



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case No: 4106737/2020 Hearing at Inverness on 26 and 27 July 2021: Members'  
Meeting by Cloud Video Platform on 9 September 2021

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Employment Judge: M A Macleod  
Tribunal Member: F Parr  
Tribunal Member: A Perriam

Karen Young

Claimant  
In Person

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St Philips Care Caledonia Limited

Respondent  
Represented by  
Mr N Brockley  
Barrister

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal is that the claimant's claims  
are dismissed.

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### **REASONS**

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1. The claimant presented a claim to the Employment Tribunal on 26 October 2020 in which she complained that she had been unfairly dismissed and subjected to detriments on the grounds that she had made protected disclosures to the respondent.
2. The respondent submitted an ET3 in which they resisted the claimant's claims.

3. A Hearing was listed to take place in the Justice Centre, Inverness, on 26 and 27 July 2021, in person. The claimant appeared on her own behalf, and Mr Brockley, barrister, appeared for the respondent.
4. A joint bundle of documents was produced to the Tribunal and referred to in the course of the hearing.
5. The claimant gave evidence on her own behalf. The respondent called as witnesses Michael Patrick Donovan, formerly Regional Director (Scotland) for the respondent; Patricia Kelly; and Glenn Millar, Operations Manager, Catalina House.
6. The Tribunal heard all of the evidence on the listed days, but adjourned to allow the parties to present written submissions thereafter, and following receipt of those submissions (as it turned out, only from the respondent), the Tribunal met by remote means in order to discuss and reach its decision, on 9 September 2021.
7. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

### **Findings in Fact**

8. The claimant, whose date of birth is 6 December 1969, commenced employment with the respondent on 16 March 2020 as an Activities Co-ordinator, at Catalina House, in Alness. She was previously engaged in carrying out hairdressing and beauty therapy from time to time from October 2019. She had also had some contact with the respondent about the position of chef in their kitchen at Catalina House, and a new employee form (46) shows that she commenced duties as a “bank cook” on 29 February 2020, carrying out shifts as a cook for the respondent on an “as and when required” basis.
9. Catalina House is a residential care facility for residents of all ages, who have experienced difficulties with alcohol, drugs and/or mental health issues. The respondent operates Catalina House, as well as a number of other facilities across the United Kingdom, as a care home provider.

10. On 14 April 2020, Glenn Millar and Carol-Anne Colgan, deputy manager, met with the claimant to discuss an allegation that the claimant had been charging residents for hair and beauty treatments, which they told her was inappropriate. The claimant accepted this, after some discussion. It was noted in that meeting that the claimant had recently suffered a bereavement, and accordingly she was offered the opportunity to take up counselling provided by the respondent. A note of the meeting (47) confirms that the meeting ended positively. It was not a disciplinary nor a formal meeting, but described by Mr Millar as a “supervision meeting”.
11. The claimant’s employment as Activities Co-ordinator commenced on 23 April 2020, and was set out in her employment contract (48ff) produced to the Tribunal. This document was not signed by the claimant, though it was signed by Mr Millar, and in evidence she confirmed that she had seen it, and thought there were two copies, one of which she signed.
12. The contract provided that she was to work 10 hours per week, with an annual equivalent of 520 hours.
13. The respondent confirmed to its Payroll department the change of her status to that of employee by a Change form dated 23 April 2020 (57).
14. On 27 April 2020, the claimant met with Mr Millar and Ms Colgan in the cash office. A note of that meeting dated 28 April 2020 was produced (58). Mr Millar was approached by the claimant who alleged that Ms Colgan was “pushing her out” and deliberately not giving her shifts on the rota, and complained that she would not be able to support herself financially if she were not given shifts on the rota. Having spoken to Ms Colgan, Mr Millar invited both individuals to attend a meeting in order to address the issue.
15. It was noted that *“KY came to the office and CA explained to KY that she was not being deliberately missing her (sic) off the rota and that the shifts she had were being distributed fairly amongst the bank staff. KY asked CA to guarantee her at least 16 hours a week, which CA refused on the basis that her post is bank and therefore shifts are not guaranteed. KY began to accuse CA of having a personal issue with KY. CA denied this to be true*

5 *but did point out to KY that numerous members of staff have commented that KY has been discussing CA and ex-assistant manager Claire (CA's sister) openly on the floor and being disrespectful about CA and her alleged involvement. CA proposed that if there was any personal issues with anyone, it was that KY had an issue with CA."*

16. Mr Millar intervened when certain personal allegations began to be made, and said that discussions about past or present members of staff would not be tolerated, and that the situation around that matter had been resolved. He told the claimant that if she had any concerns about shifts or the rota she needed to approach Ms Colgan, who was responsible for the rota. It was noted that the claimant apologised for having lost her temper and indicated that she was suffering from financial stress which was taking its toll on her.

17. On 1 July 2020, the claimant worked a shift for the respondent, and then was absent from work due to ill health. She did not return to work for the respondent thereafter.

18. On 4 July 2020, the claimant wrote to Gary Hartland, the respondent's owner, to raise a number of concerns about staff. The letter read, in full, as follows:

20 *"Dear Mr Hartland,*

*I am currently an employee at Catalina House, Alness and I was hoping to speak to you when you were up last Thursday 2 July, unfortunately this was not possible, but I feel that you should know what is happening in your absence.*

25 *I was originally approached by Glen Millar 2 years ago when I was running my own outside catering business and then again when I was working at The Kincaig Castle House, as Marilyn had intimated that she wished to retire, when the Hotel was up for sale I decided to take Glen up on his offer and I was given bank care shifts and 10 hours activities with the residents per week, 5 hours cooking lessons and 5 hours hairdressing which has all been documented, this was to tide me over until the chef's position became available.*

35 *During my time there I have witnessed things that I in all good consciousness (sic) I could not continue to see without bringing them to your attention.*

*I have tried to raise my concerns with management but Glen Millar just buries his head in the sand and does not deal with confrontation in any shape or form.*

- 5
- ***Helen Kidney, Domestic*** *has been seen stealing kitchen foil, wooden spoons, cleaning products for her own use. Helen Kidney is also the weekend cook and what I have witnessed here goes against all my training – she refuses to take the temperatures, she will not cover or label food – if she is challenged she resorts to screaming, shouting and swearing.*

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*The food that Helen Kidney serves the residents at the weekends is frankly appalling and no better than slops, the food is so bad the staff refuse to eat it and bring in packed lunches.*

*Helen Kidney cannot cook and has no idea of food safety*

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- *Metal pots in fridge*
  - *Porridge added to all soup*
  - *Raw garlic added to everything*
  - *Food temperature not checked*
  - *Raw chicken mixed in with cooked rice, covered with mushroom soup*
  - 20
  - *Raw food and cooked foods not separated*
  - *Mixed sauces together such as sweet and sour and barbeque and pours over uncooked chicken and serves with reconstituted potatoes such as Smash*
  - 25
  - *Grates blocks of cheese after being repeatedly asked not to as the cheese goes off quicker – this is done on purpose as Helen knows that it annoys Marilyn*
  - *Her attitude is that it's good enough for them as they get it for free.*

- ***Linda Cooper (Domestic)***

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*Regularly steals packs of resident labelled cigarettes, coca cola, crisps and sweets.*

*She drinks milk from the machine knowing that there was not enough milk for the residents that weekend and that they would have to be on powdered milk until supplies could be obtained.*

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*Cleaned all areas with 1 bucket of water which was filthy.*

*Served food after cleaning toilets, still wearing the same apron.*

*Ate out of the Bain Marie before residents had been fed, which resulted in a shortage of food for the residents.*

- **Caroline Hind (floor staff and activities)**

5 *Caroline sells Avon to residents, which is fine, but when the orders are amounting to £84, £60, £40 to one of the residents over a one month period then there is something wrong. Some of the staff have resorted to destroying the order forms, as the resident doesn't know what she is doing and is blatantly being taken advantage off (sic).*

10 *Caroline's 5 hours of activities usually comprises of her and her son's groceries as she can utilise the company car and driver. It can also comprise of Caroline arriving, sitting drinking coffee for 45 minutes, walking the residents over to the pond for 10 minutes and then having a 1 hour lunch break in a 5 hour shift.*

15 *Cutting the toe nails of diabetic residents, even though she has had no formal training. The risk of infection for these residents if she accidentally (sic) cuts them is obvious.*

- **Carol Ann Colgan, (Depute Manager)**

20 *Is the sister of Clare Colgan, the former Depute Manager who was 'let go' due to missing funds. Carol Ann Colgan took me into the office about my attitude (not my work which is above reproach).*

*Carol Ann Colgan currently owes the cleaner, Helen Kidney, approximately £6,000.*

25 *I have repeatedly asked for my last 4 pay cheques in order to sort out online pay slips but I have been ignored and to date have not been able to check my online payslips.*

30 *£200 missing from residents wallets at the end of June 2020, all belongings and wallets of residents where checked (sic) and this money was not found. However the money miraculously appeared the next morning in a wallet that was previously checked.*

*Carol Ann Colgan was also informed at the end of June that leaving residents bank cards and pin numbers together is a breach of security, last I knew nothing had been changed.*

35 *Carol Ann Colgan has also been by-passing current staff, who stepped up during the current Covid-19 crisis and giving her friend 5 hours of activities, even though her friend is in full-time employment.*

*Helen Dudek (resident) was rushed to hospital in May 2020, her walking frame was emptied and the contents (3 wallets containing over £100) were left on the floor unattended.*

*I would like to point out that there are a number of fantastic, honest staff with morals and integrity but the handful that have none of the above are ruling the roost by intimidation and bullying and with a manager who will not manage his staff anarchy will ensue.*

5 *I feel that it is my moral duty to inform you of the goings on at the Catalina and I hope that you will take note and take a good look at certain staff members and sort out these issues.*

10 *I have not taken the decision to inform you of what is going on lightly but I can no longer morally or ethically continue to work at the Catalina under this regime.*

*Yours faithfully, Karen E Young*

15 19. The claimant's evidence before the Tribunal was that she had raised these matters, or at least some of them, with Mr Millar over May and June 2020, verbally, when she saw him in the home, and that she wrote to Mr Hartland because Mr Millar had taken no action about these matters.

20. The claimant remained absent from work at this time.

20 21. On 14 July 2020, Mr Millar sent a text message to the claimant (62) to say:  
*"Hi Karen...tried to call you to see how you are. Can you give me a call for an update as I know you haven't taken any contracted hours. Thanks Glenn"*

22. On 15 July 2020, the claimant replied, saying (62): *"Hi Glenn. Update. Tired of being shafted. Sick of it! I gave you 100% you gave me zero. Thanks Karen"*.

25 23. On either 16 or 17 July 2020, Ms Kelly sent a text message to the claimant (63). Ms Kelly was unable to assist the Tribunal in confirming what date this was sent to the claimant. She told us that there was a daily huddle involving staff in the home, and that at the daily huddle, probably on 15 July, mention was made of the claimant's dog cage which needed to be moved; but that nobody told her to send the remainder of the message.

30 24. In her message, Ms Kelly stated: *"Hi I am so sorry I forgot I was to message you last night. I was asked to let you know that your dog cage is out the*

*back for you to collect and you have to bring in your uniform or you will be charged for it. I was so tired last night I totally forgot xx”*

25. The claimant had habitually kept a dog cage at the home where her dog could be housed while she worked there, but the respondent wanted her to remove it as there was insufficient storage room where it had been kept.  
5 The evidence on this matter was confusing, as it appears that the dog cage could be folded down and stored quite easily.

26. Ms Kelly denied that she had been instructed by anyone in management to tell the claimant to bring in her uniform or she would be charged for it. She  
10 was, however, unable to explain why, if she had not been instructed to do so, she would send such a message to the claimant. Ms Kelly was not in a position of management and lacked the authority to dismiss the claimant.

27. However, the claimant interpreted the message as an indication that she had been dismissed. As a result, she sent a text message to Mr Millar on  
15 17 July (62): *“Morning Glenn, so you got Patricia Kelly to sack my? By messenger!!!! You underestimate me...”*

28. Mr Millar replied the same day, at 12.50pm, to say: *“No one has sacked you....hence why I tried to phone you to arrange a meeting... as you have not turned up for work...call me anytime for a chat.”*

20 29. The claimant had not been in contact with the respondent since she had gone off sick.

30. On 18 July 2020, Mr Donovan, Regional Manager, contacted the claimant to set up a meeting with her to discuss her concerns, set out in her letter to Mr Hartland. He had been asked on 15 July 2020 to carry out an investigation.  
25 He asked her what time and where she would like to meet in order to discuss these concerns (66). Following an exchange of emails, an arrangement was made that Mr Donovan would visit the claimant at her home in Evanton on 21 July 2020. The meeting took place and lasted approximately 90 minutes, during which Mr Donovan took notes.

30 31. On 22 July 2020, Mr Millar wrote to the claimant (67) in the following terms:



*"Dear Karen,*

*I understand that you received a text from a colleague to state your personal belongings were being left outside for you to collect and you were asked to return your uniform. From this, you believed that your position at Catalina House has been terminated. I write to advise that the management of the service had no knowledge or input with regard to this text message and as such would like to apologise for any distress this may have caused you and to assure you that your position is still available for you should you wish to return from your leave of absence.*

*I would like to invite you to meet with me so we may discuss your return further. Should you wish to return to work, we can conduct a full return to work review meeting to enable this. I do need to specify that we have attempted to contact you during your period of absence however, have not received a response from you. to this end and as per St Philips sickness and absence policy, you have been regarded as AWOL from your position, which we would need to address on your return and may lead to disciplinary action being taken against you.*

*However, our main concern is your overall wellbeing and as such would like the opportunity to meet with you at a date and time suitable to both. I look forward to hearing from you.*

*Yours sincerely,*

*Glenn Millar"*

32. The claimant received an email on 4 August 2020 from Leanne Hunter, the administrator at Catalina House, inviting her to a return to work meeting on 6 August 2020 at 11am (68). Ms Hunter confirmed that as the meeting was a return to work meeting to discuss her wellbeing, she was not entitled to have someone sit in on the meeting with her. However, she confirmed that the meeting would be documented in minutes which could be made available to her.

33. The claimant replied to this email at 10.20am that day, saying that the letter she was sent stated that she could face disciplinary action, which entitled someone to be present. She advised that she did not feel comfortable meeting without someone present, as there were discrepancies in the letter, and also *“due to the fact that I feel I have unfairly treated already in the work place.”*

34. The claimant also wrote to Michael Donovan, with whom she was already in contact, at 10.56am on 4 August 2020 (71):

*“Good morning Michael.*

10 *I received a letter from Glenn Millar 22 July 2020. This was to invite me to meet with him. There were a few discrepancies in this correspondence, which made me uncomfortable. Supposed back to work meeting with the view to disciplinary action.*

15 *I have agreed to meet and informed Glenn that I would be accompanied at the meeting by someone else. I have now received an email to inform me that I am not entitled to bring a second.*

20 *To be honest, the untruths in the letter and the unfair treatment I feel I have already endured, the trust is gone! The other fact being the letter states it's a back to work meeting with a view to disciplinary action. As far as I am aware the meeting can only be one or the other.*

*I did not foresee a request to meet as I have been sacked by messenger, now I'm in a situation that leaves me unemployed but not sacked.*

*Please could you advise.*

*Regards,*

25 *Karen Young”*

35. Mr Donovan replied at 11.10am on 4 August, to say that he believed that there had been a misunderstanding, and that she had been invited to a return to work meeting. He went on to say that while the letter did reference possible disciplinary action, that was not the reason for the meeting. He said that the *“meeting is to ensure your welfare and to ascertain whether you wish to return to work at Catalina House.”*

36. Mr Donovan also stated that *“With regards to your being sacked their (sic) is no formal evidence of this from the management of the service, as I believe*

5           *that the individual who contacted you through social media or text was acting under their own influence and not acting on of (sic) behalf of the management of the service... We have a legal responsibility for inform you that your actions may lead to disciplinary action however no decision regards that has been made or will be made until after your return work has been confirmed.*"

37. The claimant's reply was that if this matter was all "above board" then there should not be an issue with someone who had good knowledge of the situation to sit in. She also said that "*I have only ever tried to my job to the very best of my ability and I have made it very clear that I cannot work under that regime as it is.*"

38. After Mr Donovan advised her that as a company they did not allow anyone to accompany an employee when attending a welfare/return to work interview, the claimant then replied, at 7.06pm on 4 August (69):

15           *"Hi Michael,*

*I will not be attending the meeting on Thursday 6<sup>th</sup> July. I will not be returning to work at Catalina House.*

20           *I have made my position quite clear regarding the unsavoury goings-on at Catalina. My returning to work there would be seen as sour grapes and no substance to my claims. I stressed I could not continue to work under that current regime. To my knowledge nothing has changed. That would explain Mark (resident) emailing head office to complain about his supplies going missing over a week ago.*

25           *I asked for someone with knowledge of the situation to be allowed to sit in on the meeting, that was denied. I will not be backed into a corner by management.*

*I therefore will be contacting Department of Work and Pensions claiming constructive dismissal. I will be pushing for a tribunal.*

30           *May I advise this will be my final correspondence on this matter. Thank you for your time.*

*Regards,*

*Karen Young"*

39. The claimant did not return to work.

40. Mr Donovan concluded his investigation and wrote to the claimant on 11 August 2020 (72ff) setting out his findings, having taken a number of statements (75ff). Those statements were not sent to the claimant with the report.

5 41. In his findings letter, Mr Donovan set out firstly the key issues which he had investigated, as follows:

1. *“You raised concerns that a member of staff allegedly stole items from the kitchen within the service.”*
- 10 2. *You also raised concerns about the quality of the food that the same member of staff serves in her other role as a part-time cook.*
3. *You have also alleged that the same member of staff resorts to screaming and shouting when challenged by staff within the service.*
4. *You have raised concerns about another staff member and about her conduct and her ability to carry out her duties. Specifically stating that the staff members fails to follow infection control procedures.*
- 15 5. *You raised concerns that this member of staff has stolen supplies from the kitchen and has helped herself to resident’s food.*
6. *Further concerns you raised are also relating to a staff member who is involved in activities and you allege that all she does is shop and drink coffee and have breaks. Another allegation is that she is taking advantage of residents by selling Avon cosmetics.*
- 20 7. *You raised concern regarding the competence of the deputy manager and alleged mis-handling of funds.”*

25 42. Mr Donovan went on to set out his conclusions, having confirmed that he had visited the home and spoken with the manager and several members of staff.

43. He apologised that a member of staff (Ms Kelly) had contacted the claimant and had given her the impression that her role at the service was no longer required. He said that *“This should not have happened and is unacceptable. I want to offer you reassurance at this time that at no point was the individual who contacted you acting on behalf of the management at Catalina House or St Philips Care.”*

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44. He went on to advise that he could find no evidence of any stealing from the service, having spoken to a large number of staff; that the majority of the responses about the quality of the food from staff and residents were positive; that there was no evidence that a member of staff had been involved in stealing from the service and food from residents; that the activities coordinator was given very positive feedback from staff and residents; that there was no evidence to suggest that a resident was being exploited by that member of staff in relation to the purchase of items from the Avon representative; that there were a number of investigations both externally and internally into the actions of the deputy manager, and therefore there was no evidence to implicate or support her allegations about the mis-management of resident funds by her.

45. Mr Donovan concluded by saying that he hoped that the response addressed her concerns, and repeated his apology to her for any distress or upset which this matter had caused her.

46. Following the termination of the claimant's employment, she obtained a number of positions.

47. From August until October 2020, a period of 8 weeks, the claimant was employed in the Ord Arms, in Muir of Ord, working as a chef. She earned £2,400 in that time (though it is unclear from the evidence whether that figure was net or gross).

48. For two weeks from November to December 2020, the claimant was employed in the Crofters Restaurant, Rosemarkie, and earned £750.

49. In May 2021, the claimant worked in the Ord House Hotel, in Muir of Ord, for three weeks, earning £800, and from 28 June 2021, the claimant was employed by Cornerstone Café in Evanton, earning £160 per week. As at the date of this hearing, the claimant remained in employment there.

50. The claimant denied that she had ever been provided with payslips by the respondent. She said that on 18 May 2021 she was paid £200 in respect of holiday pay.

### **Submissions**

51. For the respondent, Mr Brockley presented a detailed written submission whose terms were taken into consideration by the Tribunal in reaching its decision.

5 52. The claimant advised at the conclusion of the hearing on the merits that she did not wish to add anything to what she had said during its course, and when she was asked, on receipt of the respondent's written submission, if she wished to make a written submission, she confirmed again that she did not.

### 10 **Discussion and Decision**

15 53. In this case, there is no list of issues prepared by the parties or made available to the Tribunal in advance of the Hearing. The claimant's pleadings, which are comprised by the ET1 and the further and better particulars produced following a Preliminary Hearing before Employment Judge Hosie (27). The claimant advised the Tribunal that in placing these claims before the Tribunal she was given the benefit of assistance by her cousin who, though their qualifications were not clarified to us, had some knowledge of employment law and procedure.

20 54. The respondent's submissions suggested, understandably, that the claims made were less than clear.

55. The Tribunal considers that there are essentially two heads of claim which have been presented by the claimant in this case:

- 25 1. That she was automatically unfairly dismissed under section 103A of the Employment Rights Act 1996, on the ground that she had made protected disclosures to the respondent;
2. That she was subjected to a number of detriments under section 47B(1) of the Employment Rights Act 1996 on the ground that she had made protected disclosures to the respondent.

56. We have therefore considered carefully what the issues in this case should be defined to be, taking into account the respondent's submission as to the scope of the claims made by the claimant, and have determined that the following issues are before us for determination:

- 5           **1. Did the claimant make a protected disclosure or protected disclosures to the respondent, and if so, when and how did she make such disclosures?**
- 2. Was the claimant dismissed by the respondent, by the text message by Ms Kelly on 16 or 17 July 2020?**
- 10           **3. If not, was the claimant constructively dismissed by the respondent?**
- 4. Was the claimant automatically unfairly dismissed by the respondent under section 103A of the Employment Rights Act 1996, on the grounds that she had made protected disclosures to the respondent?**
- 15           **5. Was the claimant subjected to a detriment or detriments by the respondent on the grounds that she had made protected disclosures to the respondent, contrary to section 47B of the Employment Rights Act 1996?**
- 20           **6. In the event that the claimant's claims or any of them succeed, what remedy should be granted to the claimant by the Tribunal?**

57. We sought, then, to address these in turn.

- Did the claimant make a qualifying disclosure or qualifying disclosures to the respondent, and if so, when and how did she make such disclosures?**
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58. The Employment Rights Act 1996 (ERA) defines qualifying disclosure as:

*“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:*

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- a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
  - b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
  - c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*
  - d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
  - e. *That the environment has been, is being or is likely to be damaged;*  
*or*
  - f. *That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”*

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59. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

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60. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

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*“It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.*

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*1. Each disclosure should be identified by reference to date and content.*

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*2.. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*

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*3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.*

*4. Each failure or likely failure should be separately identified.*

*5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which*



5 *attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.*

10 6. *The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.*

15 7. *Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*

20 8. *The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."*

25 61. In addition, reference was made to the well-known decisions in **Kuzel v Roche Products Ltd [2008] EWCA Civ 380**, **Fecitt & Ors v NHS Manchester [2012] ICR 372** and **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT**.

30 62. In, **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

35 "35. *The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f). Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]'* (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). *In order for a statement or disclosure to be a qualifying disclosure*

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*according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.*

5           36. *Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable*  
10 *belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient*  
15 *factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

63. In order, then, to determine whether or not the claimant made protected disclosures under ERA, it is necessary to establish what the claimant alleges to have been the disclosures she relies upon.

20 64. In the original claim, the claimant relies upon the letter of 4 July 2020 to Gary Hartland (60) as being the correspondence in which "I put everything in writing".

65. Following the Preliminary Hearing before Employment Judge Hosie, the claimant submitted further and better particulars, and as the respondent  
25 pointed out in their submissions, the claimant made no reference to the letter of 4 July 2020 therein, despite the fact that the Order required her to set out "all instances" of protected disclosures or whistleblowing to be relied upon by her. As a result, the respondent argued that the disclosures relied upon should be restricted to those set out in the further and better  
30 particulars, and that no attention should be paid to the letter of 4 July 2020 in this regard.

66. In the further and better particulars, the claimant has identified the following points raised by her:

- "Staff not following hygiene practices set out by law.
- Staff stealing from residents

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- *Staff not properly trained in health & safety procedures when dealing with residents' health issues*
- *Failure to ensure residents personal items are secure and safe from mishandling*
- 5       • *Drinking weekend milk leaving only powdered milk for residents"*

67. We considered carefully the respondent's submissions about this matter, and have concluded that while there was some force in Mr Brockley's argument that the letter of 4 July 2020, not having been mentioned in the further and better particulars, should be left out of consideration, it would not  
10       be in the interests of justice for us to exclude that letter. The terms of the letter are long and diffuse, but the complaints actually made by the claimant are broadly comprehensible and not significantly different to those set out in the further and better particulars. It was clear to us during the course of the hearing that the claimant, and to some extent the respondent, considered  
15       that the letter of 4 July was of importance, and the points made therein were addressed in the respondent's defence. As Mr Brockley very fairly observes in his submission, at paragraph 20, evidence was led on this letter and it may be regarded as appropriate that it is addressed. We have concluded that it is appropriate.

20       68. Accordingly, we require to consider whether any and all of the assertions made by the claimant in the letter of 4 July 2020 and the further and better particulars amount to qualifying disclosures in terms of ERA.

69. In our view, the disclosures which the claimant seeks to rely on, taken from the letter of 4 July 2020 and from the further and better particulars, are as  
25       follows. We seek to identify whether each may amount to a protected disclosure under section 43B(1) of ERA.

a. Helen Kidney stole kitchen products for her own use. This may be a criminal offence, in terms of section 43B(1)(a). It is very difficult to distinguish between an allegation and a disclosure of information.  
30       We had very little evidence as to the basis upon which the claimant made this allegation, and while there was an investigation into this and other complaints made by her, it was not an impressive or

comprehensive investigation. As a result, it is very unclear whether or not the claimant had a proper basis for making this allegation. We have concluded that it amounted to the disclosure of information which tended to show that a criminal offence had been committed. However, no date was attached to the disclosure, as required by the guidance given by the court in **Blackbay Ventures Ltd**. For such a serious allegation to be made without clearly identifying a date and the precise details means that we have not been able to conclude that this amounted to a protected disclosure under ERA.

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- b. Helen Kidney failed to follow procedures by not taking the temperature of food nor covering or labelling it. We considered that this amounted to the disclosure of information about Ms Kidney's practice, which suggested that the health or safety of any person (namely residents of the home) could be endangered. The claimant reasonably believed that this disclosure was made in the public interest, and it amounted to a disclosure under section 43B(1)(d) of ERA. In this case, the disclosure appears to us to relate to a daily practice adopted by Ms Kidney, not an incident which happened on a single occasion. As a result, the absence of a date does not undermine its status as a disclosure of information tending to show that the health and safety of any person may be endangered.
  - c. Helen Kidney served food to residents which was of extremely low quality. This was a criticism of the quality of Ms Kidney's cooking, not a disclosure within the meaning of ERA.
  - d. Helen Kidney was guilty of a number of failures relating to health and safety, and in particular (as examples)
    - i. Placing metal pots in the fridge;
    - ii. Not checking food temperatures;
    - iii. Mixing raw chicken with cooked rice, covered in mushroom soup;

- iv. Raw and cooked foods not separated;
- v. Mixing sauces and pouring them over raw chicken; and
- vi. Grating blocks of cheese after being told not to do so as it went off quicker.

5 We considered that paragraphs ii and iv were disclosures that there were practices which were carried out by Ms Kidney which could have endangered the health or safety of residents, and that it was reasonably within the belief of the claimant that the disclosure was in the public interest. The other allegations appeared to us to be  
10 criticisms of the quality of Ms Kidney's work rather than qualifying disclosures under the Act; for example, mixing sauces and pouring them over raw chicken does not amount to an assertion that health and safety has been endangered, since it is not suggested that the chicken was served to the residents in a raw state. Accordingly, it is  
15 not at all clear why chicken which was then cooked should represent a risk to health and safety. Again, we have concluded that the disclosure related to a daily practice of Ms Kidney rather than an incident on a particular date.

20 e. Linda Cooper regularly stole packs of resident-labelled cigarettes and other items. Notwithstanding the reference to Ms Cooper having committed a criminal offence "regularly", the absence of any further specification and a precise date weighs against this amounting to a disclosure under ERA, and we reject it.

25 f. Linda Cooper cleaned all areas with 1 bucket of water which was filthy. This appears to us to amount to a disclosure that Linda Cooper's daily practice was an unhealthy one, amounting to information that health and safety was being endangered. We accept that this amounts to a protected disclosure and that it was reasonable for the claimant to believe that it was in the public interest  
30 to have disclosed it.

- g. Linda Cooper wore the same apron for cooking as she had for cleaning the toilets. This specific allegation lacks any date or further detail and as a result, we do not consider it to amount to a protected disclosure.
- 5 h. Linda Cooper ate out of the Bain Marie, leaving insufficient for residents. This may represent very poor practice and indeed selfish behaviour but in our judgment it does not amount to a disclosure of information tending to show that health and safety had been endangered. The purpose of the allegation is clearly to show that by  
10 doing this Ms Cooper was depriving residents of sufficient food.
- i. Caroline Hind exploited residents by selling Avon products to them in high quantities at high cost. This is an odd allegation. The claimant says that selling Avon products to residents is “fine”, but clearly this is a matter of degree. The allegation is therefore very unclear and  
15 we do not consider it to amount to a disclosure of information within the meaning of section 43B(1). We reject it.
- j. Caroline Hind used her working time for her own purposes, leaving to do her own shopping, using the company car and driver and drinking coffee at work. Again, this amounts to a criticism of Ms Hind’s  
20 performance of her duties, rather than a specific disclosure of information tending to show any of the matters arising in section 43B(1).
- k. Caroline Hind cut residents’ toenails without proper training, increasing the risk of infection to them. It is possible that this could  
25 amount to a disclosure of information, but it is too vague and imprecise to satisfy the test in section 43B(1). We reject it.
- l. Carol Ann Colgan owed Helen Kidney approximately £6,000. The Tribunal finds this statement incomprehensible. If Ms Colgan is said to owe Ms Colgan such a sum of money personally, it has no  
30 relevance to the respondent’s business. If Ms Colgan should have ensured that the respondent pay to Ms Kidney the sum of £6,000,

that may amount to an allegation of significance but the Tribunal has heard no evidence which would assist in our understanding of this matter. As a result, we are not prepared to regard this as a protected disclosure under section 43B(1).

- 5 m. Carol Ann Colgan preferred to give shifts to her friends. This amounts to no more than an allegation, without any detail attached to it, and lacking in any clarity. We reject the assertion that this amounted to a protected disclosure under section 43B(1).
- 10 n. Staff not following hygiene practices set out by law. This is not the disclosure of information but a very broad and sweeping statement which requires far more detail to amount to a protected disclosure.
- o. Staff stealing from residents. Similarly this is a broad and sweeping allegation which fails utterly to identify when such stealing took place, and who was guilty of it.
- 15 p. Staff not properly trained in health & safety procedures when dealing with residents' health issues. That allegation relates to the management of the respondent's business, and suggests that there were failings in training in health and safety procedures. Since no details are provided, we are not prepared to regard this as anything
- 20 other than a vague allegation without any substance, and therefore reject the suggestion that this amounted to a protected disclosure under section 43B(1).
- 25 q. Failure to ensure residents personal items are secure and safe from mishandling. Again, it is entirely unclear against whom, and in relation to what period, this allegation is made, and we reject it.
- r. Drinking weekend milk leaving only powdered milk for residents. In our judgment, there is nothing in this statement which could amount to a disclosure of information tending to show that any of the matters arising in section 43B(1) had taken place in this regard. We reject
- 30 this assertion.

70. We have therefore concluded that the claimant has presented qualifying disclosures to the respondent, primarily in the letter of 4 July 2020, in paragraphs (b), (d)(ii) and (iv) and (f).

**Was the claimant dismissed by the respondent, by the text message  
5 by Ms Kelly on 16 or 17 July 2020?**

**If not, was the claimant constructively dismissed by the respondent?**

71. We address these two issues together, as they are plainly related.

72. Essentially, the question before the Tribunal is whether the claimant was dismissed or resigned, or her employment came to an end in some other  
10 way. We noted that in their original ET3, the respondent suggested that the claimant's employment had not ended at all, and continued on the basis that she was "AWOL". We found this a curious suggestion, and it was not supported by their evidence nor submissions to us in the hearing.

73. Ms Kelly's evidence about the sending of the text message to the claimant,  
15 which referred to two matters, namely the dog cage and the uniform, was completely unsatisfactory. We were left to guess as to how it came about that Ms Kelly, whom the respondent insisted was not in management and therefore lacked the authority to dismiss anyone, sent a text message to the claimant in which she told her she needed to return her uniform or she may  
20 be charged for it.

74. Ms Kelly said that there had been a daily huddle the day before, and following that she agreed that she would contact the claimant about the dog cage, which had been discussed at the huddle. She refused to accept that she had been instructed by anyone to ask the claimant to return her  
25 uniform, and she denied that it had even been the subject of discussion at the huddle.

75. We did not believe Ms Kelly's evidence on this point. We found it completely unbelievable that she would, without prompting, have sent a text message to the claimant to this effect.



76. In any event, she denied that the meaning of the text message was that the claimant had been dismissed. We were uncertain as to what other meaning could have been drawn from a message asking for the return of the claimant's work clothes and warning her that she may have to pay for them if they were not returned. If her employment was to continue, surely the claimant would need her uniform on an ongoing basis.

77. We consider that the evidence demonstrates that the purpose of the text message was to "flush out" the claimant, as she had been absent for a period of time from work without having submitted any medical evidence to justify her absence. The respondent appeared to us to have concluded that the claimant would not be returning to work at all, and therefore the text message was sent.

78. Did that amount to a dismissal in law? In **Kirklees Metropolitan Council v Radecki 2009 ICR 1244 CA**, removing an employee from the payroll while they were suspended and negotiating a compromise agreement was a sufficiently unequivocal statement of the employer's intention to terminate employment. The case of **Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT**, though reflecting facts of a different nature to the current case, said that where an employee received an ambiguous letter, the interpretation should not be a technical one but should reflect what an ordinary, reasonable employee would understand by the words used.

79. In our judgment, the text message did not amount to an unambiguous statement to the claimant that she had been dismissed. It must have raised in her mind the doubt that her employer wished her to continue in employment, but in our judgment, the fact that Mr Millar both texted and wrote to the claimant within a short space of time of finding out that the text had been sent, to reassure her that she had not been dismissed, is an important fact in establishing the surrounding circumstances. We considered that a reasonable employee would have contacted Mr Millar immediately upon receipt of the text message from Ms Kelly to ask what was meant by it, rather than continuing to suggest, as she does, that it

amounted to dismissal in the face of quite unambiguous statements by the senior manager responsible for the workplace that it did not.

5 80. We were fortified in that belief by the fact that the respondent then invited the claimant to a return to work meeting, and that the claimant engaged with the respondent with regard to the arrangements for that meeting. If she had already been dismissed, there is no logical reason why the claimant would have had any interest in such a meeting. In fact, she became so upset by the reference to disciplinary action in the original invitation that she refused to come to the meeting. In our judgment, that is evidence that she did not  
10 take the text message to be a clear indication of dismissal, but continued to communicate with the respondent not just about her complaints raised in her letter of 4 July 2020, but also in relation to the possible return to work meeting.

15 81. We were left with the very strong impression that had the respondent permitted the claimant to be accompanied by a person with knowledge of the matters under discussion, she would have attended the meeting and thereby sought to return to work.

20 82. It is also noteworthy that the claimant identified her date of termination of employment in her ET1 as 17 August 2020, which was approximately one month after the text message was sent to her on 16 or 17 July 2020. She protested in evidence before us that this was merely an error on her part, but in our judgment, this was an important date, on the claimant's own version of events, and the fact that she asserted her contract to have been terminated on 17 August 2020 suggested that she was well aware that her  
25 employment had not been ended in July 2020.

83. Further, the claimant stated in an email on 4 August 2020 to Michael Donovan that *"now I'm in a situation that leaves me unemployed but not sacked."*

30 84. As a result, we have come to the conclusion that the claimant's contract of employment was not terminated in July 2020, and that the text message sent by Ms Kelly did not amount to dismissal.

85. That is not to say that the respondent acted with clarity and integrity in this matter. The text message was either an instance of Ms Kelly engaging in a frolic of her own or an attempt to flush out the claimant from her absence from work, notwithstanding that the respondent maintained before us that not having taken action before then demonstrated their compassion towards her. This was not, even taken at its best, a compassionate act, but a cynical attempt to jolt the claimant into a reaction.

86. In her email to Mr Donovan on 4 August 2020 (71) the claimant said that trust was gone, between herself and the respondent; and thereafter (70) she advised him that *"I have made it very clear that I cannot work under that regime as it is."* Finally, later that evening, she emailed Mr Donovan again to say that *"I will not be returning to work at Catalina House"* (69).

87. We have concluded, with some hesitation, that the claimant resigned from her position with the respondent on 4 August 2020. The respondent's position, that the claimant remained in employment with them as at the date of presentation of the ET3, cannot be sustained by the evidence. The claimant plainly went to work for other employers from shortly after this date, and she understood that her employment had been terminated.

88. The respondent's submissions on how the claimant's employment ended are, unfortunately, rather opaque, and do not assist us in understanding how the respondent believed the claimant's employment ended. Their ET3 may have stated that the employment did not end, but their response to the further and better particulars did not sustain that position, but denied that the claimant was dismissed.

89. That said, it is our judgment that the claimant resigned, or made clear to the respondent that she did not intend to return to work at Catalina House, on 4 August 2020, and did so primarily because of what she considered to be "untruths" in the letter by Mr Millar of 22 July 2020; because she was denied the right to be accompanied to a meeting she saw as partly disciplinary; and because the respondent raised the possibility of disciplinary action in that letter.

90. In our view, none of these matters can be said to have amounted to conduct which was repudiatory of the contract of employment by the respondent, nor carried out because the claimant had raised protected disclosures in the letter of 4 July 2020.

5 91. The claimant never clarified before us what she considered to be the untruths in the letter of 22 July 2020. In any event, it is plain that the claimant continued to negotiate with the respondent about the terms of the meeting, through her email correspondence primarily with Michael Donovan, following receipt of that letter. We did not view that letter as  
10 having been full of untruths, though it is clear that the respondent's denial that the text message sent by Ms Kelly amounted to a dismissal was something with which the claimant took issue for some time.

92. So far as denying the claimant the right to have a person with her at the meeting, the respondent insisted, following that first letter, that the meeting  
15 was return to work meeting, and therefore it would not be appropriate nor necessary for the claimant to have been accompanied. In our judgment, the clarification issued by Mr Donovan – that the meeting would only deal with the return to work issue – is one which is understandable the claimant treated with suspicion, but it meant that it cannot be said that the  
20 respondent acted in such a way as to show that they no longer intended to be bound by the fundamental terms of the contract of employment.

93. Further, the very mention of disciplinary action, which did have to be clarified by Mr Donovan, did not, in our judgment amount to repudiatory conduct by the respondent. The reality is that the claimant was absent  
25 without leave for a period of some two weeks from her employment. She did not contact the respondent during that time, nor did she submit any medical certificates explaining her absence. This may have given rise to an allegation of misconduct, but no such allegation was formally placed before the claimant.

30 94. In our judgment, the respondent's actions fell short of actions which would have justified the claimant's resignation without notice. We appreciate that

the claimant was very suspicious of the way she had been treated, but it was possible for her to attend the meeting and to express her strong views to management at it. If the issue of disciplinary conduct had been raised, she could have refused to discuss it until she had a representative present.

5 The claimant was clearly an intelligent and resourceful individual and had she wished to continue in employment, she could have done so.

95. However, it is of the greatest importance that the Tribunal does not overlook the fact that even if the claimant had been constructively dismissed, that dismissal could not, in this case, be regarded as unfair unless it could be  
10 said that it was on the grounds that she had raised protected disclosures. In our judgment, the claimant has not proved that that was the basis upon which the respondent acted as they did, such as to bring about her resignation. The respondent received the letter of 4 July 2020, and passed it to a Regional Manager, of greater seniority than any manager employed  
15 at Catalina House, from outwith the region in which it is located, as an independent and senior officer to conduct the investigation. That was the act of an employer who was, in our view, seeking to ensure that the allegations made in the letter of 4 July 2020 were properly and fully investigated by an independent manager, and therefore we are unable to  
20 conclude that the respondent therefore wished to force the claimant out of her employment as a result.

96. There is simply no evidence as to who it was that told Ms Kelly to send the text message to the claimant requiring her to return her uniform – if indeed anyone did – and we cannot therefore find that the claimant has  
25 demonstrated that the respondent was reacting to that letter of 4 July when it took the steps it did thereafter.

97. Accordingly, it is our judgment that the claimant was not dismissed by the respondent nor constructively dismissed by the respondent; and that her claims under section 103A and section 47B of ERA must fail, and are  
30 dismissed.

98. We should observe that we considered the investigation ultimately carried out by Mr Donovan to be of inconsistent quality. He plainly spent a reasonable time with the claimant when he met her at her home, and we have the impression that she continued to trust him in her communications with him thereafter. His investigations with the staff of the home, as evidenced by the statements taken and produced to the Tribunal, were in our view superficial and lacking in rigour. He appeared to accept any denial at face value, and to place little emphasis on those criticisms which were made by certain witnesses in support of the claimant's assertions.

99. However, since the investigation took place after the claimant's resignation, and its outcome was not notified to her until 11 August, it is our conclusion that the quality of the investigation, while variable, was not known to the claimant on 4 August and could therefore have played no part in her decision to resign.

**Was the claimant subjected to a detriment or detriments by the respondent on the grounds that she had made protected disclosures to the respondent, contrary to section 47B of the Employment Rights Act 1996?**

100. The Tribunal has sought to understand, from the further and better particulars, what the detriments relied upon by the claimant in this case are. It is not easy to do so. It appears to us that the claimant is essentially saying that the decision to invite her to a return to work meeting with the possibility of disciplinary action; and the decision to refuse to her the right to be accompanied; both amounted to detriments visited upon her as a result of having raised the protected disclosures.

101. In our judgment, as we found in relation to the dismissal, we have not concluded that the respondent acted as they did on the grounds that she had raised protected disclosures. The claimant insisted that she had persistently raised these matters with Mr Millar on an informal basis prior to the letter of 4 July 2020, though she did not say so in that letter, and that Mr Millar took no action. In our judgment, Mr Millar was justified in inviting the

claimant to a return to work meeting, and if that was the extent of the discussion, there would be no requirement for the claimant to be accompanied to that meeting. Once the matter was clarified by Mr Donovan, the meeting was only to discuss the claimant's return to work, and accordingly, while the reference to possible disciplinary action in that letter was unhelpful, the subsequent correspondence made it clear that the meeting was only to relate to the claimant's return to work. As a result, there was no obligation to offer to the claimant the right to be accompanied.

102. It was unfortunate, and perhaps clumsy on the part of the respondent, to have made reference to disciplinary action possibly arising at that original meeting, but in our judgment that was resolved by Mr Donovan's subsequent clarification to the claimant.

103. In any event, we did not conclude that the reason why these decisions were made was on the grounds that the claimant made protected disclosures. We have concluded that the reason why the respondent acted as they did in writing this letter was because they were unsure that the claimant wanted to continue to be employed by them, and she had not provided them with clear evidence as to the reason for her continuing absence from work. It is not unreasonable for an employer to ask an employee who has not provided medical certification for absence why they are absent from work without leave, and to regard the failure of that employee to respond properly as being, at least potentially, an act of misconduct. We considered that while the respondent by no means covered themselves in glory in the way in which they dealt with the claimant, they could not be said on the evidence to have subjected her to detriments on the grounds that she had made protected disclosures to them.

104. Accordingly, the claimant's claims all fail and are dismissed. No issue arises, in these circumstances, as to the remedy to be awarded and accordingly we do not address this issue.

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**Employment Judge**

**M A Macleod**

**Dated**

**18 November 2021**

**Date sent to parties**

**19 November 2021**

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