



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss K Letherby

**Respondent:** Abraham Nursing Homes Ltd

**Heard at:** Cardiff **On:** 25 -27 April 2022 & 6 May 2022 & 9 May 2022

**Before:** Employment Judge C Sharp  
**Members:** Mr P Charles  
Mrs J Beard

**Representation:**

Claimant: Ms C Mallin-Martin (Counsel)

Respondent: Ms Y Barlay (Counsel)

## RESERVED JUDGMENT

By unanimous decision:

1. The Claimant's claim of suffering a detriment due to the making of a protected public interest disclosure is well founded;
2. The Claimant's claim of automatic unfair dismissal due to the making of a protected public interest disclosure is well founded;
3. The Claimant's claim of ordinary unfair dismissal is well founded;
4. The Respondent is ordered to pay to the Claimant £16,875 for her injury to feelings (inclusive of 12.5% ACAS uplift);
5. The Respondent is ordered to pay to the Claimant for her automatic and unfair dismissal claims £2360.60 for the basic award and £3216.15 for the compensatory award (inclusive of 12.5% ACAS uplift);
6. The recoupment provisions apply (see attached index).

# REASONS

## Background

1. The Claimant, Miss Kayleigh Letherby, was employed as a senior care assistant at the Llantrisant care home by the Respondent. She was employed originally as a care assistant on 12 January 2008 and ended her employment with immediate effect when she resigned on 5 May 2021.
2. The Claimant asserts that she made protected disclosures in a grievance email to Mr Zahar Sheikh (the owner of the Respondent and the Responsible Individual "RI" for the care home) on 30 December 2020, which was followed up by a repetition of those disclosures to "*the authorities*" in January 2021. She says as a result of those alleged protected disclosures, she was subjected to a number of detriments and constructively unfairly dismissed (both on an automatic and ordinary basis).
3. The Tribunal noted that the Claimant had attempted to raise other claims in her further and better particulars, but they were not accepted by Employment Judge S Jenkins. The Claimant's Counsel, Ms Mallin-Martin, at the outset of the hearing confirmed that there was no claim relating to the alleged failure to pay bonus payment before the Tribunal. During the course of reading documents on day one, the Tribunal of its own volition raised a query about what had happened to the claim of less favourable treatment due to being a part-time worker that was within the further and better particulars; at the start of day 2, Ms Mallin-Martin confirmed that it was withdrawn and it was dismissed by the Tribunal.

## The hearing

4. The case had been listed for a final hearing dealing with liability and remedy for five non-consecutive days. At the outset of the hearing, the Tribunal noted that the parties had failed to provide a suitable trial ready bundle (it was unhelpful that several copies of some documents had been uploaded to the document upload centre, causing confusion to the administration; the version of the bundle being used by the Claimant's representative differed in terms of page numbers to that sent to the Respondent's representative). The Tribunal noted that it had been sent copies of recordings for which permission had not been sought from the Tribunal to be played (the Respondent's representative confirmed that it was the Respondent who wanted the recordings played, but on questioning by the Tribunal as to why permission had not been sought, Ms Barlay, who appeared on behalf of the Respondent confirmed that it was content for the transcripts only to be relied upon). The Tribunal also noted that there were two annexes to the witness statement of Mr Sheikh; it was confirmed that neither annex was within the bundle, neither had not been disclosed in the appropriate manner and there were queries as to how they were relevant in

any event to the issues before the Tribunal. Ms Barlay had no objection to the annexes being excluded.

5. The Tribunal noted that there were 11 witnesses to be heard, but that there were queries about why the Respondent seemed to be seeking to call a twelfth witness, Claire Thomas. Ms Barlay accepted that it was not appropriate to call the extra witness, and the Tribunal adopted a pragmatic approach to the witness statements provided by the Respondent's witnesses and allowed those witnesses to be called as they were not expected to take much time (with the agreement of the Claimant's representative). By day 4, three of these witnesses were either refusing or unable to attend the Tribunal to give evidence (though permission was given for Ms Gilligan to attend remotely as the Tribunal was told her father was in end-of-life care, she did not attend). These witnesses were not critical to the issues that the Tribunal needed to determine, and the hearing proceeded (no application to adjourn was made).
6. The Tribunal also pointed out that the list of issues was unclear at points, though it had not yet had the opportunity to check whether the matters asserted were pleaded properly in the statements of case. Following some discussion of these points with the representatives, it was ultimately agreed that the Tribunal spent day 1 reading the documentation, while the parties worked together to ensure that all the representatives and witnesses had the same version of the bundle as the Tribunal, and the Claimant's representative updated the list of issues and a draft timetable for the Tribunal's approval.
7. The next morning, day 2 of the hearing, Ms Mallin-Martin emailed the Tribunal to provide an updated list of issues and confirmed that the parties now agreed constructive ordinary unfair dismissal was not an issue, having not been pleaded in the statements of case. After this, there was a further email where Ms Mallin-Martin said that it was open to the Tribunal to find that the Claimant had been unfairly dismissed for a reason other than the pleaded automatic constructive unfair dismissal claim. The Tribunal heard submissions from the representatives and gave oral reasons why it did not accept a finding of constructive ordinary unfair dismissal could be upheld in the Claimant's favour without such a claim being an issue before it through the statements of case. The Claimant then applied to amend her claim to include ordinary constructive unfair dismissal, which was successful (oral reasons again were given).
8. The Tribunal had a hearing bundle consisting of 359 pages. The Tribunal heard oral evidence from the following witnesses (after an initial delay of about an hour caused by technical difficulties on the Tribunal's part):

Kayleigh Letherby, the Claimant.

Kelly Andrews, the union officer representing the Claimant during her disciplinary proceedings.

Sarah Ogunkoya (nee Merry), the deputy home manager.

Zoe Thomas, an assistant.  
Cheryl Boxer, a care assistant.  
Marie Lewis, a senior care assistant.  
Claire Webber, the home manager; and  
Zaher Shaikh, the owner of the Respondent and the RI.

It also had the witness statements from the uncalled witnesses - Michelle Gilligan, a senior care assistant; Angela Williams; and Abbey Watson, a colleague who worked in the laundry and also as a care assistant.

9. Both written and oral submissions were received at the end of the hearing from Counsel appearing on behalf of the parties.

### **The claims**

10. All references to sections below refer to the Employment Rights Act 1996 (“ERA”). The Claimant asserts that she made a series of protected disclosures:

- 10.1 In an email to Mr Sheikh (s.43C – the employer for these purposes) dated 30 December 2020, the Claimant says that she informed him of safeguarding and welfare issues affecting residents at the care home.

- 10.2 The Claimant asserts that she repeated the disclosures set out above to Care Inspectorate Wales (“CIW”), the Local Health Board (Cwm Taf Health Board), and Adult Safeguarding (Rhondda Cynon Taf Council) on or around 19 and 20 January 2021. The Claimant says she contacted the Local Health Board and Care Inspectorate Wales by phone and discussed the contents of her grievance of 30 December 2020, while correspondence with CIW and Safeguarding took place by email on or around 19 January 2021 and 20 January 2021. In respect of communications with Safeguarding, the Claimant attached her grievance email of 30 December 2020. In essence, she says that she made substantially the same disclosures to these authorities as to her employer through her email of 30 December 2020 to the RI. The Claimant relies on s43G for these disclosures, rather than the prescribed person provisions. Her case was that she thought “*nothing would happen*” after complaining to both the Home Manager and the RI and then being suspended on 13 January 2021, which was why it was reasonable in her view to contact others. The Claimant’s evidence, which was not challenged, was that she contacted Care Inspectorate Wales and the Local Health Board after her suspension on or around 18 or 19 January, and then contacted safeguarding on the suggestion of her union representative.

11. The Tribunal took the Claimant through her email of 30 December 2020 to establish exactly what she was asserting was or was not a public interest disclosure as it was not clear from her witness statement and the point was not

dealt with in cross-examination. The Claimant's position, following the questions put to her by the Tribunal, was that the following matters were qualifying disclosures:

- 11.1 *"I have noticed a severe lack of communication from management. I work shifts where I am not spoken to all day, no communication asking how residents are, and other communication lapses e.g., not informed when staff have gone off isolating."* The Claimant asserts that this is information tending to show both a breach of health & safety and a breach of legal obligations as *"communication is a big factor when in a group taking care of vulnerable persons. If not communicating, you miss something. Small issues can become big."* (Oral testimony). The Claimant orally explained that the legal obligation was *"to care, and lack of communication can affect their care."*
- 11.2 *"Back in October whilst on shift I noted a resident KW was not herself, both her mood and body language (I recorded this in her notes). Nurse HT checked obs and all were fine so with it being a weekend there was no cause at the time to call out of hours, it was passed on to Monday for a GP call out. [The nurse] spoke with KW's family on several occasions over that weekend keeping them informed on how she was. A member of care staff then facetimes (I think KW's daughter) and stated KW was fine! (This was reported to management). Nothing was done on Monday about KW's condition, on Tuesday KM who was on shift with me that weekend brought up how KW was in a flash meeting, again nothing was done. If I recall right KW went to the hospital on the Thursday, almost a week after but came back to the home. KW passed away a few days later."* The Claimant in her oral evidence said this was a disclosure of information tending to show both a breach of health & safety and a breach of legal obligations for the same reasons set out at paragraph a above. *"Not calling the GP"* was a breach in her view.
- 11.3 *"Fast forward to more recently, we have covid in the home now. A virus that can be deadly to anyone but more so to the elderly. To my understanding after speaking with Sarah Merry many people's thoughts on how it got into the home are true. It was brought in by a staff member, a staff member who did not isolate as instructed by the government when someone they live with had a test. Instead of isolating until the test came back that person came into work and from my understanding was on shift when their partners positive result came through. We now have residents and staff at risk because of this, many staff and residents treating positive and one resident in hospital. The same thing was also done previously by another staff member. their partner had a test they did not isolate and came into work and their partner was positive. As far as I am aware there has been no punishment for this, for doing something that could kill many people."* The Claimant in her oral evidence said this was a disclosure of

information tending to show both a breach of health & safety and a breach of legal obligations for the same reasons set out at paragraph 11.1 above, and explained that this was passing on information she had been given by other staff members.

11.4 “Fast forward to Christmas day, we have 1 agency nurse and 1 bank (who hasn't been there very long) we then have just 5 care staff, 1 who left due to a positive result, leaving just 4 care staff! I have pictures (attached) of the conversation I had with Claire on how bad things were. I then had to phone Claire as a care staff member was threatening to walk out because I had to speak to them regarding them neglecting a resident and leaving the resident and bathroom covered in faeces all morning. I got no answer when I tried to phone Sarah for help. Neither of them came in to help us. Michelle Gilligan stayed for the afternoon shift to help as again for the afternoon there were only 4 carers.” The Claimant in her oral evidence said this was a disclosure of information tending to show both a breach of health & safety and a breach of legal obligations for the same reasons set out at paragraph 11.1 above, though she was not certain about the legal obligation point saying “I don't know if a legal obligation – possibly with Covid, not.”. The Claimant's concern was about staffing levels on Christmas Day only.

11.5 “Whilst on shift on this day [27 December] a resident (OT) had an unwitnessed fall, I found her on the floor in her bedroom, I called the agency nurse who was working downstairs and told Michelle in passing that OT had fallen. After checking OT over the nurse wasn't happy with how OT was and asked me to get Claire. I went upstairs looking and Michelle told me she had told Claire and Claire went downstairs, I then found Claire sat in her office on her personal phone after being informed a resident was on the floor!” The Claimant said that this was disclosure of information that the Home Manager and trained nurse, Claire Webber, chose to use her phone in her office after being notified a resident had fallen. The Claimant's evidence was that this was a breach of health & safety and a breach of legal obligations for the same reasons set out above.

12. There were no other disclosures asserted by the Claimant within this email according to her evidence. The Claimant said that her disclosure about a “lack of food and fluids” as demonstrated by the photo taken of a resident referred to as AT was not a disclosure, having heard the Judge outline the legal issues at the outset of the hearing – the Claimant felt that these were accusations on reflection. She also confirmed that the following words were not a disclosure of information - “I have been on shift working short staffed, rushing around trying to do everything...Myself and other staff have also asked for support during meal times due to many residents needing assistance, we have not had this and are often struggling to assist resident with meals while this talking and

*giggling is going on.*” As the Claimant’s reasonable belief is key, the Tribunal did not view these as potential protected disclosures and Ms Mallin-Martin adopted the same approach in her submissions.

13. The Claimant asserts that these disclosures are protected as she reasonably believed the health and/or safety of the affected residents had been, was being, or was likely to be, endangered and/or that there was a breach/ risk of a breach of a legal obligation in respect of the Respondent’s regulatory obligations as a provider of care services, safeguarding legislation, and/or the Respondent’s duty of care to staff, residents and visitors. She further asserts that she had a reasonable belief that the disclosures were in the public interest.
14. The Claimant brings two claims arising from the alleged protected disclosures. The first is a claim of suffering a detriment due to the making of a public interest disclosure (s47B). The Claimant asserts that she suffered four detriments (a fifth was withdrawn at the start of the hearing):
  - 14.1 Being suspended from work on 13 January 2021.
  - 14.2 Being unreasonably ordered (the word “*asked*” was used in the statement of case) to provide consent for the Respondent to access the Claimant’s medical records on 22 January 2021.
  - 14.3 The unreasonable treatment of the Claimant’s grievance by the Respondent (which centres Mr Shaikh’s conduct at the investigation meeting on 27 January 2021 and his grievance outcome letter of 23 March 2021).
  - 14.4 the Claimant being subjected to disciplinary action for “*serious misconduct*” and the way the initial investigation hearing on 27 January 2021 and the disciplinary hearing on 5 May 2021 was conducted by Mr Shaikh.
15. The Claimant asserts that the Respondent was materially influenced by her public interest disclosures in deciding to subject her to the alleged detriments. The Claimant also asserts that the detriments are individually or cumulatively a fundamental breach of contract (breaching the implied mutual duty of trust and confidence), meaning that her contract of employment was repudiated by the Respondent, entitling her to resign and treat herself as dismissed. If the Claimant establishes that she was dismissed, she brings two claims of unfair dismissal – ordinary and automatic (the Claimant asserting that a principal reason for her dismissal was her public interest disclosures – s103A). The Respondent has not pleaded a potentially fair reason for dismissal and did not seek to amend its response to address this point. The Claimant asserts that due to the alleged breach of the ACAS Code of Practice, she is entitled to a 25% uplift in compensation.
16. The Respondent asserts that the Claimant was not dismissed, and in any event, contributed to her dismissal due to culpable and blameworthy conduct

and would have been dismissed if she had not resigned during the disciplinary proceedings. In relation to the public interest disclosure claims, the Respondent argues that the Claimant made any disclosures in bad faith and should therefore be subject to a 25% reduction in compensation (after the Tribunal explained that bad faith did not prevent a disclosure being protected under the current law).

### **The relevant law**

17. There was no dispute between the parties as to the relevant law, as confirmed by the written submissions received (and adopted in full by the Tribunal). The legislative framework from the ERA for all the claims is set out below:

#### **“43B Disclosures qualifying for protection**

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

*(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 another responsible person**

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

*(a) to his employer, ...*

*(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.*

#### **43G Disclosure in other cases.**

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

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

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

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

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

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

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

*(i) to his employer, ...*

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

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



- (b) the seriousness of the relevant failure,*
- (c) whether the relevant failure is continuing or is likely to occur in the future,*
- (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,*
- (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and*
- (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by her was authorised by the employer.*

*(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.*

#### **47B Protected disclosures**

*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

*(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*

*(a) by another worker of W's employer in the course of that other worker's employment, or*

*(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.*

*(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*

*(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer. ...*

*(2) This section does not apply where—*

*(a) the worker is an employee, and*

*(b) the detriment in question amounts to dismissal (within the meaning of Part X).*

...

#### **48 Complaints to employment tribunals**

*(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C (1), 47E 47F or 47G. ...*

*(1A) A worker may present a complaint to an employment tribunal that she has been subjected to a detriment in contravention of section 47B. ...*

*(2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done. ...*

#### **49 Remedies**

(1) Where an employment tribunal finds a complaint under section 48(1), (1XA), (1ZA), (1A) or (1B) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

...

(2) Subject to subsections (5ZA), (5A) and (6) the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and

(b) loss of any benefit which she might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding. ...

(6A) Where—

(a) the complaint is made under section 48(1A), and

(b) it appears to the tribunal that the protected disclosure was not made in good faith, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%. ...

#### **94 The right**

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

#### **95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)— ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. ...

#### **98 General**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment. ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and  
(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

### **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.

### **118 General**

(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126),  
and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

### **119 Basic award**

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

- (c) allowing the appropriate amount for each of those years of employment.
- (2) In subsection (1)(c) “the appropriate amount” means—
- (a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,
  - (b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
  - (c) half a week’s pay for a year of employment not within paragraph (a) or (b).
- (3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

### **122 Basic award: reductions**

- (1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.
- (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. ...

### **123 Compensatory awards**

- (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
- (2) The loss referred to in subsection (1) shall be taken to include—
- (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
  - (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
- (3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
- (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
  - (b) any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.
- (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland. ...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(6A) Where—

(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b) it appears to the tribunal that the disclosure was not made in good faith, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

(8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

#### **124 Limit of compensatory award etc**

(1) The amount of—

(a) any compensation awarded to a person under section 117(1) and (2), or

(b) a compensatory award to a person calculated in accordance with section 123, shall not exceed the amount specified in subsection (1ZA).

(1ZA) The amount specified in this subsection is the lower of—

(a) £89,493, and

(b) 52 multiplied by a week's pay of the person concerned.

(1A) Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 105(3) or 105(6A). ...

(5) The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—

(a) any payment made by the respondent to the complainant in respect of that matter, and

(b) any reduction in the amount of the award required by any enactment or rule of law.

#### **124A Adjustments under the Employment Act 2002**

Where an award of compensation for unfair dismissal falls to be—

(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or

(b) increased under section 38 of that Act (failure to give statement of employment particulars), the adjustment shall be in the amount awarded under section

118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).”

In addition, the Tribunal must consider the following section of the Trade Union and Labour Relations (Consolidation) Act 1992:

**“207A Effect of failure to comply with Code: adjustment of awards**

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.”

Schedule 2 includes Section 48 ERA (detriment in employment) and Section 111 ERA (unfair dismissal).

Detriment due to a public interest disclosure

*Protected disclosure – what is a detriment?*

18. In the case of Blackbay Ventures Ltd v Gahir [2014] ICR 747 the Employment Appeal Tribunal gave guidance on this issue. In paragraph 84 of the judgment, reference was made to the speech of Lord Hoffmann in Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065 quoting in turn Brightman LJ in Ministry of Defence v Jeremiah [1980] ICR 13, 31 “a detriment exists if a reasonable worker would or might take the view that the [treatment] is was in all the circumstances to his detriment.” In paragraph 85 of Blackbay, the opinion

of Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 was quoted which also referred to Brightman LJ's formulation, with Lord Hope adding, "*An unjustified sense of grievance cannot amount to 'detriment'*". In paragraph 98 of Blackbay, it was said:

*"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 to the date of the act or deliberate failure to act relied on 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."*

19. "Act" mirrors the language of s.48(3) – detriment is an act or failure to act, not a consequence.

#### *Causation*

20. In **International Petroleum Ltd & Ors v Osipov & Ors** UKEAT/0058/17 (also known as Timis v Osipov) paragraphs 81 to 84, Mrs Justice Simler (then President) said:

*"81. The test of causation in s.47B ERA 1996 is:*

*"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure"*

*82. It is common ground that s.47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower": see Fecitt v. NHS Manchester [2012] IRLR 64, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer's treatment of employees and workers.*

*83. The words "on the ground that" were expressly equated with the phrase "by reason that" in Nagarajan v. London Regional Transport 1999 ICR 877. So, the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment.*

*84. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure."*

21. In the more recent case of Malik v Csenkos UKEAT/0100/17/RN, Choudhury J said:

*“Prudent tribunals in dealing with victimisation claims will no doubt prefer, wherever possible, to make positive findings as to the grounds on which the employer acted rather than to rely on s.48(2) until its effect has been authoritatively established.”*

22. The burden of proof for such a claim is that the employee must prove that they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities. The Respondent then has the burden of proving the reason for the detrimental treatment. The burden of proof if there is a qualifying disclosure is different between unfair dismissal and detriment claims (confirmed in Timis v Osipov).

23. For unfair dismissal, Kuzel v Roche [2008] EWCA Civ 380 confirms that the tribunal has to first decide if the reason for dismissal is as the employer claims; if it finds not, then consider if the reason is as Claimant says – the tribunal can find a reason neither party asserts. If a principal reason for dismissal is the whistleblowing, even if it is not the only reason, the Claimant will succeed in a claim of automatic unfair dismissal. When constructive automatic unfair dismissal is asserted, the reason for the alleged repudiatory breaches of contract become key.

24. In the case of NHS Manchester -v- Fecitt and others [2012] IRLR 64, the Court of Appeal held that the test in detriment cases is whether *“the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer’s treatment of the whistle blower.”* Fecitt shows that if the making of a protected disclosure was an effective cause of the detriment, the causation test is met.

*What is a Protected disclosure?*

25. The Tribunal has to answer a number of questions when considering whether there has been a protected disclosure. It bore in mind the warning from the Employment Appeal Tribunal in the case of Kilraine -v- London Borough of Wandsworth UKEAT/0260/15 that tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations are often intertwined and the fact that information is also an allegation is not relevant.

26. The questions are:

26.1 Is there a qualifying disclosure – this requires the following questions to be answered (a) has there been a disclosure of information? As the case of Cavendish Munro Professional Risks Management Limited -v- Geduld



[2010] ICR 325 makes clear, there is a need to convey facts, and not just make an allegation. An opinion does not equate to information (Goode -v- Marks and Spencers PLC EAT 0442/09).

26.2 Was the information, in the reasonable belief of the Claimant, made in the public interest? This requires an analysis of the case of Chesterton Global Limited and others -v- Nurmohamed [2017] EWCA 979. Within that Judgment, the Court of Appeal made a number of useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person's interest was served by a public disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what "is in the public interest" when dealing with a personal interest issue because "*the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never.*" The four factors that the Tribunal should consider are:

- 26.2.1 The numbers in the group whose interests the disclosure served (if one is considering the entire workforce of the NHS or John Lewis, the sheer number of employees affected are likely to render a disclosure in the public interest for example and such a belief reasonable);
- 26.2.2 The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
- 26.2.3 The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
- 26.2.4 The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.

It is relevant to point out there can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not substitute its view for that of the Claimant, but it must consider

whether the Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable. Chesterton established that the necessary belief is that the disclosure is made in the public interest; the particular reasons why the worker believes that to be so are not of the essence. Also, while the worker must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – the Court of Appeal doubted whether it need be any part of the worker’s motivation. A matter that is of “public interest” is not necessarily the same as one that interests the public, and while the public will generally be interested in disclosures that are made in the ‘public interest’, that does not necessarily follow. Parliament chose not to define “in the public interest” but the Chesterton factors are a useful tool.

26.3 The next question the Tribunal has to ask is did the information, in the Claimant’s reasonable belief, show that the health and safety of an individual was endangered or there had been a breach of a legal obligation by the Respondent?

26.4 The last question to be determined is whether the Claimant suffered a detriment which was materially influenced by her disclosure(s)? The Claimant has claimed 4 alleged detriments, which were set out above.

27. The necessary components of a qualifying disclosure are clearly set out in section 43B ERA. They were summarised helpfully by HHJ Auerbach in Williams v Michelle Brown AM (UKEAT/0044/19/00):

*“9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.”*

### Constructive unfair dismissal/Automatic constructive unfair dismissal

#### *Dismissal*

28. Under Section 95(1)(c) Employment Rights Act 1996 (“ERA”), an employee is regarded as dismissed where *“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”* If an employee establishes that they are dismissed under this provision, Section 98 ERA must then be considered to decide whether or not the dismissal was unfair. Merely being dismissed is not enough to establish a claim of unfair dismissal.

29. The Claimant must, in order to succeed in this claim, establish that the Respondent breached the mutual duty of trust and confidence by conducting itself in a manner calculated or likely to destroy/seriously damage the relationship of trust and confidence between the employer and employee without reasonable and proper cause. The Claimant asserts that the detriments to which she was allegedly subjected to were individually or cumulatively repudiatory breaches of contract, ending in Ms Shaikh's alleged conduct at the disciplinary hearing on 5 May 2021 which the Claimant viewed as bullying, belittling and mocking.
30. To be repudiatory, the alleged breach must be fundamental to the contract itself such as to justify the resignation becoming a dismissal. It must be a breach that goes to the heart of the contract. The well-known case of *Western Excavating (ECC) Limited -v- Sharp* [1978] ICR 221 makes it clear that for such a claim to succeed there must be a fundamental breach of contract that entitles the Claimant to resign due to a repudiatory breach by the Respondent. This is something that must go to the heart or the root of the contract and entitle the Claimant to resign without notice. This involves a consideration as to whether there has been an act or omission, or a series of acts or omissions, by the Respondent which was the cause of the Claimant's resignation and amounted to a fundamental breach of contract. There needs to be a consideration of when the breach occurred and if there has been any affirmation by the Claimant, and whether the Claimant resigned in response to the alleged acts or omissions.
31. The case of Kaur -v- Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978 saw the Court of Appeal list five questions which should be sufficient for an Employment Tribunal to ask to determine whether an employee has been constructively dismissed:
- 31.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation? The answer in this case is the events of the disciplinary hearing on 5 May 2020.
- 31.2 Has she affirmed the contract since that act? No, as the Claimant immediately resigned.
- 31.3 If not, was that act (or omission) by itself a repudiatory breach of contract?
- 31.4 If not, was it nevertheless a part (applying the approach explained in Waltham Forest -v- Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
- 31.5 Did the employee resign in response (or partly in response), to that breach?

32. If the Claimant's resignation is found to be a dismissal, the Tribunal then must consider whether it was unfair and whether a fair procedure was adopted.
33. Lawful conduct is not something that is capable of amounting to repudiation and therefore conduct cannot be repudiatory unless it involves a breach of contract (Sparfax Limited -v- Harrison [1980] IRLR 442 Court of Appeal). The effective cause of resignation though does not need to be the sole or dominant cause for the resignation to constitute a dismissal (Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493).
34. The implied obligation of mutual trust and confidence in employment contracts requires that the employer shall not "*without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee/employer*". This is a definition which has been cited in cases such as Malik -v- BCCI, Woods -v- WM Car Maintenance Services, Imperial Group Pension Trust -v- Imperial Tobacco and Lewis -v- Motorworld Garages Limited, all of which are well known.
35. The implied obligation is formulated to cover a great diversity of situations and a balance has to be struck between the employer's interests in managing the business that they run as they see fit, and the employee's interests in not being unfairly and improperly exploited. It is a mutual obligation though it seems that implied terms adds little to the employee's implied obligations to serve his employer loyally.
36. In assessing whether there has been a breach, it is clear that what is of significance is the impact of the employer's behaviour on the employee rather than that which the employer intended, BG PLC -v-O'Brien [2002] ICR 721.
37. The burden lies on the employee to prove the breach on the balance of probabilities, this means that the employee must prove the alleged act or omission, and the employee must prove that the employer's conduct was without reasonable and proper cause.
38. The test whether such proven conduct, in the absence of reasonable and proper cause, amounts to a breach is said to be severe (Gogay v Hertfordshire County Council 2000 IRLR 703 CA). It is not enough for the employee to prove the employer has done something which is simply in breach of contract, or "*out of order*", or perhaps unreasonable. She must prove that the degree of breach was sufficiently serious, or calculated, to cause such damage that the contract can be fairly regarded as repudiatory and that repudiation accepted. The cases of Croft -v- Consignia PLC [2002] IRLR 851 and The Post Office -v- Roberts [1980] IRLR 347 indicate that the quality of the breach must be substantial. It must go to the heart of the contract – its root. Those cases along with Lewis also indicate that a repudiatory breach may be formed of the cumulative effect of a number of incidents which of themselves, in isolation, may or may not be

repudiatory. The case of Leeds Dental Team v Rose [2014] ICR 94, EAT, confirms that whether behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. The case of Hilton v Shiner Ltd- Builders Merchants [2001] IRLR 727 saw the EAT observe that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract. Unreasonable conduct alone is not enough to amount to a constructive dismissal- Claridge v Daler Rowney [2008] IRLR 672, EAT.

39. If the Claimant does establish that she resigned in response to a proven repudiatory breach of contract then the Tribunal must go on to consider whether the reason for her constructive dismissal was a potentially fair one. That requires the Tribunal to determine what were the set of facts or beliefs held by the employer at the time of the dismissal Maund -v- Penwith District Council [1984] ICR 143. It will also entail consideration of the procedure used and whether it was fair and in accordance with the ACAS Code of Practice for Grievances and Disciplinarys.

*Automatic unfair dismissal*

40. This requires an analysis as to whether any of the disclosures made by the Claimant amount to a protected disclosure; the findings in relation to the s47B claim will be relevant here too. The only additional question is whether the reason or principal reason for the Claimant's dismissal is that she made a protected disclosure?
41. It is also worth noting that if the Claimant establishes that there is an issue warranting investigation and capable of supporting her claim of automatic constructive unfair dismissal, the burden of proof moves to the Respondent, who must prove, on the balance of probabilities, the reason for dismissal (Maund v Penwith District Council 1984 ICR 143 CA and Kuzel v Roche Products Ltd 2008 ICR 799 CA). It is also open to the Tribunal to find a reason for dismissal, on the basis of the evidence before it, not advanced by either party.

*Remedies – in general*

42. An injury to feelings award can be made in respect of public interest disclosure detriments (but not for dismissal on the same grounds, which means only acts up to resignation can be covered by such an award) It cannot be made for unfair dismissal claims, and the onus is on the Claimant to provide evidence of her injury to feelings. This is generally provided through her witness statement and in oral evidence. The Claimant if successful will also be entitled to her financial

losses, but there is a duty to mitigate. It is for the Respondent to raise the point and test the evidence.

43. Injury to feelings awards are split into three bands. The Tribunal must consider the bands of awards set by the case of Vento-v-Chief Constable of West Yorkshire Police [2003] IRLR 102 CA, as uplifted by the case of Da'Bell-v-NSPCC [2010] IRLR 19 EAT and then the further case of Simmons-v-Castle [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation; Beckford-v-Southwark LBC [2016] IRLR and King-v-Sash Window Workshop Ltd [2015] IRLR 348 and De Souza-v-Vinci Construction (UK) Ltd EWCA Civ 879). The Presidential Guidance was updated in March 2021 for claims presented from 6 April 2021 until 5 April 2022 and the following bands now apply; £900-£9,100 in respect of less serious cases, £9,100-£27,400 the cases which did not merit in awarding the upper band and £27,400-£45,600 for the most serious cases, with the most exceptional cases capable of exceeding £45,600.
44. When reaching a figure for injury to feelings, the award should be compensatory and just to both parties. It should be neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-discriminatory legislation. Tribunals should bear in mind the value in everyday life of the particular sum that we chose to award, particularly in the context of the Claimant's salary and personal injury awards where relevant.
45. In relation to other matters dealt with at the remedy stage, Polkey and contributory conduct are remedy matters and the provisions of the ERA should be followed carefully.

*Polkey/Contributory fault*

46. It has been established since Polkey v AE Dayton Services Ltd [1987] IRLR 503 that where an employee has been unfairly dismissed due to procedural failings, the tribunal may reduce the compensatory award to reflect the likelihood that the employee would have lost their job in any event, even if a fair procedure had been followed. Although this inherently involves a degree of speculation, tribunals should not shy away from the exercise. The Tribunal has to consider not what a hypothetical employer would do but what the Respondent would do, on the assumption the employer would this time have acted fairly. Could this employer have fairly dismissed and, if so, what were the chances that it would have done so?
47. Regarding the issue of contributory fault, there is no requirement for a causative relationship between the conduct and the dismissal. In Steen v ASP Packaging Ltd [2014] 42 ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

- 47.1 What is the conduct which is said to give rise to possible contributory fault?
- 47.2 Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).
- 47.3 Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?
- 47.4 If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that “A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.”

48. In Nelson v BBC No 2 [1980] ICR 110 it was said:

*“It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.”*

ACAS uplift

49. In Slade & Hamilton v Biggs and others EA-2019-000687-VP/EA-2019-000722-VP, the EAT said:

*“In future, when considering what should be the effect of an employer’s failure to comply with a relevant Code under section 207A of TULRCA, tribunals might choose to apply a four-stage test:*

- i) Is the case such as to make it just and equitable to award any ACAS uplift?*
- ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?*
- iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET’s judgment is the*

*appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?*

- iv) *Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?"*

50. Such uplifts cannot be made to the basic award (s.124A), but apply to the compensatory award for unfair dismissal and injury to feelings awards.

### **Findings of Fact**

#### *Credibility/adverse inferences/witnesses*

51. The Tribunal made findings of fact to determine this claim. Its approach though was affected by adverse inferences drawn due to the conduct of the Respondent during the proceedings and in respect of disclosure, and the evasive way Mr Shaikh gave his evidence to the Tribunal.

52. Mr Shaikh was forced to admit repeatedly that key evidence was not before this Tribunal and had never been disclosed to the Claimant or her representatives. A non-exhaustive list of the evidence not before the Tribunal would be the dignity of residents policy, the Claimant's contract of employment containing contractual terms that Mr Shaikh asserted existed (a statement of employment particulars was provided), a policy about access to medical records of staff, investigation notes and statements for both the grievance and the disciplinary proceedings (Mr Shaikh gave varying accounts why they had not been disclosed, but broadly his evidence was that as he collected them when dealing with a disciplinary against another member of staff, it would require redaction to disclose), and the evidence he relied upon showing that the Claimant made "*false and misleading evidence to the authorities*" (again Mr Shaikh's explanation was varied but appeared to be claiming that the authorities had the evidence, that their reports were marked "*official sensitive*" – the bottom level of security in public authorities, and that he did not ask for a disclosure order for reasons unknown). Mr Shaikh accepted that the Claimant never received any of the other evidence he said was before him and there was no evidence within the hearing bundle supporting his allegations against the Claimant, other than the statement dated 12 January 2021 by Ms Webber and the statements collated about the door slam, and an email dated 12 April 2021 obtained from Bridget about Christmas Day 2020. The other statements shown to the Tribunal were asserted to be prepared for the purposes of these proceedings, with the exception of Mrs Boxer's (see below).

53. Mr Shaikh's oral evidence was unpersuasive. Apart from the wholesale failures to disclose evidence, either to the Claimant when dealing with her during the employment or through the tribunal proceedings, he failed repeatedly to answer questions put to him. Ms Barlay in her submissions suggested that there may be a language issue as English was not Mr Shaikh's first language. Mr Shaikh



was expressly asked about this and he denied that there was any language barrier. He used complex words himself and was able to explain the meaning of the word "*erratic*" as an example. Mr Shaikh's inability to answer questions in the view of the Tribunal was not a language issue. He persistently refused to answer the question he was asked, but preferred to give the evidence he wished to give, even when warned of the potential risk of an adverse inference twice and after innumerable requests by the Tribunal and Ms Mallin-Martin to answer the question asked. Mr Shaikh at times appropriately asked for a question to be re-phased, demonstrating that he could recognise when the question was not clear. Mr Shaikh was not willing to make any concessions, preferring instead to making allegations against the Claimant or to resile from the words in the transcript when they did not suit the case he was arguing before the Tribunal. Combined with the lack of evidence supporting much of what Mr Shaikh said, the Tribunal concluded that where there was any difference between any other witness (including the Respondent's other witnesses) or the written documents within the bundle, it would prefer that evidence over Mr Shaikh.

54. The Claimant was cross-examined; the Tribunal noted that the Claimant was not challenged or asked about the issues of her reasonable beliefs surrounding the alleged protected disclosures or whether she had committed the alleged acts of misconduct (relied upon by the Respondent to justify the suspension and disciplinary proceedings and relevant to the issue of contributory conduct). The Tribunal also noted that the Claimant's witness statement was silent about her evidence given in her oral evidence about allegedly raising concerns previously orally and in writing to the home manager and her reasonable beliefs regarding the disclosures and whether they were in the public interest. However, the Claimant made concessions, such as saying two of the disclosures were not disclosures, and she answered questions straightforwardly.
55. Ms Andrews' evidence orally was about what she observed remotely at the disciplinary hearing on 5 May 2021, though her statement dealt with wider matters. Her evidence was considered in conjunction with the transcript before the Tribunal, and the Tribunal found her to be a plausible witness. It noted that Ms Barlay did not challenge Ms Andrews' contention that Mr Shaikh shouted at and mocked the Claimant at the disciplinary hearing.
56. Mrs Ogunkoya's evidence was limited by her admission that she did not see the Claimant slam a door, but assumed she must have as she heard a slam and saw the Claimant in the vicinity.
57. Ms Thomas was keen to make an oral statement to the Tribunal, which she continued to request to be permitted to do, despite the Judge explaining that Ms Thomas' role was to just answer the questions put to her and her witness statement had been read. She accepted that she had no evidence to support her belief that the Claimant was pretending to be unwell on 27 December 2020.

58. The evidence of Mrs Boxer about the Claimant's alleged conduct on 27 December 2020 was given less weight by the Tribunal than others. She asserted that she wrote her statement in the evening of 27 December 2020, despite it referring to the events of that day in the past tense ("*that morning*") and to be provided for both disciplinary and tribunal proceedings yet to be instituted. Ms Boxer was given every opportunity to reconsider the matter, as confusion is not uncommon, but she persisted in her assertion. Mrs Boxer said that she was asked to give a statement by the home manager about the Claimant being in a toilet on 27 December 2020 and it was written on 27 December; the Tribunal did not accept this date as it was inconsistent with both the wording of the statement and the evidence that the home was under serious pressure caring for residents due to staffing issues and Covid logic – it was unlikely that the statement was written in such circumstances and before Mrs Webber complained to Mr Shaikh about the Claimant. From the evidence before it, it appeared that if the statement had been written by Ms Boxer when she claimed, it should have been disclosed to the Claimant in her disciplinary proceedings and it was not. Mrs Boxer was asked by Ms Mallin-Martin whether her account was false; she denied this. Mrs Boxer confirmed to the Tribunal that her account related to a different toilet to that given by Ms Gilligan in her statement. Mrs Boxer asserted that she stood for about ten minutes watching the Claimant in the toilet – the Tribunal considered it most unlikely that this is correct. While it accepted that it was more likely than not that Ms Boxer stood in the doorway and offered the Claimant a glass of water, given the staffing situation and the pressures on the home, it did not think it likely that Ms Boxer stood there for ten minutes (as she said in response to the Tribunal's questioning), and then examined the toilet minutely after the Claimant left when working in such pressured circumstances.
59. Ms Lewis confirmed that she had not written her account of the events of 25 December 2020 until 11 April 2022 and was not asked to give a statement in relation to the investigation or disciplinary. Her evidence was that she was astounded by the Claimant's complaint that she was "*sick of working with rubbish carers*" and did tell Mrs Webber about it, and that she was asked to come in on Christmas Day as her colleague was Covid positive. The Tribunal found Ms Lewis to be a credible and plausible witness.
60. Ms Webber's oral evidence was more extensive than the previous Respondent witnesses. Her position was that she had seen the Claimant's grievance email but her statement of 12 January 2021 did not address all the concerns raised as she chose to focus on the more recent events. Ms Webber said that her statement was dated 12 January as that was the earliest opportunity she had to write it and it was done both at Mr Shaikh's request and by mutual agreement. Ms Webber accepted that the statement's creation was triggered by the grievance email, but did not accept that the evidence changed from the statement of 12 January to the statement prepared for these proceedings in respect as to whether Mrs Boxer was in the room with the resident referred to as OT because the Claimant pointed out that could not be correct as Mrs Boxer

could not look after covid positive residents, such as OT. Ms Webber was also asked about the photo of AT; she denied asking for the photo or seeing it, despite it being within her messages with the Claimant. The Tribunal preferred the Claimant's account regarding this photo for the reasons given in the next paragraph in this decision. Ms Webber did not accept that the Claimant was not present at supervision meetings or spot checks if her signature was not on the page (the relevance being that the Respondent asserted that the Claimant had no concerns as shown by these documents). She disagreed with Mr Shaikh on the issue of calls on Christmas Day; she was adamant that there was no such call between them on that day, when she was off. The Tribunal prefers Ms Webber's account on this issue as it was logical that Ms Webber would not speak to the RI on her day off about what was happening at the home and because it placed little weight on Mr Shaikh's evidence as a whole.

61. Ms Webber denied that Mr Shaikh's conduct at the disciplinary hearing was bullying or mocking or that he shouted. The Tribunal's view of Ms Webber was that she was broadly a honest and credible witness, with the exception of the issue of the photo of AT sent to her phone by the Claimant in May 2020. The Tribunal preferred the evidence of the Claimant that Mrs Webber asked for such photos – partly because within the messages themselves, Mrs Webber does not object to the photo and partly because the Tribunal does not accept Ms Webber's contention that she did not see it. It was a striking image and Ms Webber continued to message the Claimant days afterwards. It finds that it is more likely than not Ms Webber did see the photo and did not object because it was sent at her request as evidence of the Claimant's concerns.

*Agreed facts*

62. It was agreed by the parties that the Claimant returned from maternity leave to work on a part-time basis as a senior care assistant from 18 April 2020 onwards. On 15 May 2020, the Claimant sent a photo of a resident, AT, to Ms Webber the home manager, with no wording within the message to explain why the photo was being sent. The Claimant says the photo evidenced that the resident in question was suffering from dehydration and was sent at the request of Ms Webber. The Tribunal has found above that it prefers the Claimant's account of this issue.
63. As is well known, the global Covid-19 pandemic reached the UK in March 2020, and there was a significant impact on the care industry and those working within residential care homes for the elderly and vulnerable. Such persons were more at risk from the virus, and staffing levels were affected by the self-isolation rules. PPE was required in large amounts to protect the residents and had to be changed for each visit to residents, who at the height of the outbreak were confined to their individual rooms.
64. The Claimant worked shifts on 24, 25 and 27 December 2020. It is accepted that by the time of these shifts, unfortunately Covid-19 had entered the home

and was having a significant impact on staffing levels. It is the Claimant's position that on Christmas Day, the home was short staffed; 5 members of staff (excluding the two nurses) were rota'd to work a six-hour morning shift in the morning, but one had to be sent home on becoming Covid positive. The two nurses appear to have been bank or agency nurses and neither the RI, the home manager or deputy home manager were on duty. The Claimant's position is that normally 7 members of staff work on what she said was the busiest day of the year (due to calls and visits from relatives and Christmas activities), but she appeared most aggrieved about the lack of management on site in her oral evidence.

65. It is accepted that the Claimant indicated in a message to Ms Webber that more staff would be required; it is also accepted that Marie started work from 12 o'clock that day and Michelle Gilligan offered to work a 12-hour shift, meaning that there was more staff by the end of the day shift than the Claimant expected. There was no dispute that the home operated without any issue after the Claimant went home.
66. The Respondent's position appears to be that the Claimant effectively was moaning about short staff on Christmas Day and that this constituted erratic behaviour. The Respondent also says that the Claimant shouted at a colleague called Bridget; the Claimant in an email to her union representative accepted that she raised her voice but that was because Bridget was on her phone and had left a resident covered in faeces. It is not disputed that Bridget did go outside and Ms Webber was called by the Claimant, but Bridget then returned to work. The Claimant as a senior carer directed Bridget worked upstairs; there are indications that the Respondent felt that this was for personal reasons but there is no actual evidence before the Tribunal about this point.
67. On 27 December 2020, the Claimant returned to work, where the Respondent's position is that she was complaining to other colleagues about the short staffing on Christmas Day before the start of her shift. This is also described by Mr Shaikh as erratic behaviour. A resident, OT, was found by the Claimant on the floor; the Respondent criticises the Claimant for leaving OT with an agency nurse while she searched for Ms Webber (not only was Ms Webber was the home manager, but a nurse). The Claimant says that she found Ms Webber on her phone in her office, rather than carrying out her duties and that she had to find her as the nurse was not very familiar with the home.
68. The next event on 27 December 2020 is that the Claimant says that due to a headache induced by stress at work, commencing on 25 December, she was vomiting. Those who are vomiting should not be present in a nursing home and so the Claimant says that she was advised to go home by the agency nurse. There is no evidence from that nurse before the Tribunal. The Respondent's position is that the claimant was lying about vomiting because she knew the home management would have no choice but to let her go home. Intriguingly,

there is no allegation against the claimant that she falsified illness in the subsequent disciplinary proceedings.

69. On 30 December 2020, the Claimant sent an email to Mr Sheikh, which is referred to as the grievance email by parties. Within the email, the Claimant sets out a number of matters. It is fair to note that the email deals with a mixture of matters that are not whistleblowing allegations, but the Claimant asserts that some of the matters raised are public interest disclosures.
70. The Claimant asserts that her grievance was not responded to; the Respondent says that it was acknowledged by way of a letter dated 31 December 2020 sent to her parents address which was the address it had on record for the Claimant. The Claimant's position is that the letter never reached her or her parents' address, and that she changed her address with the Respondent. Mr Shaikh's account as to why a letter was sent when correspondence with the Claimant was by email was that he asked the finance manager to deal with it. All that the letter says is "*Thank you for your concerns and I confirm receipt of the same. We are currently going through a crisis of COVID-19 positive cases in the home, which will inevitably delay my investigation in this matter. I will be in contact with you in due course.*"
71. The Claimant was signed off work for two weeks due to stress at work by her GP on 30 December 2020. The fit note showed her correct address. On 11 January 2021 the Claimant tells Mr Sheikh in an email that she is a whistleblower. On 12 January 2021, Ms Webber makes a statement about the claimant's behaviour on 25 and 27 December 2020 and the next day the Claimant is suspended. Ms Webber's evidence was that her statement was to respond to the more recent allegations within the grievance email from the Claimant. There was no formal suspension letter setting out the grounds of suspension. The email from Mr Shaikh simply says "*pending further investigation regarding your recent conduct at work*". The Respondent says that the email to the Claimant's union representative on 15 January 2021 at page 141 of the hearing bundle sets out the reasons for her suspension. All that this email says is that the Claimant was suspended for behaviour and is "*a mere investigation of misconduct by Ms Letherby on 24<sup>th</sup>, 25<sup>th</sup> and may be also 27<sup>th</sup> December 2020*". No more detail is given until the Claimant is sent an invite to a disciplinary meeting on 19 April 2021.
72. On 27 January 2021, there was a meeting between the Claimant and Mr Sheikh. It was not wholly clear whether this was an investigation meeting or a meeting dealing with the claimant's grievance. Mr Shaikh's evidence was that he dealt with both issues at the same time as he had been advised that he could do so concurrently, and it was his only opportunity to deal with both matters due to Covid. There is no explanation why the Claimant and Mr Shaikh could not have met outside of the home. The invitation says "*As part of my fact finding investigation, I now require to speak to you urgently. Please attend at Llantrisant Care Home at 11 am on Monday the 25th January 2021. You will*

*please note that this is not a disciplinary meeting*" (the date was later changed due to snow). It is described by the Respondent as a fact-finding meeting and the Claimant was not offered a companion; if this was an investigation meeting, this would be appropriate. If it was a grievance meeting, the Claimant would have been entitled to bring a companion if complaining about a duty owed by the employer to the worker (paragraph 35); in any event, it is good practice to allow a companion. It is likely as a union member, the Claimant would have wanted a companion. Mr Shaikh accepted that he did not tell the Claimant in advance that he would be discussing her grievance with her.

73. The Tribunal was provided with a transcript of this meeting; it will deal with its contents in due course. At the end of this meeting, the Claimant left. The Respondent asserts that the Claimant slammed a door, which was allegedly heard by residents and staff causing them distress, particular to a resident coming to the end of her life. There is allegedly an eyewitness who saw the Claimant slam a door, Claire Thomas, but she did not provide a statement for the Tribunal proceedings. The Claimant points out that the other witnesses given conflicting accounts about the presence of Claire Thomas and the date of her statement is 6 March 2021 (after 18 February, the date of the letter putting this allegation to the Claimant for her response), and Mr Shaikh's admission that he kept asking for a statement from Ms Thomas. The Respondent followed this meeting by raising queries about other matters with the Claimant in a letter sent to her parents' address dated 18 February 2021, particularly the alleged slamming of the "*main door*" and suggesting that the Claimant allegedly having two addresses is misconduct. Despite being an investigation letter, Mr Shaikh asks the Claimant to explain her misconduct, rather than ask her to give an account in a neutral manner; he provides no evidence with the letter. The Claimant responds on 22 February 2021 saying she did not slam the door but possibly the wind did so.
74. On 23 March 2021, Mr Sheikh sent a grievance outcome letter to the Claimant at her actual address in which he dismisses all of her complaints. In summary, he says that there is insufficient detail within the grievance email, that there is no substance to her concerns, that the Claimant had provided misleading and inaccurate information and had breached policies by taking a photo of a resident, and that the Covid rules had been complied with by the staff. Mr Shaikh quoted extensively from the statement of Mrs Webber of 12 January 2021, but claimed it was from his own investigations in his letter. Mr Shaikh at the hearing admitted that there was no evidence provided to support any of his findings and that a member of staff had attended the home while her partner was awaiting the results of a PCR test. The letter ends with the words "*if you are to appeal, I will try my best to consider your new evidence or documents, if any.*"
75. On 19 April 2021, the Claimant is invited to a disciplinary hearing via a letter sent to her actual address and by email. Mr Shaikh accepted that much of the evidence he claimed to have collected in his oral evidence was not disclosed.

This is supported by several of the Respondent's witnesses who said that they were not interviewed in relation to the Claimant. The hearing took place on 5 May 2021 with her union representative attending by Zoom, and again a transcript is before the Tribunal. In the invitation to the disciplinary meeting, the Claimant was accused of the following (summarised):

- 75.1 Unprofessional and inappropriate behaviour on 25 December 2020, asserting that the Claimant created a tense and unpleasant atmosphere, caused panic amongst the staff, undermined the authority of management, misbehaved with Bridget and failed to tell the Home Manager that Marie came in early to help and the kitchen staff also helped that day. The accusation ended with the words *"If you fail to provide satisfactory explanations, this will be treated as a serious misconduct."*;
- 75.2 That the Claimant continued such behaviour on 27 December 2020 by complaining loudly about the lack of staff on Christmas Day. The accusations ended with "These repeated unprofessional and inappropriate behaviours on your part would constitute serious misconduct in those critical circumstances unless you can provide satisfactory explanations.";
- 75.3 That on 27 December 2020 the Claimant failed in her responsibilities by not staying with OT and refusing to make a professional communication with the Home Manager sending Michelle to tell her, and in her grievance email of 30 December she gave false and misleading information about what the manager was doing in her office. The accusation ended with the words *"If you fail to provide satisfactory explanations, this will be treated as a serious misconduct."*;
- 75.4 That on or before 11 January 2021 the Claimant provided false, misleading and self-serving information about the concerns raised by her to the authorities. The Claimant was also accused of taking a photo of AT without authorisation and sending it to the authorities. The accusation ended with the words *"If you fail to provide satisfactory explanations, this will be treated as a serious misconduct."*;
- 75.5 That the Claimant gave the names of the staff who she said did not comply with Covid policies. The accusation ended with the words *"Please forward your evidence or satisfactory explanation for these false and misleading information, failing which, your actions will be treated as serious misconduct."*;
- 75.6 That the Claimant behaved unprofessionally and inappropriately in disclosing her concerns to the authorities so soon after her email to Mr Shaikh of 30 December 2020. The accusation ended with the words *"If you fail to provide satisfactory explanations for this, failing which your actions will be treated as a serious misconduct."*;

- 75.7 That on 27 January 2021 the Claimant slammed the door next to the lift (not described as the main door as in the letter of 18 February 2021) and that Mr Shaikh had “clear evidence” that the Claimant’s account was inaccurate. The accusation ended with the words “*If you fail to provide satisfactory explanations for this, failing which your actions will be treated as a serious misconduct.*”.
76. The disciplinary meeting saw an argument at the start about the number of people who were in attendance supporting Mr Sheikh, as opposed to the Claimant who sat alone with her union representative attending remotely. Mr Sheikh claimed that he needed Ms Webber and Ms Gilligan present in order to protect him from the Claimant as he asserted that she had slammed a door in January which he viewed as a violent act. The meeting ended with the Claimant walking out, alleging that Mr Sheikh was biased and was not conducting a fair hearing.
77. The Claimant resigned by email the same day, saying that Mr Sheikh’s behaviour in the disciplinary meeting was bullying and a breach of the mutual duty of trust and confidence. ACAS early conciliation was carried out in one day, 14 May 2021, and the claims presented to the Employment Tribunal on 19 May 2021. Further and better particulars were provided at a later date and accepted by the Tribunal.

*Disputed facts*

78. Taking the remaining events in date order, the Tribunal considered that the Respondent had produced insufficient evidence to prove on the balance of probabilities that the Claimant had on 25 or 27 December 2021 carried out acts of misconduct. It is not misconduct for a member of staff to express concerns about a shortage of staff. There was no challenge to the Claimant’s evidence that the number of staff rota’d to work on Christmas Day was less than the usual number; on the contrary, the Respondent’s witnesses accepted that the home was short-staffed due to Covid. In relation to the Claimant allegedly misbehaving towards Bridget, there appears to be no investigation as to whether the Claimant was right in asserting that Bridget had left a resident covered in faeces (a concerning omission in the Tribunal’s view) from the evidence before the Tribunal. There is no dispute that there was an altercation with Bridget, and no dispute that Bridget left the building before returning, but this alone is not sufficient to establish whether the Claimant unprofessionally and inappropriately raised concerns with Bridget. Ms Lewis in her oral evidence talked about the Claimant complaining about “*being sick of working with rubbish carers*”; this supports the view that the claimant was unhappy with at least one of her colleagues and concerned about the care being provided to residents. However, without investigating the Claimant’s allegations against Bridget, this does not take matters any further forward and such a comment in itself is not misconduct.



79. The allegations set out in the disciplinary invite letter are vague. It does not explain how on Christmas Day 2020 the Claimant created a tense and unpleasant atmosphere; there is no evidence about how she caused “*panic*” or undermined the authority of management. There was no explanation as to why the Claimant contacting the home manager before Marie’s arrival is somehow an act of misconduct; the manager was aware that the kitchen staff were assisting as this was her instruction to the Claimant as shown in the messages.
80. Turning to 27 December 2020, it is not misconduct to complain to colleagues as the Tribunal has already said. There is no dispute that the Claimant expressed her concerns about the events of Christmas Day. Doing so does not constitute erratic behaviour. In relation to the allegations surrounding OT, the Claimant did not leave OT alone but left her with a qualified nurse. There is no evidence before the Tribunal that showed that the Claimant was wrong in doing so; no such policy was provided. There is no evidence before the Tribunal that the Claimant refused to speak to the home manager on this occasion or sent Ms Gilligan to speak to her instead. Ms Gilligan does not make such an accusation in her statement, nor does Ms Webber. There is no evidence that the Claimant gave false and misleading information regarding what the manager was doing in office. The Claimant simply says in her grievance email that Ms Webber was in her office and on her personal phone; Ms Webber says in her statement that she was on her phone because she was looking at a rota. This is not a conflicting position; both the Claimant and Ms Webber can be correct. The fact that Mr Sheikh viewed Ms Webber’s account as demonstrating the Claimant gave false and misleading information is an indicator of his biased approach and inability to look at the evidence in the Tribunal’s view. Despite the best efforts of the Respondent at the hearing to suggest that the Claimant was not ill on 27 December 2020, there is no allegation against her in that regard.
81. The next event is the Claimant’s email of 30 December 2020. The Tribunal will deal in its conclusions section with whether it contains protected disclosures. The Tribunal accepts that the letter on 31 December 2020 was sent to the Claimant at her parents’ address (despite her correct address being in the sick note); equally it accepts the Claimant’s evidence that it was not received. The postal service was badly disrupted during the pandemic and in normal circumstances, letters can be lost. There is no information as to why this letter was not sent by email, the usual communication method between the parties as shown by the hearing bundle. Further, the Tribunal could not see any benefit to the Claimant in lying about whether she received the letter as its contents are slight. In essence, it is an acknowledgement of receipt of the grievance and says it will not be considered at this time and gives no indication when it will be.
82. The next event is the Claimant’s email of 11 January 2021 when she says that she is a whistleblower. The Tribunal finds it is more likely than not that when this email was received, Mr Sheikh believed that the Claimant had contacted third parties. This conclusion is drawn on the surrounding evidence including

the allegation made in the investigation meeting and in the invitation to the disciplinary that on or before 11 January 2021 the Claimant contacted the authorities when there was no evidential basis to make such an allegation.

83. Ms Webber's statement of 12 January 2021 by her own account was prepared in response to the Claimant's grievance, and the Tribunal considers the fact that the statement was not prepared until the day after the Claimant asserted her whistleblower status to be relevant. The statement does not address the entirety of the claimant's grievance; if it was truly a statement prepared in relation to the grievance, the Tribunal considers it as more likely than not it would have dealt with all the issues raised, particularly as Ms Webber is the home manager. The Tribunal also notes that no-one else prepared a statement at this time; there has been no dispute to the assertions that Ms Webber and Mr Sheikh worked closely together.
84. The Tribunal turned to the suspension of the Claimant on 13 January 2021. It does not consider that the explanation given either on 13 January or 15 January 2021 by Mr Shaikh sets out any proper reason for suspension. The explanations refer to 24 December 2020, but the Claimant is not accused of any misconduct on this day; the only thing that the Claimant did do on this day was discuss the staffing levels for Christmas Day. The Tribunal has already expressed its view that the allegations made against the Claimant in relation to 25 and 27 December are unsupported by an evidential basis. At the time of suspension, the only evidence before Mr Sheikh is the Claimant's grievance and Ms Webber's statement. There is nothing within either document that justifies a suspension of the Claimant. The Tribunal bore in mind that the evidence before it was that at the time suspension the care home was suffering due to Covid-19 and short-staffed, and the Claimant was an experienced long-serving member of staff. Mr Sheikh's oral evidence was that he had to suspend her because the home manager and deputy home manager felt that this was required; there is no evidence supporting this contention. The decision to suspend is illogical in the view of the Tribunal, given the wider circumstances the home faced, unless it was motivated by the Claimant's grievance email or her assertion that she was a whistleblower.
85. The correspondence between Mr Sheikh, the Claimant and Ms Andrews, the Claimant's union representative on the issue of medical records in January 2021 was considered next by the Tribunal. Given the lack of any allegation against the Claimant about her health, it was noteworthy that Mr Sheikh required full access to the Claimant's medical records without the Claimant being given any ability to see what was being sent to the Respondent in advance.
86. Bluntly, in the view of the Tribunal this requirement appears to be a fishing expedition. Its conclusion in this regard is supported by Mr Sheikh's adverse reaction to the Claimant and her union representative reminding him of her legal right to see any medical information before it is sent to the Respondent

and her limiting the range of dates covered by a letter of authority to the GP from 30 December 2020 (when she saw a GP and obtained a sick note) until her suspension. Given that the days prior to 30 December 2020 saw Christmas take place (when medical access is very limited), was during a pandemic (again, restricting medical access) and the Claimant's explanation that one would not normally see a GP due to vomiting and the unsuccessful attempts she did make to see a GP earlier, Mr Sheikh's oral evidence that he simply did not accept the Claimant's account was unreasonable in the view of the Tribunal. There was no evidential basis for such a conclusion and the Claimant's account was plausible. Mr Sheikh confirmed that he is not a medical practitioner. It is difficult to understand on what basis, given the combination of Christmas and Covid and when the Claimant got the sick note, together with his stated interest in the reasons why that sick note was issued, Mr Shaikh objected to the Claimant limiting the range of dates to which you could have access to her medical records if he was simply investigating her departure from work on 27 December 2020 and her sick note.

87. In his initial request of 13 January 2021, Mr Shaikh expressly referred to the Claimant's sick note covering 30 December to 12 January, but then reacted poorly and unprofessionally when it was pointed out to him the legal rights of the Claimant and the need to limit the information sought. Examples of this response include on 21 January 2021 Mr Sheikh telling the Claimant and her union representative Ms Andrews "*We never asked Ms Letherby to contact her GP. We asked her to sign the draft letter of authority and return it to us. In your email of today, you are suggesting that the GP to have a prior consent from Ms Letherby before the GP would send the letter of response to our letter of request. These are thoroughly inappropriate and unreasonable demands on your part and that of Ms Letherby and indeed, these are causing and contributing to the delay of my current fact finding investigations in this matter.*" Upon receipt of the Claimant's amended letter of authority, Mr Sheikh on 22 January 2021 said "*I have received your envelope and I advise you that you are in breach of terms of employment. as you have amended/edited without our consent to do so and with these unauthorised additions by you. in effect, you have restricted us to ask relevant questions to your GP. You have now left me with no other choice but to proceed to speak to you without reports from your GP*". Mr Sheikh at the hearing was unable to show the Tribunal a contractual term entitling him to full access to the medical records or explain why the amended letter of authority prevented him from investigating the matter he had expressly said he was investigating (the sick note of 30 December). The Tribunal will deal with the inferences to be drawn in the conclusion section.

88. Turning to the investigation meeting invitation, Mr Sheikh accepted that the investigation letter did not tell the Claimant that he was also going to deal with her grievance. As the Tribunal has already observed, this prevented the Claimant from asking to bring a companion to a grievance meeting. As Ms Mallin-Martin observes, this failure also meant that matters relating to the investigation were mixed with the grievance at the meeting; the ability to run

concurrent processes does not mean that the two matters should be conflated and confused with each other. The word “*concurrently*” means that the two processes can be undertaken separately at the same time.

89. The investigation meeting of 27 January 2021 requires careful consideration and analysis. The transcript was of great assistance in this regard. The investigative officer (and later the dismissing officer) was Mr Sheikh. The purpose of an investigation meeting is to hear the Claimant’s account of the matters of which she is accused; in fact, some of the allegations set out in the disciplinary invite letter were added after the meeting but the Claimant was given an opportunity to respond in writing.
90. At the investigative meeting, Mr Sheikh starts by asking about the Claimant’s concerns on Christmas Eve and earlier (though she had not raised any). At a fairly early stage in the meeting, Mr Sheikh referred to the Claimant’s grievance email but then said “*but I am investigating that matter, it is not a grievance meeting yet on that matter, I am investigating.*” He then moved on to Christmas Day and 27 December 2020. Some time is spent discussing the Claimant’s health from 27 December onwards and then Mr Sheikh moved on to whistleblowing. The Claimant pointed out that she had blown the whistle but then is the person who is suspended; Mr Sheikh’s response was that if a whistleblower discloses their identity, then they lose protection. He told the Claimant that her whistleblowing is “*directly relevant*” to her suspension and then asked a series of questions designed to find out when the Claimant made public interest disclosures and to whom. He asserted that the Claimant must have contacted the authorities before 11 January 2021, but does not explain why and refers to the Claimant as “*exposing*” herself. Mr Sheikh then says the Claimant did not give the Respondent sufficient time to investigate her grievance email and demanded that she answers his question about when she contacted the authorities.
91. There was then a discussion about the photograph the Claimant took of the resident AT which the Claimant explained was at Ms Webber’s request. The impression given is that Mr Sheikh was not investigating allegations against the Claimant, but was trying to find out exactly what she had told third parties and when. His approach is not neutral in the judgment of the Tribunal, but was largely focused on the Claimant’s whistleblowing. It is noteworthy that there was no meaningful discussion of a single concern raised by the Claimant in her grievance email for a meeting with Mr Shaikh claimed was investigating her grievance, as well as her alleged misconduct.
92. The Tribunal finds that the Claimant did not on the balance of probabilities slam a door on 27 January 2021. The only eyewitness, Claire Thomas, did not provide a witness statement for these proceedings or attend the hearing, and the other witnesses conflicted over whether she was present or her location. Her statement does not specify which door (out of three options) the Claimant allegedly slammed. Claire Thomas’ statement is not contemporaneous but

prepared about 6 weeks later after Mr Shaikh asked for it more than once by his own account. In any event, the Tribunal considers the way that the Respondent initially put the allegation to the Claimant, namely that she slammed the main door, to be an attempt to trick her. The Claimant's response that she did not slam the door and it may have been the wind is plausible (especially as there had been snow two days earlier causing an adjournment of the meeting - no effort was made by Mr Sheikh as investigative officer to establish the weather conditions at the time). It is only after the Claimant gives her explanation that she is told a different door (next to the lift) was allegedly slammed. Given that there are three possible doors, it is difficult to understand on what basis Mr Sheikh could select a set of doors as there is no evidence saying which one was allegedly slammed and it is a change of position from the "*main door*" which is not explained. The Tribunal would also observe that slamming of a door in itself is not an act of misconduct of such seriousness likely to lawfully led to the dismissal of a long-serving employee.

93. The grievance outcome letter has been set out above, as has the invitation to the disciplinary hearing. The next matter considering requiring findings of fact therefore is the disciplinary hearing on 5 May 2021. Again, the Tribunal has the benefit of a transcript. The transcript in the judgment of the Tribunal is damning for Mr Shaikh. It starts with Mr Sheikh accusing the Claimant of having carried out an act of violence by allegedly previously slamming a door on 27 January (an allegation yet to be determined) and asserting that he needs the presence of two others for his protection, overlooking the fact that the Claimant was alone in the room with her union representative only attending remotely. In the Tribunal's view, it was wholly appropriate for Ms Andrews to object to both the number of people alone with the Claimant at the hearing and to Mr Sheikh's clearly expressed view that the Claimant had carried out the slamming of the door on 27 January 2021.
94. The disciplinary hearing did not improve from this point, despite the departure of one of the members of staff (Ms Gilligan). Mr Sheikh as already noted had said that he had enough evidence to find the allegation about the door slamming proved, and proceeded to object to the Claimant's representative asking questions at relevant points and making representations on behalf of her member. His position was that the union representative should only speak at the very end of the hearing. Ms Andrews did not accept this, rightly in the view of the Tribunal as it is best for clarification questions to be asked or relevant representations at the time those matters are being discussed. Paragraph 17 of the ACAS Code of Practice sets out her right to speak. Mr Sheikh's position was that he was provoked by the attitude of the union representative; the Tribunal does not accept this as Ms Andrews acted properly and reasonably within the context of her role.
95. In addition to Mr Sheikh's behaviour in alleging the Claimant carried out an act of violence which required him to be protected by two colleagues, demonstrating his biased approach, Mr Sheikh clearly struggled to be quiet and

to allow other people to speak (something which the Tribunal considers happened not just from the transcript by also from the way Mr Sheikh conducted himself at the Tribunal hearing). At various points in the meeting, the Claimant complained about not being given an opportunity to speak. Mr Sheikh demanded to know why the Claimant did not tell him some of the information she tells him at the meeting in January; the Claimant points out this was because he did not hold a grievance meeting with her. Mr Sheikh told the Claimant that her defiance to the authority of the management was displayed clearly in her asking Michelle to tell the home manager about OT's fall (despite this allegation not being clearly put to the Claimant or determined by this point).

96. Mr Shaikh was asked by Ms Andrews to stop shouting at the Claimant, who also pointed out that Mr Sheikh was speaking over the Claimant when she was trying to answer his questions. Mr Sheikh then made a number of comments about the Claimant reading from her notes to answer the allegations. He persistently referred to her notes as a diary even after the Claimant told him that he was incorrect; after Mr Shaikh made such a statement several times, the Claimant asked Ms Andrews if she could leave. Mr Sheikh's oral evidence was that he had to say for the purposes of the tape that the Claimant was reading from a diary or notes. There is no explanation as to why this is relevant as an employee is perfectly entitled to use preprepared notes when facing a disciplinary hearing and to use those notes to assist in answering questions.
97. The disciplinary hearing ended with the Claimant walking out, Mr Sheikh having been told that his behaviour was unreasonable and upsetting to the Claimant. Mr Sheikh said in response to Ms Andrews' complaints was "*what do you want me to do, stay quiet? Okay I will stay quiet. I will not make a single noise.*"
98. In the judgment of the Tribunal, the way that Mr Sheikh conducted the disciplinary hearing was unprofessional and unfair. It was made clear from the outset that he viewed the Claimant negatively and had already decided that at least one act of misconduct had been committed (the door slam); apart from the fact that he said so, he also required two others to be in the room for his protection. It was never explained to the Tribunal how slamming a door was an act of violence, an extreme term. Mr Sheikh's whole attitude throughout the disciplinary hearing in the judgement of the Tribunal was not neutral and the Tribunal finds as a fact that his continued interruption of the Claimant and references to her reading from notes were mocking and belittling. This was demonstrated by his final words in saying he would not make a single noise, a form of words that showed Mr Shaikh was not taking the Claimant's or Ms Andrews' concerns seriously. The Tribunal prefers the unchallenged evidence of Ms Andrews that Mr Sheikh was shouting. The Tribunal also reminded itself that Mr Sheikh as early as the disciplinary invite letter indicated that he considered the Claimant was guilty of misconduct without any further explanation.

99. The Tribunal noted there is no evidence that on or before 11 January 2021 the Claimant provided false, misleading or self-serving information to the authorities. It prefers the account of the Claimant who said that she did not contact the authorities until after her suspension. It has already addressed why it prefers the account of the Claimant in relation to the photo of AT. Given its findings that the Claimant did not receive the acknowledgement of receipt of the grievance, and was then suspended, there is no actual evidence supporting the allegation that the Claimant behaved unprofessionally or inappropriately in contacting the authorities. It was reasonable for the Claimant to have formed the view that given her suspension, the Respondent was not going to deal with the grievance properly. Due to the poor investigation by Mr Shaikh on the basis of what has been disclosed to the Tribunal, there is insufficient evidence to support any of the allegations levied at the Claimant.

## **Conclusions**

### *Protected disclosures*

100. The Tribunal considered each of the five alleged protected disclosures:

100.1 *“I have noticed a severe lack of communication from management. I work shifts where I am not spoken to all day, no communication asking how residents are, and other communication lapses e.g. not informed when staff have gone off isolating.”* The Claimant asserts that this is information tending to show both a breach of health & safety and a breach of legal obligations as *“communication is a big factor when in a group taking care of vulnerable persons. If not communicating, you miss something. Small issues can become big.”* (oral testimony). The Claimant orally explained that the legal obligation was *“to care, and lack of communication can affect their care.”*

In the view of the Tribunal, this allegation was not a disclosure of information. There are no facts conveyed. There is an allegation that the claimant was not informed that staff were isolating, but nothing more. This therefore is not a qualifying disclosure.

100.2 *“Back in October whilst on shift I noted a resident KW was not herself, both her mood and body language (I recorded this in her notes). Nurse HT checked obs and all were fine so with it being a weekend there was no cause at the time to call out of hours, it was passed on to Monday for a GP call out. [The nurse] spoke with KW’s family on several occasions over that weekend keeping them informed on how she was. A member of care staff then facetimed (I think KW’s daughter) and stated KW was fine! (This was reported to management). Nothing was done on Monday about KW’s condition, on Tuesday KM who was on shift with me that weekend brought up how KW was in a flash meeting, again nothing was done. If I recall right KW went to the hospital on the Thursday, almost a week after but came*

*back to the home. KW passed away a few days later.*” The Claimant in her oral evidence said that this was a disclosure of information tending to show both a breach of health & safety and a breach of legal obligations to care for the residents. “*Not calling the GP*” was a breach in her view.

The judgment of the Tribunal is that this was a disclosure of information as it conveys facts. It conveys the details of what happened in relation to resident KW according to the Claimant. The Claimant’s oral evidence was that she believed it was in the public interest; she talked about more than once how all of her disclosures were about vulnerable people in the care sector and there is a duty to care for them. She was concerned that nothing had been done as far as she was aware.

In the Tribunal’s view, the Claimant genuinely believed in this. The Chesterton factors were fully engaged in assessing whether objectively this was in the public interest and the reasonableness of the Claimant’s belief. Given the potential outcome if breached such as death, that those affected were vulnerable people in the care sector, and according to the account of the Claimant, the alleged breach could be viewed as deliberate, the Tribunal viewed the disclosure as being in the public interest and the Claimant’s belief in this was reasonable. The same applied to her belief the information she disclosed tended to show that KW’s health and safety had been endangered. According to the account given by the Claimant, KW was not well and the experienced carer was in a position to judge that from her mood and body language; yet the family were told that she was well and nothing was done about getting a GP to see her in a timely manner. Ultimately, the resident died.

In terms of the Claimant’s reasonable belief about whether the information she disclosed tended to show that a legal obligation had been breached, she made the point that there was not just a legal obligation to care, but also ensure proper medical attention was obtained. The Tribunal recognised that the case law said it was important for the Tribunal to specify the nature of legal obligation, but this does not necessarily require analysis of all laws. What is important is what the Claimant reasonably believed, not whether she was correct. She talked about the duty to care. Given that care workers and their managers can be prosecuted for neglect or gross negligence manslaughter, failure to care and seek medical attention when it is required, something which is a matter of public concern, the Tribunal believes that the legal obligation in this case is so obvious that further analysis is unnecessary. As Ms Mallin- Martin pointed out in her written submissions, the case of Eiger Securities LLP v Korshunova [2017] IRLR115 confirms that “*the identification of the obligation does not have to be detailed or precise, but it must be more than a belief that certain actions were wrong.*”; the Tribunal considers that to be the case here. The Claimant reasonably believed that there was a legal duty to care and the



information she provided tended to show that it may have been breached. The disclosure is a qualifying disclosure.

100.3 *“Fast forward to more recently, we have covid in the home now. A virus that can be deadly to anyone but more so to the elderly. To my understanding after speaking with Sarah Merry many people's thoughts on how it got into the home are true. It was brought in by a staff member, a staff member who did not isolate as instructed by the government when someone they live with had a test. Instead of isolating until the test came back that person came into work and from my understanding was on shift when their partners positive result came through. We now have residents and staff at risk because of this, many staff and residents treating positive and one resident in hospital. The same thing was also done previously by another staff member. their partner had a test they did not isolate and came into work and their partner was positive. As far as I am aware there has been no punishment for this, for doing something that could kill many people.”* The Claimant in her oral evidence said this was a disclosure of information tending to show both a breach of health & safety and a breach of legal obligations for the same reasons set out in paragraph 100.2 above, and explained that she was passing on information given by other staff members.

In the judgment of the Tribunal, this was a disclosure of information as it conveyed facts. The specific fact conveyed is that a member of staff came to work and did not self-isolate while awaiting the result of a test by her partner, which meant when his positive test result was received, that member of staff was in the care home, putting both residents and staff at risk. The Tribunal found that the Claimant had a reasonable belief that this was in the public interest, particularly in light of the Covid-19 pandemic and the impact on care homes and their residents, and she reasonably believed that this was information tending to that it was a breach of both health and safety and legal obligations. The Chesterton factors remain fully engaged in assessing whether objectively this was in the public interest and the Tribunal refers to its reasoning above in paragraph 100.2 for this and the reasons why it is a reasonable belief regarding health & safety/legal obligation. The legal obligation in this case is wider than the one detailed above, due to the additional issue about failing to comply with the legal requirement to self-isolate due to Covid. The disclosure is a qualifying disclosure.

100.4 *“Fast forward to Christmas day, we have 1 agency nurse and 1 bank (who hasn't been there very long) we then have just 5 care staff, 1 who left due to a positive result, leaving just 4 care staff! I have pictures (attached) of the conversation I had with Claire on how bad things were. I then had to phone Claire as a care staff member was threatening to walk out because I had to speak to them regarding them neglecting a resident and leaving*

*the resident and bathroom covered in faeces all morning. I got no answer when I tried to phone Sarah for help. Neither of them came in to help us. Michelle Gilligan stayed for the afternoon shift to help as again for the afternoon there were only 4 carers.”* The Claimant in her oral evidence said this was a disclosure of information in the public interest and tending to show both a breach of health & safety and a breach of legal obligations for the same reasons set out above, though she was not certain about the legal obligation point saying *“I don’t know if a legal obligation – possibly with Covid, not.”*. The Claimant’s concern was about staffing levels on Christmas Day only.

In the judgment of the Tribunal, this was a disclosure of information, in that it conveys the fact that there were insufficient staff on duty on Christmas Day 2020 and the Claimant even attached evidence of what the home manager was being told. There is the additional information that a resident and a bathroom was covered in faeces all morning. The Tribunal remains of the view that the Claimant reasonably believed that this disclosure was in the public interest for the reasons outlined above in paragraph 100.2 and was a breach of health and safety endangering individuals (the residents in the care home). The Claimant does not need to be correct. However, the Tribunal was not persuaded that the Claimant reasonably believed that a legal obligation was or had been breached as she honestly admitted in the course of her oral evidence that she did not know about the rules about staffing in a time of a Covid-19 outbreak. Given the requirement for some specificity about a breach of a legal obligation, this admission by the Claimant meant that the Tribunal did not find the Claimant had the required belief. However, the disclosure was still a qualifying disclosure on the basis of the health & safety reason.

100.5 *“Whilst on shift on this day [27 December] a resident (OT) had an unwitnessed fall, I found her on the floor in her bedroom, I called the agency nurse who was working downstairs and told Michelle in passing that OT had fallen. After checking OT over the nurse wasn’t happy with how OT was and asked me to get Claire. I went upstairs looking and Michelle told me she had told Claire and Claire went downstairs, I then found Claire sat in her office on her personal phone after being informed a resident was on the floor!”* The Claimant said that this was disclosure of information, in that the home manager and trained nurse, Ms Webber, chose to use her personal phone in her office after being notified a resident had fallen. The Claimant’s evidence was that this was a breach of health & safety and a breach of legal obligations for the same reasons set out above.

In the judgment of the Tribunal, this disclosure was a disclosure of information, but it was insufficient. The specific fact conveyed was that the home manager had been notified of a resident having fallen and was found

using her personal phone in her office before seeing the resident. While the Claimant reasonably believed such a disclosure may be in the public interest on the basis of the reasoning outlined in paragraph 100.2, this disclosure fails to convey the problem with Ms Webber being on her phone. The Claimant does not say what Ms Webber was doing. Ms Webber's position is that she was using her phone for work purposes. The wider circumstances around this disclosure is that OT was already with a nurse. What the disclosure fails to do is explain how the facts conveyed tend to show that there has been a breach of health and safety or a legal obligation. This renders the disclosure more of an accusation. In the judgment of the Tribunal, it is not a qualifying disclosure.

101. The Tribunal did not consider that there was any logic in separating the disclosures found to be qualifying in its consideration about whether an detriment was imposed on the Claimant and materially influenced by due to making of those disclosures. It will deal with this point later in this judgment.
102. The qualifying disclosures found above were made to the RI of the respondent and therefore were being made to the employer. This gives them the protected status. In addition, the Claimant relied s43G in respect of her later disclosures of substantially the same information to Care Inspectorate Wales, the Local Health Board and safeguarding on or around 19 and 20 January 2021. There is no dispute that the Claimant did so. The provisions are set out above.
103. While the Respondent argues that the Claimant made the disclosures in bad faith, there is no evidence before the Tribunal that support such an allegation. This finding is relevant both the remedy and s43G. Under s 43G, the Claimant is required to reasonably believe that the information disclosed, or any allegation contained within it, is substantially true. Mr Sheikh accepted in his oral evidence that a member of staff had attended work while her partner was waiting for the outcome of the PCR test. The evidence gives a basis for the Claimant's concern that residents were not receiving adequate care shown by the photo with AT (the Tribunal acknowledges Ms Webber's oral account that AT was end-of-life, but if correct there is no explanation as to why Ms Webber did not object to the Claimant sending her this photo if it did not show as the Claimant indicated evidence of dehydration; the Claimant was never challenged about what the photo showed). The Respondent accepts that it was short-staffed on Christmas Day. There is no evidence about KW; the most that the Respondent can say is to ask why the Claimant delayed raising the concern with the RI, but her response is that the delay was because she raised concerns with the home manager. Accordingly, having reviewed the three qualifying disclosures, the evidence before the Tribunal is that the Claimant reasonably believed as she asserts the information disclosed was substantially true. She does not need to be correct. There is no evidence that she made the disclosure to the authorities for personal gain, and it is accepted that the disclosures were previously made to the employer.

104. This leaves the issue as to whether in all the circumstances of the case it was reasonable for the Claimant to make the disclosure to the authorities. It is relevant to point out that the Claimant made a disclosure to Care Inspectorate Wales and the Local Health Board who have a well-established relationship with care homes in terms of both the provision of support and inspection. The disclosure to safeguarding was made on the recommendation of the union representative, but the safeguarding issues are obvious.
105. The Tribunal notes that it was a very short time from the grievance email of 30 December 2020 until the Claimant contacted the authorities in mid to late January 2021. However, it is also found that she had not received an acknowledgement of her grievance, had been suspended and was given few reasons as to why she had been suspended. Given these facts from the perspective of the Claimant, the seriousness of the concerns raised and the potential impact on vulnerable people isolated from the outside world due to the pandemic, the Tribunal considered it was reasonable for the Claimant to make the disclosure to the appropriate authorities. The disclosures are therefore protected under s43G as well as s43C.

#### *Detriments*

106. The Tribunal must now consider whether the alleged detriments occurred. There is no dispute that the Claimant was suspended on 30 January 2021. While the Respondent disputed whether a suspension could be viewed as a detriment, in the Tribunal's judgement it could following the case law set out above - a reasonable worker would or might take the view that a suspension was a detriment.
107. Turning to the next alleged detriment, the Tribunal has already set out its findings regarding the request for the Claimant to provide consent to the Respondent accessing her medical records. In the judgment of the Tribunal, the Respondent's request was unreasonable. It initially sought to ignore the Claimant's legal right to see a copy of any report or information sent to the Respondent in its letter of authority, and sought unfettered access to the entirety of her records. Upon the Claimant properly and reasonably amending the letter of authority to reflect both the legal position and the dates covered by the sick note to which Mr Shaikh had referred in his request, the Respondent's response demonstrated its unreasonable approach (see above). In the judgment of the Tribunal, an employee would reasonably consider an employer attempting to access all of their medical records to be a detriment, particularly given the unreasonable way Mr Shaikh acted.
108. The Tribunal then turned to the conduct of the Claimant's grievance by the Respondent through the actions of Mr Sheikh. It found that it was unreasonable. Mr Shaikh failed to carry out a grievance meeting in accordance with the provisions of the ACAS Code of Practice for disciplinaries and grievances (he did not discuss the concerns, there was no notice, no

opportunity to bring a companion was given). His focus at the meeting of 27 January 2021 was on the Claimant's whistleblowing and who she had told and when; there was little interest in the concerns that she actually raised. The grievance outcome letter demonstrated this approach and chose instead, rather than to engage and address the serious concerns raised by the Claimant, to repeatedly accuse her of giving false or misleading information without specifics. The Tribunal in its industrial experience has rarely seen a grievance so poorly conducted as has happened in this case. It has no difficulty finding it was unreasonable.

109. The Tribunal's findings in relation to the meeting of 27 January 2021 apply with equal force in relation to the last alleged detriment. The way the Claimant was treated was inappropriate and demonstrated that the Respondent had no real interest in discussing her concerns or properly investigating the allegations against her. In addition, in light of its findings in relation to the disciplinary hearing on 5 May 2021, the Tribunal has no difficulty in finding that the Claimant was subject to a detriment in the unprofessional, biased, mocking, belittling and inappropriate conduct of Mr Sheikh towards her at that meeting. A reasonable employee would consider being treated in such a way as a detriment.

110. Having established all four alleged detriments occurred, the Tribunal then considered whether one or more of the detriments occurred was materially influenced by the Claimant's protected disclosures. As no action was taken against the Claimant until she declared herself a whistleblower on 11 January 2021 (and there is no objective evidence before the Tribunal of any policy that no contact be made with an employee covered by a sick note), that there was no reasonable or proper cause for her suspension on 13 January 2021, that nothing within the statement of Ms Webber of 12 January 2021 indicated that the Claimant should immediately be suspended, that Mr Sheikh told the Claimant on 27 January 2021 that her whistleblowing was "*directly relevant*" to her suspension, that the focus of the meeting of 27 January 2021 was about the Claimant's whistleblowing, and that many of the allegations made against the Claimant in the disciplinary invitation letter were about her whistleblowing, the Tribunal drew the inference that all of the detriments were materially influenced by the Claimant's protected disclosures. Mr Sheikh has disclosed little evidence of his investigations into either the allegations against the Claimant or the concerns raised within her grievance, and admitted in his oral evidence to a wholesale failure to disclose relevant documents both to the Claimant and the Tribunal. His approach to the Claimant was shown in both his correspondence and his meetings with her and demonstrate that he had already made his mind up that the Claimant had committed misconduct with little or no evidence to underpin any such finding. Indeed, the matters of which the Claimant was accused in the Tribunal do not constitute misconduct of such a nature that a reasonable employer would find dismissal was within the range of reasonable responses. Even in relation to the matter where the Claimant on her own account could potentially be at fault (raising her voice to Bridget),

Bridget did not make any written complaint until requested by Mr Sheikh several months later and the concerns about Bridget were not addressed.

111. Stepping back, the Tribunal asked itself why would an employer conduct itself in such an extraordinary fashion with so little evidence when it was short-staffed during a global pandemic towards a long serving member of staff? In light of all of the evidence, the Tribunal inferred the reason was because of the Claimant's whistleblowing – this patently was the core of Mr Sheikh's concerns regarding the Claimant and led to his description of feeling subject to a "*tremendous unfairness*". The Tribunal did not need to rely on s48(2) ERA to find that the making of the detriments were materially influenced by the protected disclosures, but for the avoidance of doubt, the Respondent did not discharge its burden to show why the detriments were made if not due to the disclosures. The Tribunal finds that the Claimant's claims of suffering detriments due to making protected disclosures to be well-founded.

#### *Dismissal*

112. The Claimant asserts that each of the detriments are a repudiatory breach of contract in breaching the mutual duty of trust and confidence without reasonable and proper cause for the Respondent's conduct. The Tribunal agrees. The suspension was made without reasonable or proper cause and was a fundamental breach of contract. The same applies to the unreasonable demands made by the Respondent in relation to the Claimant's medical records, and the unreasonable way that the grievance, investigation and disciplinary proceedings were all conducted by Mr Sheikh. The Respondent conducted itself in such a way as calculated to damage or destroy the duty of trust and confidence required and actually did so. At no point did the Claimant ever affirm any breach of contract. The Tribunal accepts that the reason the Claimant resigned was because of the Respondent's conduct, culminating in the unreasonable way the disciplinary hearing was conducted. She did not have a new job. The Tribunal finds that the Claimant was dismissed.

#### *Reason for dismissal*

113. It is worth reiterating that the Tribunal has already found that there is insufficient evidence before it supporting any of the allegations made against the Claimant in the letter of 19 April 2021. There is no basis on which it could find that the Claimant was dismissed for a potentially fair reason as there was no reasonable investigation, there were no reasonable grounds to support a finding of misconduct and the Tribunal is not satisfied that the Respondent through Mr Sheikh would have had a reasonable belief in the Claimant's guilt.

114. The question that the Tribunal must address is whether the principal reason or one of the principal reasons for the Claimant's dismissal was that she made protected disclosures. Given that the Respondent breached the contract fundamentally and repeatedly, and the same detriments that underpin the

whistleblowing claim have also been found to be repudiatory breaches of contract, the Tribunal adopts the relevant findings from above.

115. While the test of “material influence” is a lower threshold than the test of “principal reason for dismissal”, the Tribunal has no hesitation in finding that the Respondent conducted itself in a way calculated to damage or destroy the mutual duty of trust and confidence and actually doing so because the Claimant had the temerity to make protected disclosures, not just to the Respondent, but also to the authorities. Mr Sheikh used the phrase to describe his view of the Claimant’s actions of “*disappointed*” and felt it was tremendously unfair; this had the ring of truth about it and is one of the few parts of Mr Sheikh’s evidence that is supported by the evidence before the Tribunal. He was disappointed and felt it was tremendously unfair, and that is why he treated the Claimant in the way that he did. It was the Claimant’s whistleblowing that led to the Respondent fundamentally breaching the contract of employment. The Tribunal finds that the Claimant was automatically unfairly dismissed under s103A ERA.

116. The claim for unfair dismissal also succeeds; the Claimant was dismissed and not for a potentially fair reason; she was dismissed because she blew the whistle. The procedure used was also unfair. The Claimant did not receive the benefit of a proper investigation where all the allegations and evidence collected were put to her. The investigation and the dismissing officer (who was the same person) was not neutral and was principally interested in finding out the details and extent of the Claimant’s whistleblowing. The decision to require the Claimant to sit in a room with three people while her union representative was only allowed to attend remotely, and then to be subjected to accusations that she was violent was unfair. The way that the disciplinary hearing was conducted by a dismissing officer who behaved unprofessionally and in a manner humiliating to the Claimant was unfair. The fact that an independent person was not involved at any stage of the process and was unlikely to be involved in the appeal. given the failure to offer an independent appeal officer for the grievance, was unfair. While Mr Sheikh said he had been told the likely cost of an independent person doing the whole process was in the region of £10,000, as the deputy home manager was barely involved, no thought was given to her dealing with part of the process or asking an independent person to deal with one stage. While the Respondent is small, it is not absolved from the obligation to act fairly. The Tribunal finds that the Claimant was unfairly dismissed under s94 ERA.

### **Remedy**

117. Dealing with preliminary matters first, there is no evidence on which the Tribunal could find bad faith on the part of the Claimant as previously found. In addition, there was no evidence on which it could find that it would be just and equitable to reduce the basic award or the compensatory award for culpable or blameworthy conduct due to the Claimant’s conduct before dismissal or contributing to her dismissal. The point of the public interest disclosure scheme

is to protect employees like the Claimant who raise concerns; that is not culpable or blameworthy conduct.

118. In relation to Polkey, the Tribunal finds that, contrary to the Respondent's submissions, there is a 0% chance that the Claimant would have been fairly dismissed by this employer. Firstly, there is insufficient evidence to support any finding against the Claimant in respect of the allegations set out in the disciplinary invite letter. Secondly, taking the allegations at their highest, in the view of the Tribunal they do not constitute misconduct for which a long serving employee could be dismissed by a reasonable employer. Thirdly, given the Respondent's failure to carry out a fair procedure in respect of either disciplinary or the grievance and Mr Shaikh's biased approach, the Tribunal considers it unlikely that this employer would have carried out a fair procedure.
119. The basic award is a standard calculation and equates to £2360.60 due to the Claimant's date of birth of 5 December 1989, 13 years' service and a weekly gross pay of £214.60.
120. The compensatory award is made in respect of the financial losses suffered by the Claimant due to her dismissal. This compensation is uncapped due to the finding of automatic unfair dismissal.
121. The claimant provided very little evidence in relation to remedy. She revealed that her new job was in a local Chinese restaurant for which she received £97 less than when she was employed by the Respondent, but did not tell the Tribunal when it started. The job searches within the hearing bundle show that the Claimant searched for work very little after 28 July 2021. The Tribunal considered the schedule of loss for assistance, which appeared to indicate that the Claimant started her role on 28 July 2021, judging by the calculations within. The Tribunal would observe that it is not uncommon for the parties to focus on the liability decision to the exclusion of the evidence needed for a remedy decision, and this appears to be the case here.
122. The Claimant said that she was unwilling to work in the care sector again due to her experience at the Respondent after she blew the whistle. The Tribunal was not persuaded by this contention, given that the Claimant had many years working in the care sector and was good enough to be promoted to the responsible role of senior carer. The Tribunal bore in mind that the Claimant's personal circumstances limited her hunt for work, but from the limited evidence before it, she appeared to make few applications after she commenced her role in the Chinese restaurant. The Tribunal used its industrial knowledge to reflect that it was aware that both the care sector and hospitality suffered staff shortages from the summer of 2021 onwards, both of which are substantial sectors across all of the region.
123. The Tribunal concluded that it is more likely than not that the Claimant was satisfied in her job at the Chinese restaurant and was not seeking to further



mitigate her loss. Accordingly, it only awarded for 12 weeks' lost wages in compensation up to 28 July 2021 and after this date, no further award was made for wages. The Tribunal was aware that the Claimant also sought notice pay, but this was not awarded. This was on the basis that as the Claimant brought a claim of constructive unfair dismissal, any payments received in wages had to be deducted (as an exception to the *Norton Tool* principle – Stuart Peters v Bell 2009 ICR 1556 CA) and it would be double recovery as it covered the same period as the wages award. However, as the Tribunal was concerned that the Claimant may be taxed on this post-employment award, it awarded the lost wages on a gross basis (£2575.20) and reminds the Claimant that it is her obligation to settle any tax due. Pension loss was awarded until 28 July 2021 on the same basis; at £2.80 a week, this totalled £33.60. The Tribunal also award £250 for loss of statutory rights, reflecting the modest weekly wage of the Claimant. This leads to a total for the compensatory award of £2858.80.

124. The Tribunal then considered the issue of the ACAS uplift. It bore in mind the case of Slade set out above and noted that there was not a wholesale failure to comply with the requirements of the ACAS Code of Practice. There was an investigation, the allegations were set out in advance to the Claimant before she attended the disciplinary hearing, and the Claimant was permitted to bring union representation at the disciplinary meeting. On the other hand, the investigation was poor and very little evidence was disclosed either to the Claimant (or the Tribunal), Mr Sheikh had conflated the investigation process for a disciplinary and a grievance meeting, the Claimant had no opportunity to bring a companion to a grievance meeting (though the Tribunal observed that the meeting of 27 January was not a grievance meeting as the Claimant's concerns were not properly explored so the Claimant was deprived of a proper grievance meeting), the suspension was without proper or reasonable cause, and the treatment of the union representative at the disciplinary hearing was unreasonable. The biased approach of the same individual, Mr Shaikh, who acted as both investigation officer, dismissal officer and grievance officer could not be ignored. The Tribunal considered the need to ensure that there was no element of double recovery with the injury to feelings award and concluded, while admitting that such matters are more a matter of art than science, that the correct uplift was 12.5%. For the compensatory award, this meant the additional compensation was £357.35.

125. The Tribunal reminded itself that the Claimant was entitled to any financial losses arising out of a successful claim of suffering a detriment due to a public interest disclosure, but there was no evidence of any other financial loss other than that dealt with within the unfair dismissal award. This therefore left consideration of an injury to feelings award. The Tribunal reminded itself that no such award can be made in respect of the dismissal itself; this award should be on the basis of the four detriments it has found were materially influenced by the Claimant's protected disclosures.

126. The Tribunal reminded itself that the detriments were suffered over a period of approximately four months (13 January 2021 to 5 May 2021). They formed a pattern of targeting the Claimant due to her whistleblower status. On this basis alone, this meant that the award must be within the middle or higher Vento band, not the lower. The Tribunal did not consider that the acts of detriment were of such severity that an award in the higher band was appropriate, and noted that Ms Mallin-Martin did not make such a submission. The middle band was found to be the appropriate range.
127. The difficulty was that the Claimant provided little evidence of injury to feelings. The Tribunal has already said that it was not persuaded by her contention that her treatment had put her off working in the care sector in its entirety. The schedule of loss said more, but this was not reflected in the Claimant's sworn evidence. The Tribunal was left with nothing more than common-sense conclusions that the Claimant was likely to be upset by such treatment; this was certainly supported by the comments in the transcript of 5 May 2021 about the Claimant being upset and then in the end walking out and resigning with immediate effect. The Claimant was troubled by her suspension as shown by her repeated questions as to why she had been suspended. There is no evidence to support any finding of injury to feelings caused by the detriments in relation to medical records, and no access was in the end given.
128. Taking all these factors into account, the Tribunal concluded that the award for injury to feelings should be in the mid-range of the middle band and awarded £15,000. No award for aggravated or exemplary damages made. No order for interest was made as it was not contended for. With the ACAS uplift, the additional compensation for the injury to feelings was £1875.00.

Employment Judge C Sharp  
Dated: 16 May 2022

JUDGMENT SENT TO THE PARTIES ON 17 May 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche