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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103211/2020

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**Held via Cloud Video Platform on 20, 21 and 22 September, 6, 7 and 8
December 2021**

Employment Judge M Brewer

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Ms N McLelland

**Claimant
Represented by
Mr S Smith
Solicitor**

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Community Lifestyles Limited

**Respondent
Represented by
Mr G Cunningham
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant's claim for unfair dismissal fails and is dismissed

REASONS

Introduction

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1. This case was heard over six days. It had been listed for a three-day hearing but given the number of witnesses and the size of the bundle the case went part heard and three further days were required.

2. The claimant's claim is for automatic unfair dismissal. She lacks the necessary continuous service to bring a claim of ordinary unfair dismissal. The claimant's claim is under section 103A of the Employment Rights Act 1996 (ERA).

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3. I had a bundle of documents running to 430 pages. I heard witness evidence from the claimant and, on behalf of the respondent, from Andrea Duffield, Operational Manager, Jennifer Boyle, Assistant Head of Human Resources, Catherine Sinclair, Area Manager, Robert Darroch, Consortium Manager and Jean Ramsey, Head of Support. Each witness produced a witness statement and were cross examined. At the end of the evidence, I heard submissions from Mr. Smith and Mr Cunningham and in reaching my judgment I have taken account of all the evidence and submissions.

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4. At the end of the hearing I reserved my decision and I set out below the reasons for my decision.

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Relevant law

5. I set out here a summary of the essential law to be applied to this claim. The relevant sections of the Employment Rights Act 1996 ("ERA") state:

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

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43B Disclosures qualifying for protection: *In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*

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

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

43C Disclosure to employer or other responsible person: *A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —*

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(a) *to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—*

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(i) *the conduct of a person other than his employer, or*

(ii) *any other matter for which a person other than his employer has legal responsibility, to that other person.*

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103A Protected disclosure: *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

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6. The word 'disclosure' does not necessarily mean the revelation of information that was formerly unknown or secret. Section 43L(3) of the ERA provides that:

'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'.

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7. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in **Parsons v Airplus International Ltd** EAT 0111/17.

8. Not all disclosures are protected under the ERA. For a disclosure to be covered, it has to constitute a ‘protected disclosure’. This means that it must satisfy three conditions set out in Part IVA of the ERA:
- a. it must be a ‘disclosure of information’,
 - 5 b. it must be a ‘qualifying’ disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six ‘relevant failures’ has occurred or is likely to occur,
 - c. it must be made in accordance with one of six specified methods of
10 disclosure.
9. The worker’s reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has in fact occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the
15 information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only a reasonable belief that the information tended to show the relevant failure.
10. This point was considered by the EAT in **Soh v Imperial College of Science, Technology and Medicine** EAT 0350/14. It was explained that there is a
20 distinction between saying, ‘I believe X is true’ and ‘I believe that this information tends to show X is true’. As long as the claimant reasonably believed that the information provided tends to show a state of affairs identified in section 43B(1) ERA, the disclosure will be a qualifying disclosure
25 for the purposes of that provision even if the information does not in the end stand up to scrutiny.
11. The wording of S.43B(1) indicates that some account is to be taken of the worker’s individual circumstances when deciding whether his or her belief was reasonable. The statutory language is cast in terms of ‘the *reasonable* belief
30 of *the worker making the disclosure*’ not ‘the belief of a reasonable worker’.

Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective — S.43B(1) requires a *reasonable* belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** 2012 IRLR 4, EAT, which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

12. If the claimant reasonably believed that the information tends to show a relevant failure, there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in ***Darnton v University of Surrey*** 2003 ICR 615, EAT. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the Tribunal. This case was cited with approval by the Court of Appeal in ***Babula v Waltham Forest College*** 2007 ICR 1026, CA, when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of, for example, any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

13. In ***Kilraine v London Borough of Wandsworth*** 2018 ICR 1850, the Court of Appeal held that 'information' in the context of S.43B can cover statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

14. In relation to a purported disclosure under S.43B(1)(d), as with the other categories of relevant failure, a worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. However, this duty does not appear to be too onerous.
- 5 In **Fincham v HM Prison Service** EAT 0925/01, for example, the employee perceived herself to be the subject of a campaign of racial harassment. She wrote a letter to her employer containing the statement: *'I feel under constant pressure and stress awaiting the next incident.'* Although an employment Tribunal held that this was not sufficient to amount to a qualifying disclosure,
- 10 the EAT thought otherwise. It said: *'We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything other than a statement that [the employee's] health and safety is being or at least is likely to be endangered... [That] is not a matter which can take its gloss from the particular context in which the statement is made.'*
- 15 15. And in **Palmer and anor v London Borough of Waltham Forest** ET Case No.3203582/13 the employment Tribunal considered whether a worker was required to identify 'a specific risk or a specific person or a specific timescale of risk' but held that, in its view, that would be a gloss on S.43B(1)(d), which refers to the health and safety of 'any' individual
- 20 16. There is no requirement that to attract the protection of the statutory scheme, disclosures must be made in good faith. However, S.49(6A) of the ERA, gives the Tribunal the power to reduce compensation in successful claims under S.103A by up to 25% where *'it appears to the Tribunal that the protected disclosure was not made in good faith'*.
- 25 17. The leading case on good faith (in a slightly different context under previous whistleblowing legislation) is **Street v Derbyshire Unemployed Workers' Centre** 2005 ICR 97 where the Court of Appeal equated 'good faith' with acting with honest motives. It was held that where the predominant reason that a worker made a disclosure was to advance a grudge, or to advance
- 30 some other ulterior motive, then he or she would not make the disclosure in good faith.

18. In **Kuzel v Roche Products Ltd** [2008] ICR 799, the Court of Appeal considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. Mummery LJ envisaged that the Tribunal will decide first
5 whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure.
19. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that the making of protected
10 disclosures was the reason for dismissal. However, Mummery LJ was in agreement with the EAT that, once a Tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. He proposed a three-stage approach to S.103A claims:
- 15 a. First, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the
20 evidence produced by the employer and to produce some evidence of a different reason;
- b. Second, having heard the evidence of both sides, it will then be for the employment Tribunal to consider the evidence as a whole and to make findings of primary fact based on direct evidence or reasonable
25 inferences;
- c. Third and finally, the Tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is
30 open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept

the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

20. I bear in mind that an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case of automatically unfair dismissal advanced by the employee.
21. Whistleblower protection is analogous to the victimisation provisions in anti-discrimination legislation, in that both seek to prohibit action taken on the ground of a protected act. This has led courts and Tribunals considering claims under S.103A to refer to the substantial body of case law concerning causation under the victimisation provisions in what is now the Equality Act 2010 (EqA) for guidance. In **Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL, a claim concerning victimisation contrary to the former Race Relations Act 1976, Lord Nicholls stated that the causation exercise for Tribunals is not legal but factual. A Tribunal should ask: *'Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?'* This approach was expressly approved in the context of S.103A by the EAT in **Trustees of Mama East African Women's Group v Dobson** EAT 0220/05.
22. The question of whether the making of the disclosure was the reason (or principal reason) for the dismissal is distinct from the question of whether the disclosure was protected under the statutory scheme — **Croydon Health Services NHS Trust v Beatt** 2017 ICR 1240, CA. The former question requires *'an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss'*. The latter, however, is 'a matter for objective determination by a Tribunal' and 'the beliefs of the decision-taker are irrelevant to it'. Furthermore, as Lord Justice Elias confirmed in **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** 2012 ICR 372, CA, the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the

disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal. Thus, if the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out.

23. Lord Denning MR in **Abernethy v Mott, Hay and Anderson** 1974 ICR 323, CA held that the principal reason for the dismissal is the reason that operated on the employer's mind at the time of the dismissal, it is the:

'set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.

24. Lord Justice Underhill adopted this approach in **Croydon Health Services NHS Trust v Beatt** 2017 ICR 1240, CA, stating that

'the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision — or, as it is sometimes put, what "motivates" them to do so'.

25. More recently, however, that the Supreme Court in **Royal Mail Group Ltd v Jhuti** 2019 UKSC 55, SC, held that, in enacting S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was that the employee had made a protected disclosure, the automatic consequence should be a finding of unfair dismissal. On this basis, the Court held that where the real reason for the dismissal is hidden from the decision-maker behind an invented reason, it is an employment Tribunal's duty to look behind the invention rather than to allow it also to infect its own determination. Provided that the invented reason belongs to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker

26. What must be borne in mind is that a '**Jhuti**' case will be exceptional. **Jhuti** was most recently considered in **Kong v Gulf International Bank Ltd EA-2020-000357 (10 September 2021)**.

27. In the earlier case of **University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall** UKEAT/0150/20 (30 June 2021, unreported) Judge Tayler in the EAT pointed out that, important as the development was in **Jhuti**, in allowing an ET to look beyond the mental processes of the dismissing manager in a case where there was another manager acting as an éminence grise in the background procuring the dismissal (eg because of whistleblowing) by misleading the dismissing manager, that development operates as an *exception*. The *rule* remains that normally one looks at the motivation of the dismissing individual or body.
28. That approach was further emphasised in the decision of Judge Auerbach in the EAT in **Kong**. The facts are instructive on this important point. The claimant was head of financial audit at the bank. A draft report by her raised concerns about the adequacy of a particular audit. It was accepted that this constituted a protected disclosure. The Head of Legal became involved and disagreed with this assessment. After a rather fraught conversation and email the latter formed the view that the claimant was impugning her integrity. She complained to HR, saying that she could not see how she could work further with the claimant. The Head of HR and the CEO determined that the claimant had to be dismissed, which was done.
29. The claimant claimed whistleblowing detriment (based on actions by the Head of Legal) but this was out of time. Her action for ordinary unfair dismissal (in time) succeeded but a second action, for whistleblowing automatically unfair dismissal, was rejected. This was because the Employment Tribunal held that the reason for dismissal by the senior management was her treatment of the Head of Legal and handling of the whole matter. She appealed, arguing that, under **Jhuti**, the Tribunal should have looked beyond the reasoning of the dismissing managers and taken into account the involvement of the Head of Legal (who, she argued, *had* been motivated by the protected disclosure).
30. The EAT rejected this argument, holding that this was *not a Jhuti* case. At [72] the judgment states:

5 *'I note the following points. First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ [in the Court of Appeal], which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in **Jhuti**. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to*
10 *procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their*
15 *motivation to be attributed to the employer.'*

Issues

31. The issues in this case are as follows.

32. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

20 a. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

i. 18 March 2019 – in an email to David Meiklejohn;

ii. 11 July 2019 – in an email to David Meiklejohn; and

iii. 23 August 2019 – in an email to the Care Inspectorate.

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b. Did she disclose information?

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

d. Was that belief reasonable?

e. Did she believe it tended to show that:

i. there was a failure to comply with a legal duty; and/or

ii. the health or safety of any individual had been, was being or
was likely to be endangered?

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f. Was that belief reasonable?

33. If the claimant did make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 was that the reason for her dismissal?

10 **Findings in fact**

34. References below are to page numbers in the agreed bundle.

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35. The claimant was employed by the respondent as a support worker with effect from 13 February 2019. It was a condition of the claimant's employment that she register herself with the Scottish Social Services Council (SSSC) within six months of her start date [98].

36. The claimant started her employment on probation and was required to complete probation and register with the SSSC In order to be confirmed in post as a support worker.

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37. The respondent provides care services to vulnerable adults in their own homes. As a social care provider, the respondent is regulated, and that regulation is overseen by the Care Inspectorate. In this case the respondent's client was Glasgow City Council and in that context the Council also had an oversight role in relation to the respondent's performance.

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38. At the material times and for the purposes of this claim the claimant was providing support to service users R and A. Service user A had complex

needs given that he was addicted to alcohol, doubly incontinent and was diagnosed with Asperger's syndrome, amongst other things.

39. It is part of the respondent's ethos that where a service user is deemed to have capacity to make their own decisions, care workers do not impose on the service users their own standards of, for example, hygiene, food and alcohol consumption. Service users have a care plan and the care provided must be in accordance with that plan.

40. The claimant failed to register herself with the SSSC throughout her employment with the respondent.

41. On 18 March 2019 the claimant sent an email to Mr David Meiklejohn, Assistant Support and Development Manager in the following terms:

"Hi David, pictures on the attached of what I came into on Saturday, before the Tesco, incident. Poo in pan from guy cleaning poo off kitchen floor, after I arrived. Used a dish towel and spray bleach to clean floor. Pillows I washed on Wednesday, still on airer in same place. As the bed hadn't been changed since I left Thursday morning, bed saturated two mattress and base, bedding and quilt in the same. No handover sheet or meds paperwork completed. Cheers, Nicola"

42. The claimant says that this was a protected disclosure as it raises a matter of the health or safety of an individual. The respondent does not accept that this email contains a protected disclosure [174]. In contacting Mr Meiklejohn directly, the claimant bypassed her line manager Sandra McGovern, Team Leader.

43. Following receipt of the above email Mr Meiklejohn met with the claimant on 26 April 2019. He reported the content of that meeting to Sandra McGovern by email which he also copied to Phyllis McGhee, Support and Development Manager, who was Mr Meiklejohn's line manager [176]. In his email Mr Meiklejohn notes that he informed the claimant that he had received a complaint about her from an on-call manager concerning a late-night phone

call that manager had received from the claimant. In the email Mr Meiklejohn also says that Ms McGovern should ensure that the claimant's manner is discussed with her during probation supervision meetings and that support should be offered to her to help with her stress.

5 44. Ms McGovern did subsequently discuss this issue with the claimant [177].

45. On 5 June 2019 Mr Meiklejohn met with the claimant to advise her that she was no longer going to support service user R. This was at R's request [178 – 180].

46. On 11 July 2019 the claimant sent an email to Mr Meiklejohn headed
10 "neglect/official complaint" [186]. The email includes the following:

*"Hi David. I feel I have no choice than to put this in writing to you, for action to be taken. When I arrived this morning A very intoxicated, falling asleep but still had just under half a glass of alcohol. Complaining of sore ribs, telling me he had a fall just after his birthday. No visible bruising on his ribs. Please see on the attached picture, the
15 gash on his head. Once again there is no report of how or when this happened. Nor is there any recording of the bruising on his legs, arms or cut on his elbow... Before I went off, I highlighted to you A had gone four days without a bath. No one is encouraging him to eat or drink
20 anything, other than his alcohol... I believe my role is to improve/better his quality of life. I also mentioned that I detail how I am able to achieve this with him on my notes, as it's not always easy. The bottom line though is that it's achievable if people care enough... He deserves so much more than a caretaker..."*

25 47. The claimant says that this was her second protected disclosure. The respondent agrees that this is a protected disclosure "in relation to paperwork issues".

48. Mr Meiklejohn sent the claimant's email to Ms McGhee whose views are at
[185]. She states that she visited A on 5 July 2019 and her observations were
30 "really positive". She states that his clothing was clean and appropriate, his

environment was clean, and he was wearing protection as a means of managing his then current loose bowel movements. Ms McGhee stated that she had no concerns at all, but she understood that because of A's addiction he will have bad days which have to be managed. He will present as unkempt and can refuse meals which although difficult for staff there are risk assessments in place to help A manage his addiction.

49. Ms McGhee also carried out a spot check at A's house on 17 July 2019 [189]. She found A well-groomed, his environment clean and tidy and other than some paperwork issues noted on the form completed after the spot check, no issues were noted.

50. I also note that as well as the respondent providing care workers to support A, A also received regular visits from family members, mental health workers, addiction support workers and Glasgow City Council. There is no evidence that at any point any of those visiting and supporting A expressed concerns over the support being provided to A by the respondent.

51. On 23 July 2019 Ms McGhee met with the claimant to discuss her 11 July email. Notes of this meeting are at [192]. Ms McGhee thanked the claimant for her email, she explained that she had undertaken a spot check and that there were no findings which would support what the claimant had said about A being neglected. Ms McGhee also told the claimant that she had located a report in the daily notes about the fall and consequent injuries to A which the claimant had suggested had not been recorded. Ms McGhee then asked the claimant for more detail and particular incidents that she had witnessed which she considered to be neglect or causing harm to A. in response the claimant said that she was not suggesting that there was any "wilful harm or neglect" being caused to A directly from staff members, but that she was frustrated that whilst she was off, "other staff members do not put the same amount of effort as she does into encouraging A to bath, eat or get out and about". Ms McGhee pointed out that the service user's diagnosis of Asperger's, learning disability and alcohol dependency meant that there would be times when he would not engage and that this was not a reflection of staff not trying. Ms

McGhee said that “historically A has always responded more positively to one member of his team and at this time he had chosen to respond to [the claimant]”. There was a discussion about the claimant moving to a different service and the claimant seemed positive about this.

- 5 52. On 24 July 2019 Ms McGhee sent an email to Robert Darroch, Consortium Manager, which was copied to Catherine Sinclair, Area Manager, setting out her concerns about the dynamics between the claimant and the rest of the team. Ms McGhee stated that the claimant felt stressed and wanted a move which Ms McGhee felt would be beneficial for her stating: “*this move would*
10 *have no negative impact on A's support*” [183]. It should be explained that Catherine Sinclair was Ms McGhee's line manager and Robert Darroch was Ms Sinclair's line manager.
- 15 53. On 5 August 2019 the claimant had a discussion with HR in which she confirmed that she had agreed to move teams, but that since she then had discovered that this would mean a drop in hours, and this would be a problem for her [194].
54. On 9 August 2019 the claimant and Ms Sinclair met and one outcome of that was that there was to be no moved to another service.
- 20 55. On 13 August 2019 Mr Meiklejohn visited A. He sent an email to Ms McGhee detailing his visit [196]. Amongst other things he reported that the service user had referred to the claimant as a “baddy”, “bully” and a “bad bitch”. This was not taken at face value because Mr Meiklejohn says, “I do appreciate this can be language he uses when his support team are trying to motivate him to do things e.g., take a bath etc”.
- 25 56. On or around 22 August 2019 Mr Meiklejohn met with a colleague of the claimant's who was supporting service user R. Amongst other things the colleague stated that service user R, who was a regular visitor to service user A stated that he did not want to visit A if the claimant was there supporting A [199].

57. On 23 August 2019 the claimant sent an email to the Care Inspectorate which she says is her third protected disclosure. The claimant told the Care Inspectorate that she had raised issues with the respondent about the care of A, that the outcome of raising these issues was to “put me to another service that would work better for me” and that the claimant’s email of 11 July 2019, which had been copied to Catherine Sinclair, had, in effect, not being acted upon [200]. The respondent accepts that the email of 23 August 2019 is a protected disclosure in relation to paperwork.
58. On 29 August 2019 Mr Meiklejohn carried out a further spot check with A. He noted that “A disclosed some concerns about worker Nicola that need to be scoped out”. Present at this visit was Sandra McGovern, the claimant’s Team Leader, who stated that she had received concerns from the claimant’s colleagues about the claimant’s outbursts at handovers and also that service user A has told them that he is frightened of the claimant and thinks she is a bully. Mr Meiklejohn’s response was that this needed to be passed up the managerial chain to seek an action plan to scope out and collate the concerns [205 – 206].
59. Following the claimant’s email to the Care Inspectorate, Glasgow City Council were asked by the Care Inspectorate to investigate the claimant’s concerns. A visit to service user A was undertaken on 8 September 2019 by a Care Manager employed by Glasgow City Council, and on 9 September 2019 by an ASP Team worker. Julie-Ann Kerr, who is also an employee of Glasgow City Council, and it is apparent from Mr Meiklejohn’s email of 9 September 2019 [210 - 211] that Ms Kerr Spoke directly to A, spending some 30 to 40 minutes with him. Ms Kerr also interviewed Gillian Dale, a colleague of the claimant who also supported service user A. By all accounts the meeting was very detailed and Ms Kerr asked questions about how the service user was encouraged to eat, his alcohol consumption and some specific questions about for example the purchase of extra alcohol all of which were responded to.

60. On 13 September 2019 the claimant met with Catherine Sinclair. At the meeting there was a long agenda and a discussion about a number of matters [213 – 216].

5 61. Following the investigation undertaken by Glasgow City Council on behalf of the Care Inspectorate, Isobel Crawford, Senior Officer – Commissioning for Glasgow City Council spoke with Ms Sinclair to express her concerns. Ms Sinclair asked Ms Crawford to put her concerns in writing which she did in an email to Ms Sinclair on the same day [217].

10 62. Ms Crawford confirmed that she had concerns about the claimant. She described the claimant as “forceful” in her claims of neglect which “were then refuted by A” when he was spoken to. She said that A “told the Care Manager that he was scared of [the claimant] and that she swore at him”. She concluded her email as follows:

15 *“As I said this morning I have serious concerns regarding [the claimant’s] ongoing support to A or any of our service users...”*

63. Ms Sinclair made her manager, Robert Darroch aware of Ms Crawford's concerns with a view to them meeting to discuss them [218].

20 64. Mr Meiklejohn paid a further visit to service user A on 19 September 2019. He recorded that visit in an email to Cathryn Sinclair on the same day [220 – 221]. During the meeting the service user reiterated that he had been bullied by the claimant and he said that the claimant had ordered him to eat, had sworn at him, had shouted at him and that she was “always ordering him around, to get him to do things”.

65. The claimant was suspended on 20 September 2019 [222[]].

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66. Robert Darroch was asked to carry out an investigation into the concerns raised about the claimant by the service users, by colleagues and by Glasgow City Council. Mr Darroch met with the claimant on 24 October 2019 and a

note of that meeting starts at [233]. Mr Darroch said that he had looked at some of the claimant's personal notes from her care of A and he stated that the language she used was worrying to him because the language was suggestive of treating A like a child rather than an adult, and that the claimant's behaviour came across as controlling. The claimant was sent a copy of the meeting notes and she had a number of comments on them which appear at [253 et seq].

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67. Mr Darroch concluded his investigation and on 4 December 2019 the claimant was written to and invited to attend a disciplinary hearing on 12 December 2019. The invitation letter sets out in detail the issues of concern that will be discussed at the hearing, and she was informed that one outcome could be her dismissal. In the event, that hearing was postponed and rearranged to take place on Friday 10 January 2020.

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68. The disciplinary hearing went ahead as planned and was chaired by Jean Ramsay, Head of Support. Notes of the hearing start at [298].

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69. Ms Ramsay took some time to consider the evidence and make her decision which was conveyed to the claimant by letter on 28 February 2020. The decision was that the claimant had failed to meet the standard required by the respondent in relation to her practise, that she therefore did not successfully complete her probation and was not therefore confirmed in post. This amounted to a dismissal because Ms Ramsey found the allegations in large part proved.

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70. I do note that the claimant raised a grievance which was not successful, and she also appealed against that grievance, the appeal also being unsuccessful. I have not detailed any of this grievance because it does not form part of the claimant's case.

71. The claimant commenced early conciliation on 15 April 2020 and received her early conciliation certificate on 6 May 2020.

72. The claimant presented her claim form on 5 June 2020.

Observations on the evidence

73. I shall deal with specific aspects of the evidence below. In general, the respondent's witnesses gave evidence which was consistent with the contemporaneous documentation, and their answers to questions in cross examination were consistent with their witness statements and witnesses were consistent with each other when being cross examined about the same matters. The claimant was in a somewhat different position because she sought to argue that much of the contemporaneous documentation is either incorrect, untrue and in some cases deliberately falsified. It follows that much of her evidence contradicts or is contradicted by the contemporaneous documents and that is a matter I deal with in the discussion below. What is clear is that the claimant genuinely believes in her case even if there is little or no evidence to support her contentions.

Respondent's submissions

74. Mr Cunningham's submissions dealt in large parts with the law. He pointed out the ethos adopted by the respondent in working with service users, a matter which was not the subject of any challenge. Mr Cunningham's essential submission was that although there were protected disclosures it is clear from the evidence of Ms Ramsay that any such disclosure played no part in her decision to terminate the claimant's employment and he says that this is not an exceptional case to which **Jhuti** applies.

Claimant's submissions

75. Mr Smith's submissions are of course the polar opposite of Mr Cunningham's. In effect he relies entirely on the application of **Jhuti** and invites me to look behind the stated reasons for dismissal and find that the real reason or principal reason was the fact that the claimant made protected disclosures. What Mr Smith relies upon is what he refers to as the extensive factual overlap between the factual matrices which he says were set out in the protected disclosures and the allegations made about the claimant which the

respondent relied upon in dismissing her. Mr. Smith says that both the claimant's disclosures and the complaints about the claimant involved the same persons, including service users and co-workers, he says that the consequences of the claimant having made protected disclosures became known to the respondent and the claimant's co-workers and, as he puts it, these consequences were uncomfortable for both. From that he asks that I infer that because those consequences were uncomfortable, that is evidence that the real reason for dismissal was the fact that the claimant made protected disclosures.

Decision

76. My first task is to decide whether the claimant made the protected disclosure's she asserts.

77. In respect of two of the purported disclosures my task is made somewhat simpler by the fact that the respondent accepts that they were protected disclosures in relation to records. Mr Smith argues that all the protected disclosures also fall under section 43B(1)(d) ERA which is that the health or safety of any individual has been, is being or is likely to be endangered.

78. The respondent accepts that on 11 July 2019 in an email to Mr Meiklejohn the claimant made a protected disclosure under section 43B(1)(b) ERA. The legal duty referred to is the obligation to keep appropriate records and the respondent accepts that in some respects that had not been done.

79. The email of 11 July 2019 is in the following terms:

"Hi David. I feel I have no choice than to put this in writing to you, for action to be taken. When I arrived this morning A very intoxicated, falling asleep but still had just under half a glass of alcohol. Complaining of sore ribs, telling me he had a fall just after his birthday. No visible bruising on his ribs. Please see on the attached picture, the gash on his head. Once again there is no report of how or when this happened. Nor is there any recording of the bruising on his legs, arms or cut on his elbow... Before I went off, I highlighted to you A had gone

four days without a bath. No one is encouraging him to eat or drink anything, other than his alcohol... I believe my role is to improve/better his quality of life. I also mentioned that I detail how I am able to achieve this with him on my notes, as it's not always easy. The bottom line though is that it's achievable if people care enough... He deserves so much more than a caretaker..."

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80. In some of his cross examination of the respondent's witnesses Mr Smith put to them that this email is about the service user's welfare. In other parts of his cross examination, he put to other witnesses that this was about the claimant's health.

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81. The evidence about the service user is that he was addicted to alcohol, and it was not uncommon for him to fall and injure himself. The assertion that this was unreported was incorrect and indeed the claimant was herself provided with a body map by the Support and Development Manager Ms McGhee. I find that had the claimant wished, she would have found the body map which she was shown by Ms McGhee. I do not see how it can be reasonably asserted that saying in an email that an alcoholic, who has a propensity for falling, and who falls and injures himself, is a disclosure of information which in the reasonable opinion of anyone is in the public interest. I could accept that if the disclosure was of facts which tended to show that, for example, a lack of care resulted in the service user falling, but that is not what the email says. If there was a disclosure about the health or safety of A it was that he was a risk to himself which, as I say is not a matter which can be reasonably believed to be in the public interest.

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82. The other reference in the email which might relate to the service user's health or safety being endangered is the purported lack of encouragement to get the service user to eat or drink anything other than alcohol. The fact is that given that the service user had one to one care, and the only overlap between the claimant and other colleagues was a short handover means that it is unclear how the claimant can reasonably assert that her colleagues did not encourage the service user to "eat or drink anything other than alcohol". She was not

present when colleagues were providing their support to A. Furthermore, the claimant was well aware that, as well as the respondent caring for the service user, he had regular visitors including family and members of the multidisciplinary team dealing with A, which included addiction specialists. It was not reasonable for the claimant to believe that in those circumstances that there was a lack of encouragement to get the service user to eat or drink anything other than alcohol. In relation to A's mental health, that he had mental health issues which were not getting addressed, the claimant is not a mental health specialist, and she will have had no idea what specialist mental health assistance A was getting in particular from the addiction team.

83. For those reasons I do not accept that anything in the email of 23 August 2019 amounted to a disclosure under section 43B(1)(d) ERA.

84. The second disclosure which they responded accepts was a protected disclosure is the disclosure to the Care Inspectorate on 23 August 2019. Again, the respondent says that the subject matter is related to paperwork and therefore falls within section 43B(1)(b) ERA. Again Mr. Smith invites me to find that the subject matter of the disclosure also falls within section 43B(1)(d) ERA.

85. The first point to note is that the claimant copied to the Care Inspectorate her email to Mr Meiklejohn of 11 July 2019 and therefore I make the same findings about that here as I have made above. The subsidiary question is whether there is a protected disclosure in the body of the email to the Care Inspectorate as opposed to the 11 July 2019 email which was attached.

86. A great deal of the email concerns what the claimant says happened to her. Other than matters related to documentation, the claimant refers to the fact that she had sent the email of 11 July 2019 and asserts that nothing has been done about that. In relation to the service user, other than repeating matters from the 11 July 2019 email, the claimant asserts that there was "*no encouragement to wash, eat or drink anything other than alcohol*" and that he was "*treated like an alcoholic*".

87. I understand from the evidence that the service user was an alcoholic and I do not understand that by her reference to him being treated “like” an alcoholic the claimant was making a disclosure which meets the requirements of section 43B(1)(d) ERA.

5 88. As to purported lack of encouragement I do not read either of these comments as a disclosure of information which shows that that the service uses health or safety had been, was being or was likely to be endangered. But even if I'm wrong about that, I find that the claimant could not have held this belief reasonably. The claimant would not have been present when the service user
10 was receiving support from colleagues, so it is difficult to see how she could be conveying facts about this. The claimant was also aware that the service user was seen regularly by many visitors, family and other professional supporters and there is a total lack of evidence to support any contention that the service user was being neglected.

15 89. Finally, I turn to the email of 18 March 2019 which is said to be the first protected disclosure.

90. The complaints raised by the claimant were that the claimant's toilet was dirty, the floor was dirty, some clean pillows were still being aired and the bed had not been changed. In my judgement there is nothing in this email to suggest
20 that the claimant was disclosing information which tended to show that the service user's health or safety had been, was being or was likely to be endangered. The disclosure is clearly about the environment in which the service user was, at that particular point in time, living and the email does not make any connection with or even suggestion that this is a health and or
25 safety matter.

91. In summary therefore:

- a. The email of 18 March 2019 was not a protected disclosure;
- b. The email of 11 of July 2019 was a protected disclosure pursuant to section 43B(1)(b) ERA;

c. The email of 23 August 2019 was a protected disclosure pursuant to section 43B(1)(b) ERA.

92. I turn them to the question of the reason for dismissal.

93. As I have indicated it is the claimant's case that notwithstanding what Ms Ramsay said in her evidence about her reason for dismissing the claimant, the underlying or real reason for dismissal was the fact that the claimant made protected disclosures. It was not being suggested that Ms Ramsay was being dishonest and therefore the **Jhuti** principle is pleaded. That requires finding first that a person (or persons) sought to procure the claimant's dismissal for the proscribed reason, and second that Ms Ramsay was particularly dependant on that person as the source for the underlying facts and information concerning the case.

94. As I understand the assertions made by Mr Smith in his submissions, his argument is essentially that the claimant was only complained about after she made a protected disclosure, that the complaints are fabricated for the purpose of trying to get the claimant dismissed, that the procedure followed was so poor that the fabrication was never investigated, and the complaints of the complainants about the claimant were simply taken at face value.

95. The first point to note is that the first evidence of a complaint about the claimant is in an email from Mr Meiklejohn to Ms McGovern dated 26 April 2019. This was before the claimant made a protected disclosure but after she complained about the state of service user A's room. The complaint came from an unnamed on-call manager, and it was never suggested by the claimant that this complaint was untrue. The on-call manager had received a phone call from the claimant and had complained about her manner towards him during the phone call. This on-call manager is not one of the colleagues who Mr Smith asserts was part of the group who were trying to get rid of the claimant and, more importantly, it is difficult to see how he would have known about the claimant's email to Mr Meiklejohn of 18 March 2019, even if that had been a protected disclosure.

96. As to the allegation that concerns were raised by the claimant's colleagues only after she made a protected disclosure, it should be noted that as well as service user A, the claimant was also supporting service user R and he too complained about the claimant's attitude towards him and had requested that she no longer support him. Whilst Mr Smith asserted that service user A may have been persuaded by the claimant's colleagues to complain about her, no such assertion was made about service user R.
97. The claimant ceased providing care to services R on 31 May 2019 which was before her first protected disclosure on 11 July 2019 and could not therefore have been retaliatory.
98. The simple fact which emerges from the findings of fact and from the evidence I heard is that the claimant initiated what amounted to a series of investigations into the care of A by her raising concerns about that. That is not a criticism of the claimant, but as part of those investigations, when colleagues of the claimant were asked about the care being provided to the service user, a number of issues emerged which related to the care provided by the claimant. That is a far from unusual scenario. The fact is that if an investigation is carried out it is likely to unearth matters which had hitherto not been aired and which had been kept quiet for no reason other than they were previously being managed within the team, possibly by not being referred to. But when asked direct questions about their work and the care of the service user, those being questioned responded, and some of those responses related to their perception of the care being provided by the claimant.
99. Important is the fact that service user A was clearly unhappy with the way in which the claimant was providing support to him. One interesting aspect of this is the interplay between the claimant's perception and the perception of the service user.
100. The claimant's view is that she was particularly successful in, for example, getting the claimant to be more hygienic, and getting him to eat and drink. The

5 service user's perspective is that he was being bullied. Service user A is described as having capacity, which means that despite his addiction and mental health issues he was capable of making his own decisions about his life, which includes decisions about whether he eats and what, whether he drinks and what, whether he bathes, whether he wishes his bed linen to be changed and all aspects of his life. So, the fact that the claimant was, as she perceived it, more successful than other colleagues is entirely consistent with, and I take to be an example of, where the claimant was trying to impose upon the service user her standards of hygiene and what she felt he ought to be eating and drinking, and when, rather than what he wanted, which explains why he felt bullied by the claimant and not by any of her colleagues.

101. Critically in this case is the evidence in relation to the role of the Care Inspectorate and Glasgow City Council.

15 102. Following the claimant's disclosure on 23 August 2019 to the Care Inspectorate, The Care Inspectorate asked Glasgow City Council to carry out an investigation on their behalf into what the claimant had alleged. That investigation was therefore wholly independent of the respondent.

20 103. As I have set out above, following the investigation by Glasgow City Council, Isobel Crawford, Senior Officer - Commissioning for Glasgow City Council wrote to Catherine Sinclair to reiterate concerns she had raised in a conversation with Ms Sinclair earlier that day. Ms Crawford says as follows [217]:

25 *"from the initial meeting with [the claimant], the Care Manager found [the claimant] to be forceful in her claims of neglect which were then refuted by a when she spoke with him. Albeit A made some new/different allegations which you have provided some context for, he also told the Care Manager that he was scared of [the claimant] and that she swore at him... after our discussion it is clear you have found [the claimant] to be aggressive in her approach too. The opinion that you and the Care Manager hold on [the claimant] gives further*
30 *credence to A's statement to the Care Manager of his being scared of*

[the claimant]. As I said this morning, I have serious concerns regarding [the claimant's] ongoing support to A or any of our service users..."

104. Given the relative seniority of those carrying out the investigation by Glasgow
5 City Council for the Care Inspectorate I find it more likely than not that the
Care Manager who spoke to service user A was experienced in dealing with
service users and there is no suggestion from the investigation that A was
anything other than genuine when he said that he was scared of the claimant.
It was as a result of this that the claimant was suspended and why Mr Darroch
10 was asked to carry out an investigation.

105. I accept entirely the evidence of Mr Darroch and his investigation seems to
me to have been detailed and thorough. It is perhaps unfortunate that there
is no investigation report to encapsulate what Mr Darroch did and what he
found, but I accept that this is the practise adopted by the respondent, albeit
15 one which I think they should revisit. But it is clear that the respondent
considered that there was substance to the concerns raised about the
claimant's practise not least because two service users refused to accept the
claimant's ongoing support and Glasgow City Council had significant
concerns about the claimant's practise following their investigation. They did
20 not raise similar concerns about the claimant's colleagues and neither of the
service users, and in particular service user A, raised concerns about anyone
else providing support to them whether engaged by the respondent or any of
the other agencies providing support. I also consider it highly relevant that no
relative or other visitor to service user A, nor any of the other agencies
25 supporting service user A raised any concerns about the standard of care
being received by him from the respondent.

106. I accept the evidence of Ms Ramsay that the reason for her dismissing the
claimant was as set out in the dismissal letter and those matters are entirely
30 unrelated to either of the protected disclosures made by the claimant.

107. Mr Smith Asserted that the respondent and/or those referred to by the claimant in her complaints were embarrassed by the investigation commenced by the Care Inspectorate and carried out by Glasgow City Council and this explains their retaliatory complaints. The reality is that the care sector is highly regulated, care providers are subject to regular scrutiny and it seems to me highly unlikely that the mere fact of some embarrassment, even if that was the case, and the evidence on the point was very thin, led to the complaints made about the claimant which in turn led to the claimant's dismissal. The more likely scenario and the one I have found to be the case is, as I have said above, that the investigation simply unearthed concerns which had up to that point not been ones which anyone felt required to be escalated to more senior management. It was, perhaps ironically, the fact that the claimant herself complained which led to the investigations, through spot checks, discussions with her colleagues and discussions with the service users, which unearthed the concerns about the claimant and which ultimately led to her dismissal.

108. For those reasons I find that the claimant was not dismissed because she had made protected disclosures and her claim fails.

20 Employment Judge: Martin Brewer
Date of Judgment: 10 December 2021
Entered in register: 13 December 2021
and copied to parties

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