, we understand why she felt that it was a strange process to follow given that the meeting's main purposes was to provide feedback following her raising concerns about someone else's behaviour. Further, the reason she was asked the question was not the fact that she had made a disclosure but because it was what was on the form which, the respondent accepts, was probably not a particularly useful form in all the circumstances.
66. The request for her to rewrite her answer occurred because she was commenting negatively about another member of staff's performance – something that is not appropriate for a self-reflection exercise but also not appropriate in any event when she was a very new member of staff who was being informed about the outcome of her disclosure and it was confirmed to her that action had been taken. Ms Johns was clear that the claimant should not express opinions about another member of staff on such a form but it was not intended or capable of being negative. She was simply clarifying the purpose

and extent of the meeting and the form. It was not intended to be negative towards the claimant, it was providing an explanation. The claimant was not being told not to speak up about colleagues, she was just told that this was not the right place to make such comments. The claimant had already in these meetings, been praised for raising the Speak Up complaint which was the correct forum for raising concerns about a colleagues' practice. The explanation of the form and suggesting more appropriate content to her during those meetings were not misleading or detrimental.

67. Detriment 7 concerns the claimant's actions. She contacted speak up again and reported further concerns. This is not capable of being a detriment as it was a positive action by the claimant.

68. Detriments 8,9 and 10 are allegations are about being overloaded with work. On one of the days relied upon, (10 March) the claimant did not work. That claim therefore cannot succeed. On the other days, we have found that the staffing levels were the same as on other days and accord with the respondent's standard staffing requirements. The claimant has accepted in any event that all staff working these shifts were working under the same conditions and that there was no deliberate attempt by the respondent to put her on a short staff shift because she had made the disclosure.

69. Detriment 11. It is possible that instructing an individual to do a job that they are not trained for and could result in harm to another, would amount to a detriment. However that is not what happened here. The claimant was asked to perform part of her role which was to wash a patient in accordance with his care plan. The claimant states that she had been told that she needed specialist training to wash wounds but we have found that this was not the case in this instance. The care plan stated that the care staff could and should wash the resident's wounds in between the community nurse's visits. It was part of the role she had not done before and she had been told that if she needed help she could ask. However she states that this ought not to have been part of her role because this resident required specialist help. That was not the case and she was informed that it was appropriate for her to do it and told that she ought to do it. That is not capable of being a detriment in all the circumstances. In any event the request arose because of the patient's care plan not because the claimant had made the disclosure. The fact that the claimant refused to do it did not result in any negative treatment either. Ms Thomas did not chastise or discipline the claimant as a result of her refusal to wash the resident.

70. Detriment 12 – Ms Thomas checking the claimant's work as part of her probation process does not amount to a detriment. The claimant was aware, as part of her induction portfolio, that her work would be supervised and assessed. There was nothing to suggest that Ms Thomas did this in a negative way (e.g. overly harsh or rude criticism), but simply fulfilled her obligations as the claimant's supervisor on that shift. In addition it is again clear that this process

took place because this was the respondent's policy, not because the claimant had made the disclosure.

71. Detriment 13 – this relates to the incident on 12 March when the claimant had a biscuit removed from her and was told that she could not eat the resident's food. This was repeated by the duty manager. This occurred when the claimant states that she was suffering from low blood sugar when she felt that she was going to faint. We accept that not allowing an individual to eat when she needed to in order to prevent herself from fainting could amount to a detriment. There is however a context. The claimant was being informed of the rules regarding eating the resident's food, something she had been told beforehand. Further, there is nothing to link this situation to the disclosure. The two events were in no way related.
72. Detriment 14 – We do not accept that Ms Yearly said that the claimant was not suitable for the job. The reason for this conversation was originally intended to address a complaint by a resident's daughter and then overtaken by the biscuit situation. We have found that Ms Yearly did not say that if the claimant fainted she should not be in that job nor was she in any way uncaring about the Claimant. In fact she spent some time trying to ascertain whether the claimant needed medical assistance. Ms Yearly took the claimant to a private room because of the incident with the biscuit. She wanted to ascertain whether the claimant was well enough to be at work and whether she needed medical assistance. This was not linked to the disclosure in any way.
73. Detriment 15 – We do not accept that Ms Eastwood told the claimant that she should not be doing the job. The remaining detail about the conversation regarding the claimant's glucose levels and how she manages them along with comments by the claimant regarding her exercise levels are not detriments. This was a conversation during which Ms Yearly and Ms Eastwood were attempting to find out what was medically wrong with the claimant in circumstances where she was shouting at them and accusing them of treating her badly. We find that Ms Yearly attempting to find out what the claimant's glucose levels were was entirely appropriate in the circumstances. Again it was also entirely unrelated to the disclosure.
74. Detriment 13b – This incident is described as the claimant crying and alleging that it was discriminatory to treat her that way. This is an action by the claimant and not capable of being a detriment done to the claimant. However if the claimant intended to state that the detriment was the fact that she was made to cry by the respondent's actions, we have considered what occurred at that meeting above. We also reiterate that nothing that occurred during this meeting occurred because of the claimant's Speak Up complaint.
75. Detriment 14b – We have accepted that were a manager to raise a complaint from a resident's family out of the blue during a heated discussion regarding an

employee's health that it could have amounted to a detriment. However we accept Ms Eastwood's account that she only mentioned it because the claimant was shouting repeatedly that there were many complaints about her and Ms Eastwood told her that she was only aware of one complaint.

76. Detriment 15b – We do not accept that Ms Yearly told the claimant that the residents had difficulties understanding the claimant. This incident did not occur.
77. Detriments 16 and 17 appear to be primarily descriptions of things that the claimant did or said. They therefore cannot amount to detriments. However detriment 16 does reference an incident where the claimant states that she was told that a resident had fallen over because she was on her list. This incident appears to be a reference to something that occurred during the shift when the claimant had a pager but did not understand how to use it. Being chastised for an incident could, in theory, amount to a detriment. However we have heard that in response to what occurred during this shift the claimant was reminded what her responsibilities were and shown how to use the pager. Further the claimant provided no link whatsoever between this incident and the disclosure.
78. Detriment 18 – This detriment is a description of the actions the claimant took to contact Speak Up again after she had left the respondent. As these are actions taken by the claimant of her own volition, they are not capable of being a detriment.
79. Detriment 19 – this concerns the fact that during the course of the second Speak Up report/complaint, the individual dealing with the matter stated that the claimant no longer wanted to help with the investigation. This is factually correct which the claimant accepted in evidence to us. We therefore consider that the Speak Up investigation making a factual statement in these circumstances is not capable of being a detriment. Further there is no link between this factual statement and the claimant's first Speak Up complaint which is the relied upon disclosure.
80. Detriments 20-24 are accepted as all being descriptions of the claimant's responses, feelings and alleged consequences from or to some of the incidents that she has relied upon as detriments. They are not capable of being detriments in themselves. Further they are all responses to incidents that are unrelated to the disclosure relied upon.
81. We have found that either the incidents relied upon as detriments did not happen, are not capable of being detriments and/or were not caused by the Speak Up complaint. For all these reasons therefore all the claimant's claims for whistleblowing detriment fail.

Automatic Unfair Dismissal – s103 Employment Rights Act

82. The claimant resigned because she no longer felt able to work for the respondent. She relied upon all the incidents given above as detriments as separate and cumulative reasons for her deciding to resign with the final straw being the meeting with Ms Years and Ms Eastwood on 14 March. We have found that none of the incidents she relies upon as being the cause for her resignation were whistleblowing detriments and therefore her claim for constructive unfair dismissal under s103 ERA is not upheld.

Disability Discrimination

83. The claimant was disabled for the purposes of the Equality Act 2010 by reason of her diabetes.

84. We were not provided with any evidence that the claimant had told the respondent that she had diabetes at the outset of her employment – though we think on balance it is more likely than not that she did fill in a form about this – we accept that it is possible that it was not passed on to her managers. Nevertheless, we conclude that the respondent knew or ought reasonably to have known about her diabetes on or before 4 March when she was first spoken to by a colleague called Georgia, about taking food from the resident's kitchen. The managers, including Ms Yearly, had been told about the claimant taking food from the residents' kitchen and her explanation for doing so being, at the very least, low blood sugar. We accept on balance that the claimant is likely to have told the person who asked her not to take food that she had diabetes. We therefore conclude that Ms Yearly had actual knowledge of the claimant's condition from, at the latest, 4 March.

85. We also accept that the claimant attended a hospital appointment for her diabetes during a shift and notified her managers of this and the purposes of it. Whilst this information may not have been properly shared it ought to have been. Even if, as Ms Yearly and Ms Eastwood claim, they did not know about this, they ought reasonably to have known about the claimant's condition.

86. The incidents that the claimant relies upon as being discriminatory are:

- (i) that on 12 March 2019, C's clinical manager denied her sugar when, owing to her diabetes, she needed to consume some sugar;
- (ii) that subsequently the clinical manager did not allow C sufficient time to recover from the effects of her diabetes.

87. We do not accept that the claimant was denied sugar on either occasion where she was asked not to eat the food in the residents' kitchen. The pleadings state that this incident occurred on 12 March but we consider that this is a mistake and is meant to be the 13 March; the claimant's last day. The claimant was not denied sugar, she was asked not to eat the residents' food. Despite being asked not to eat the residents' food she drank some milk and ate some sugar from a tea trolley nearby very shortly after she had tried to eat the biscuit. At the time she became aware of the incident, Ms Yearly tried to assist the claimant by

taking her to a private room and trying to ascertain what was happening medically for the claimant so that she could assist her. Had the claimant needed food and communicated this calmly to Ms Yearly, we are sure that the food she had brought in that was upstairs would have been fetched or something would have been done to ensure that she was properly looked after. That did not happen because the claimant became angry at being challenged and told not to eat the residents' food. Thereafter her responses to any of Ms Yearly's questions, which were designed to try and assist her, were met angrily. This was not a case of the claimant being denied food, this was a case of the claimant being asked to follow the rules regarding consumption of the residents' food and subsequently wrongly interpreting all Ms Yearly's questions as negatively intended.

88. We do not accept that the claimant was not given enough time to recover from the effects of her low blood sugar or diabetes. She became angry and confrontational with Ms Yearly and Ms Yearly therefore suggested that they discuss the situation with the home's manager Ms Eastwood. The claimant agreed. Subsequently the claimant continued to respond angrily during that meeting that the claimant barely allowed Ms Yearly and Ms Eastwood to speak. She would not answer the questions she was being asked; essentially saying that she was being wrongly accused and made to feel as if she was stealing food. Even if the claimant had a good reason (which we do not accept) for feeling as if she was not being listened to, she did not ask for help, or time to recover, or suggest any solutions to the situation. This was a short meeting (both the meeting with Ms Yearly in the dining room and the meeting with Ms Yearly and Ms Eastwood combined took around 20 minutes). The claimant did not allow anyone time to think at this point as she was being so defensive and shouting. We also note that despite now saying that she needed time to recover, at the end of this stressful meeting the claimant quickly and calmly (by her account) went upstairs, gathered her things, said goodbye to members of staff and left the building.

89. We have considered whether the claimant's angry and confrontational behaviour could have been something arising from her diabetes but she has not stated that it was and does not rely on this behaviour as being the 'something arising' from her disability. She says that the something arising was the drop in her blood sugar levels and the need to eat. The claimant has stated that she was not as angry or confrontational as is being described and says that she was calmer than the picture painted by Ms Yearly and Ms Eastwood. We disagree particularly given the fact that the claimant freely accepts that she was screaming or shouting as she walked from the dining room to Ms Eastwood's office in an attempt to get people's attention. Instead, the something arising that the claimant is relying upon is the fact that her blood sugar drops and she needs to eat sugar at that point as being the something arising from her diabetes. We accept that this happens and may have happened on this occasion – but it is not the reason that the incident occurred

as it did. Further, the unfavourable treatment the claimant specifically relies on did not happen as described.

90. The claimant's claim for discrimination arising out of her disability is not upheld.

Employment Judge Webster

Date: 6 July 2021

Schedule 1 - LIST OF DETRIMENTS

C relies on the 27 alleged detriments numbered 1-24 and 13b, 14b and 15b in the details of claim (50), further specified in the Scott schedule (75, 99, 110A). We have set out below, for reference only, a summary list of the detriments. When deciding the claim we have had regard to the entirety of the pleadings which set out these detriments in full using different language and giving more detail. The below is simply a paraphrased summary for reference.

It was agreed in cross examination that the claimant's last day was 13 March and not 12 March. Therefore Detriments 13 – 20 below, all of which it was agreed occurred on her last day, occurred on 13 March 2019. We have however kept them below as stating 12 March to reflect that this is how they were pleaded.

1. Detriment 1 - 27/02/2019 team leader Georgia asked the claimant to go to every single room and check if the residents were okay eight minutes before her shift finished.
2. Detriment 2 - 05/03/2019 the claimant was not taught how to use a pager. She went to the wrong room when the emergency call rang. She missed two other emergency calls. She told the team leader Michelle that she had not been taught how to use it. Michelle recorded this in the last phrase of the report.
3. Detriment 3- the claimant was interviewed by Ms Yearley regarding her Speak Up complaint about SE. Ms Yearley did not give the claimant time to read her report and did not provide her with a copy.
4. Detriment 4 -07/03/2019 - the clinical manager Ms Yearley sent the claimant in a email asking her why she was not at the training course that morning. The claimant had not been told about the course. Ms Yearley said that the notice was on a notice board for more than a week previously. The claimant attended the course in any event but was late.
5. Detriment 5 -the claimant was asked by Ms Yearley to write on a paper if she was happy for SE to return to work. The claimant said that she was not happy for her to return to work. The claimant wrote on her paper that “[SE] has strengthened drive to work hard but not on the care setting.” The claimant was asked to comment on what she would have done differently.
6. Detriment 6 – On 7 March 2019, Ms Yearley and Ms John told the claimant to remove her comment about SE from the documents. The claimant rewrote it but said that she was very sorry that the incident had happened. The claimant felt pressurised into changing what she had written.

7. Detriment 7 – On 10th of March 2019 the claimant contacted speak up whistleblowing hotline and stated that she was not been taught the basics of her job and was being set up to fail.
8. Detriment 8 - On 10th of March 2019.the claimant was overloaded with work due to a staff shortage
9. Detriment 9- On 11 March 2019 the claimant was overloaded with work due to a staff shortage.
10. Detriment 10 – On 12 March 2019 the claimant found out that she had nine people to look after on that day and was overloaded with work again.
11. Detriment 11 - On 12 March 2019 the claimant was asked to treat one of the residents who had various open wounds on his leg. In the claimant's opinion the resident needed specialist help because of how bad his wounds were. The claimant explained this to the respondent but the duty manager, Ms Thomas, said that the claimant had to complete the work.
12. Detriment 12 - On 12 March 2019 Ms Thomas walked after the claimant with a list checking if she knew how to do her job. During this incident Ms Thomas told the claimant to do a number of things including calling to her attention where a thermometer was being kept and asking her to look for a hairdryer in a room off the corridor.
13. Detriment 13 - On 12 March 2019 the claimant's glucose levels dropped very badly. The claimant told Ms Thomas that she needed sugar and was going to the canteen to get it. When she got the canteen she took a biscuit and Karen took it from her saying that she was not allowed to eat food from the residents' kitchen. The claimant told her that she was going to faint. Ms Thomas stated that the claimant was not allowed to eat the residents food. The claimant had to drink some milk and sugar to stop herself fainting.
14. Detriment 14 - On 12 March 2019 the claimant was taken to a private room by Ms Yearley. Ms Yearley confirmed that the claimant was not allowed to have residents' food. The claimant's glucose levels were still low. Ms Yearley showed no care and repeatedly asked the claimant what the claimant's glucose levels had been before she drank the milk and ate the sugar. Ms Yearley refused to listen to the claimant's answers and stated that if the claimant was going to faint she should not be in the job.
15. Detriment 15 - Ms Yearley took the claimant to see the home manager Ms Eastwood. Ms Eastwood said that the job was full on and the claimant was not suitable for it. Both Ms Yearley and Ms Eastwood said that if she was going to faint she should not be doing that job.

16. Detriment 13b - The claimant was crying and told them that they were discriminating against her.
17. Detriment 14b - Ms Yearley and Ms Eastwood stated that there was a complaint about the claimant from the resident's family.
18. Detriment 15b – Ms Eastwood told the claimant, in front of Ms Yearley, that the residents did not understand what she was saying.
19. Detriment 16 - the claimant reiterated various allegations of abuse which are set out in full in the grounds of claim under detriment 16. Following this meeting the claimant said that it would be impossible to work for the respondent resigned and left.
20. Detriment 17 - the claimant left the respondent's premises in shock. She stopped the car and called 999 and reported the matter to the BUPA speak up hotline.
21. Detriment 18- On 14 March 2019 the claimant was asked if she was still willing to talk to the speak up complaint line about the incident which she did. The claimant spoke to Sally on the hotline.
22. On 8 May 2019 the head of clinical services Ms Burton telephoned the claimant to discuss her concerns, the claimant did not understand the voicemail message and asked her to put in writing. In response to an email the claimant stated on 9 April that she did not have anything further to add.
23. Detriment 19 - BUPA speak up said that the claimant did not want to help with the investigation which they respected.
24. Detriment 20 - the claimant contacted her GP and reported that her anxiety had become worse because of the way they had treated her regarding her diabetes.
25. Detriment 21 - the incident with the diabetes where the respondent denied the claimant food has made her lose confidence that she can work.
26. Detriment 22 - the incident where the respondent denied the claimant food has made her feel sad, a nuisance and incompetent when she is not.
27. Detriment 23 - the claimant had to ask for two extensions on her university work because she was not well enough to do it due to the way that the respondent had treated her. The incident where the respondent denied the claimant food was very humiliating. It could have given the impression to staff and residents that the claimant was doing something wrong and bad which she found distressing and humiliating.