



# EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Mr L McLaughlin

AND

BUPA Care Homes (GL) Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Middlesbrough

On: 24,25,26 September 2018  
22 and 24 October 2018

Before: Employment Judge Shepherd

Members: Ms S Don  
Mr G Gallagher

### *Appearances*

For the Claimant: Mr Robinson-Young  
For the Respondent: Mr Bayne

## RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of automatically unfair dismissal for making a public interest disclosure contrary to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The claim of detriments for making public interest disclosures contrary to section 47B of the Employment Rights Act 1996 are not well founded and are dismissed.

## REASONS

1. The claimant was represented by Mr Robinson-Young and the respondent was represented by Mr Bayne.
2. The Tribunal heard evidence from:

Lora Williams, former Team Leader;  
Bryony Pickett, Bank Nurse;  
Lee McLaughlin, the claimant;  
Lisa Fleming, former Regional Director;  
Aileen Waton, former Managing Director for Scotland and North Region.

3. The Tribunal also had sight of a written witness statement from Helen Holden, former Regional Director of the respondent. A witness order had been made for Helen Holden to attend the Tribunal hearing. That witness order was set aside by Employment Judge Buchanan when Helen Holden wrote to the Tribunal indicating that she had a prearranged holiday abroad on the date of the hearing. In her letter she indicated that when she had provided a witness statement to the respondent's representatives it had been on the basis that she understood that she would not have to attend the hearing. She said that she had informed the respondent's representatives that she had been unwell following some personal circumstances which had led to her resignation from her employment in order to take another role which did not involve travelling time away from home. She was surprised when she was then asked to attend the hearing and that a witness order had been obtained. She said that she was unable to attend the hearing as she would be out of the country on a holiday which had been booked at a time when she believed she would not be required to attend the hearing. She also said that she was not well enough to attend the hearing.

The statement was signed and contained a statement of truth. In her letter Helen Holden asked for her witness statement to be rescinded.

4. Mr Robinson-Young, on behalf of the claimant, submitted that this witness statement should not be considered by the Tribunal as the witness had said it was rescinded. Mr Bayne, on behalf of the respondent, said that the Tribunal should consider the statement and attach the appropriate weight to it.

5. The Tribunal considered this issue. The letter from Helen Holden did not seek to deny the truth of her evidence in the written statement and the Tribunal found that the contents of the letter made it apparent that the witness was not intending to withdraw the contents of her statement and her concern was that she was unable to attend the hearing. The respondent did not seek a postponement and it was appropriate for the Tribunal to consider the contents of the written witness statement and accord it the appropriate weight.

6. There was also a written witness statement submitted on behalf of the claimant from Clare-Alison Whiteside. This witness did not attend the hearing and both these written statements were considered.

7. Written witness evidence which is presented in circumstances where the witness does not attend the hearing is accorded much less weight than evidence given in person when that evidence can be challenged and properly tested and the Tribunal has considered both these statements on that basis.

8. There was no witness statement or evidence provided by the Home Manager. In view of the allegations and criticisms of the behaviour of the Home Manager, the Tribunal find it appropriate not to provide the identity of this individual in this Judgment and reasons.

9. The Tribunal considered provisions of rule 50 and whether it was necessary to make an anonymisation order in respect of the Home Manager. The Home Manager did not attend the hearing. Members of the press were present at the hearing on the sixth and seventh day of the hearing and they made representations to the Tribunal. The Tribunal has taken into account that serious allegations were made against the Home Manager and the Tribunal has considered the European Convention Article 8 right to respect for private and family life in relation to an anonymisation order under rule 50. Taking into consideration that the Home Manager was not a party to the proceedings and did not have the opportunity to defend himself against serious allegations the Tribunal has balanced the convention right of freedom of expression and the principle of open justice and the interests of the home manager. There were serious issues in respect of the failure to safeguard the needs of vulnerable residents. There is a legitimate public interest in the reporting of these issues including matters relating to the Home Manager and the claimant and the Tribunal is satisfied that the requirements of open justice and freedom of expression mean that it was not appropriate for an anonymisation order to be made pursuant to rule 50. However, the Tribunal has not referred to the name of the Home Manager in this judgment and reasons.

10. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, consisted of 860 pages. The Tribunal considered those documents to which it was referred by parties.

11. The claims and issues to be determined by the Tribunal were identified and agreed as follows:

#### The Claims

1. The Claimant was employed by the Respondent as the Clinical Services Manager at Hillview Care Home ('the Home') from 20 February 2017 until his dismissal on 5 June 2017. He brings claims that as, a result of making various protected disclosures between 22 March and 5 June 2017, he was:
  - a. Automatically unfairly dismissed by the Home Manager, on 5 June 2017, contrary to s103A of the Employment Rights Act 1996 ('the ERA').
  - b. Subjected to the detriment of being denied the right of appeal against dismissal by Helen Holden ('HH'), Regional Manager, and/or Lisa Fleming ('LF'), Regional Director for East Scotland, contrary to s47B of the ERA (Detriment 1).
  - c. Subjected to the detriment of an NMC and DBS referral by Aileen Watson ('AW'), Managing Director for Scotland and the North, contrary to s47B of the ERA (Detriment 2).

2. The alleged protected disclosures relied upon by the claimant are (in chronological order):
  - a. Informing Lucy Campbell, consultant from James Cook University Hospital, with whom the Home had a contract to provide 10 beds, on 22.03.17 that he did not think the Hospital's patients were safe (Disclosure 3, pp39-40).
  - b. Informing Ann Parker ('AP'), external consultant, and the Home Manager of 'a massive amount of medication errors' on 07.04.17 and 27.5.17 (Disclosure 4, p41)
  - c. Informing the Home Manager on numerous occasions in May 2017, that the Home was not meeting the needs of resident J (Disclosure 6, p45).
  - d. Informing the Home Manager, HH and an inspector from the CQC ('MR-C') on 22.05.17 that a patient had been admitted to the Home without his knowledge 3 days previously (Disclosure 5, pp43-4).
  - e. Sending the email which appears at p149 to HH dated 03.06.17 concerning staffing levels (Disclosure 1, pp35-7).
  - f. Informing the Home Manager of a near miss incident involving a resident almost falling out of a sling, and providing him with an incident report and statement from a care assistant, Jude Foster on 05.06.17 (Disclosure 2, p38).
3. C no longer pursues his claims for associated disability discrimination, holiday pay, or other outstanding payments.
4. The issues
  - a. Did C make a disclosure of information on any of the occasions alleged, what was disclosed and to whom?
  - b. If so, did that disclosure tend to show, in C's reasonable belief, one or more of the relevant failings under s43B(1), and in particular that the health and safety of a person has been, or is likely to be, endangered?
  - c. If so, was that disclosure made in the public interest?
  - d. If so, was it a protected disclosure, on the grounds that it was made to R's employer (s43C) or to a prescribed person (s43F)?
  - e. If C made any protected disclosures, was that the reason, or the principal reason, for his dismissal?
  - f. If C made any protected disclosures, did that significantly influence R's decision to deny him the right to appeal his dismissal?

- g. Were the referrals to the NMC or DBS protected by the doctrine of absolute privilege?
  - h. If not, and if C made any protected disclosures, did that significantly influence R's decision to refer him to the NMC or DBS?
5. If appropriate, the issues that may arise in respect of remedy are:
- a. Would, or might, C have been dismissed in any event, either:
    - i. For misconduct due to his involvement in an incident involving Claire Jackson and a bath of food slops; or
    - ii. By reason of redundancy upon the closure of the Home on 11.09.17?
  - b. In either event, what are C's pecuniary losses as a result of his dismissal?
  - c. What is the appropriate award for injury to feelings for being subjected to either of the alleged detriments?
  - d. Has C sustained any additional pecuniary losses as result of being subjected to either detriment?
  - e. Should any deduction be made on the grounds that the disclosures were not made in good faith (s49(6A))?

12. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

12.1. The claimant was employed by the respondent from 20 February 2017. He was employed as a Clinical Services Manager at Hillview Care Home, Eston.

12.2. The claimant was not provided with a job description or terms and conditions of employment. When giving evidence to the Tribunal, he agreed that his responsibilities included managing all clinical issues and the nursing staff at the home.

12.3. The claimant undertook mandatory training and induction at Saint Mary's Care Home, another of the respondent's homes from 20 February 2017 to 24 February 2017.

12.4. Helen Holden implemented a Home Improvement Plan on 7 March 2017 in respect of Hillview. This improvement plan included references to actions required to be carried out by the Clinical Services Manager.

12.5. The Tribunal had sight of a file note dated 8 March 2017 in which there is reference to the Home Manager speaking to the claimant regarding the claimant having referred to members of staff as “crap” in front of district nurses. The claimant denied having any meeting or discussions with the Home Manager on that date and he said that this and the other typed notes had been fabricated.

12.6. On 22 March 2017 the claimant said that he had a conversation with Lucy Campbell, who was the nursing consultant in respect of a contract with James Cork University Hospital, with regard to the transfer of patients from that hospital to Hillview. The claimant said that this conversation was in the presence of a Regional Clinical Services Manager. This was the first alleged disclosure when considered chronologically and was referred to as ‘disclosure 3’. The claimant said that Lucy Campbell had asked the claimant whether the residents were safe and he replied that they were not with the staffing levels, poor quality of senior staff and the amount of medication errors. The claimant said that Lucy Campbell had accepted the claimant’s disclosure, reported to her manager and the contract with the NHS was not renewed. The respondent’s evidence was that this contract was coming to an end, it was a winter beds contract and Aileen Waton believed that it had not been put out to tender again.

12.7. The claimant said that, on the same day, 22 March 2017, he told the Home Manager that he had had to be honest with Lucy Campbell and the Home Manager merely shrugged his shoulders.

12.8. In a typed file note dated 30 March 2017 the Home Manager has recorded that Helen Holden had found it necessary to speak with the claimant regarding his conduct in a safeguarding meeting. It was said that the claimant had been overpowering and had interrupted other people when they were talking.

12.9. On 6 April 2017 the claimant said that he made a further disclosure, ‘disclosure 4’, to the Home Manager and to Ann Parker, Specialist Medicines Optimisation Technician for the North of England Commissioning Support (NECS) during an audit carried out on behalf of Redcar and Cleveland Borough Council. The claimant said that he had disclosed a massive amount of medication errors that he had noticed during his own personal medication audits. He said that one of the medication administration record sheets was missing 60 signatures and these highlighted that the residents were not receiving their prescribed medication which is a serious safeguarding issue and a risk to residents’ health and safety. The claimant said that these errors were not reported to the correct governing bodies and were not highlighted until the Care Quality Commission’s findings about Hillview were published.

12.10. In a file note dated 12 April 2017 the Home Manager records a conversation with the claimant in respect of his attitude towards staff.

12.11. In a Monthly Home Review dated 27 April 2017 Helen Holden records failures in respect of the daily walk around and medication management.

Amongst other things, it is stated that clinical risks had not been completed since 14 February 2017 and that the last medical audit evident was February 2017 x 3.

12.12. The claimant said that during May 2017 he raised numerous concerns to the Home Manager that they were not meeting the needs of a resident named J. He said that the Home Manager told him “we can’t get rid of him. We need the money”.

12.13. On 22 May 2017 an inspection of the home took place by the Care Quality Commission. The inspector was Michelle Richardson-Christie. Ms Richardson-Christie highlighted that a care plan devised for a resident, Mr G was insufficient. The claimant informed Michelle Richardson-Christie that he was unaware that this resident had been admitted. The claimant said this was disclosure 5.

12.14. On 23 May 2017 there was a file note in respect of a conversation. This file note is signed by the Home Manager and refers to Helen Holden having spoken to the claimant in respect of the claimant having told the CQC that he didn’t know that a resident was in the building and that no one had informed him. The note indicates that Helen Holden had spoken to the claimant and informed him that this could have been prevented if he had done his CSM walk round. It is stated that the claimant explained that he could not do this because the CQC had been there and that Helen Holden advised the claimant that, no matter what is going on in the home, he should complete the CSM walk round. It was the claimant’s role to ensure these were done daily. It was also said that Helen Holden had to speak to the claimant regarding his conduct when the CQC inspector was giving feedback and that the claimant had been interrupting the inspector.

12.15. The Monthly Home Review by Helen Holden on 26 May 2017 referred to failures in respect of care plans and medications.

12.16. On 3 June 2017 the claimant sent an email to Helen Holden asking for supervision regarding his employment at Hillview. The claimant referred to the difficulties with regard to cover being provided and he requested a “supervision” so that they could attempt to amend these issues that were continually arising.

12.17. On 5 June 2017 the claimant said that he informed the Home Manager that, on Sunday, 4 June 2017, a Health Care Assistant had raised serious concerns about a patient almost falling out of a sling that was not suitable for him as it was too big. The Health Care Assistant had completed an incident report and the claimant handed this to the Home Manager together with a statement from the Health Care Assistant. The claimant said that the Home Manager crumpled both of these up and the Home Manager said:

“I’ll sort this, and she wants to fucking watch it as I ordered them slings ages ago... If he “nearly” fell out it’s not an incident so I don’t know what she’s fucking on about”

12.18. Later the same day, 5 June 2017, the claimant was called to a meeting in the Home Manager's office. Susan Carter, a Home Manager from another home was present as note taker. The notes of the meeting show that the Home Manager told the claimant that he was going to terminate his probation with immediate effect due to:

“Professional conduct, i.e. talking in front of professionals in an inappropriate manner and also clearly stating to Michelle CQC that you were unaware of the new admission.”

12.19. The Tribunal had sight of computer entries which referred to an audit history. There were notes of conversations between the Home Manager and MAS (Management Advisory Service), the respondent's HR assistance consultant Gabriella Basiu. The summary box referred to “probation case” and it was stated with some repetition:

“Summary Box includes the following information:

“Concerns re performance – not completed clinical walk around in 2 weeks (had resident admitted and didn't know was there) also not completing risk meetings in 3 weeks. No reason why – has had extra CSM in place for support for 3 months. Also been told by CQC was dismissed from last employer (only verbal reference given and no reason for leaving given – (the Home Manager) to check what was declared by him at recruitment before suggesting dishonesty). 01/06 (the Home Manager) wants to hold probation meeting on 05/06/17. Potential dismissal. Talked through other options i.e. PIP, extension also. 05/06 failed probation – awaiting to review outcome 07/06 awaiting to discuss with (the Home Manager) – GB concerns over this meeting. 15/06 feedback given on letter – unsure of final version undefined.

Concerns re performance – not completed clinical walk around in 2 weeks (had resident admitted and didn't know was there) and also not completing risk meetings in 3 weeks. No reason why – has had extra CSM in place for support for 33 months. Also been told by CQC was dismissed from last employer (only verbal reference given and no reason for leaving given – (the Home Manager) to check what was declared by him at recruitment before suggesting dishonesty).

01/06 (the Home Manager) wants to hold probation meeting on 05/06/17. Potential dismissal. Talked through other options i.e. PIP, extension also.

05/06 failed probation – awaiting to review outcome

07/06 awaiting to discuss with (the Home Manager) GB concerns over this meeting.

15/06 feedback given on letter – unsure of final version”

12.20. In a letter dated 5 June 2017, but it was accepted that this had not been received by the claimant until around 22 June 2017, the Home Manager



wrote to the claimant confirming his decision to terminate the claimant's employment with notice on the grounds of failure to complete a satisfactory probationary period. In that letter it was stated:

"Your conduct in front of other professionals was of an unsatisfactory level

- Informing CQC that you were unaware of a resident being in the building for three days. This would have come to light if CSM walkaround was completed.
- Discussing residents' personal information in the vicinity of outside professionals and visitors.

Your level of performance was unsatisfactory. It was your responsibility to ensure all nursing paperwork is completed fully and signed off by you. Paperwork that was behind listed below.

- Weekly medication audits 10 weeks behind
- Daily Clinical Walk Round not completed daily
- Nurse Clinical Supervision is Not completed"

12.21. On 22 June 2017 the claimant indicated that he wished to appeal against the decision to terminate his employment

"without any warning or supervision, for raising concerns and issues around the home manager and safety of the residents through public disclosure act."

"I am appalled that a care company the size of BUPA could treat not just a registered nurse but any employee the way I have been completely unsupported and pushed out of the company with 1 month left of a probationary period, with no previous discussion or information."

12.22. Helen Holden replied to the claimant on 26 June 2016 informing the claimant that a failed probation does not carry a right of appeal but, as the claimant's letter raised some serious concerns which required further investigation, they would appoint an impartial manager to investigate the complaint.

12.23. On 27 June 2017 Michelle Richardson-Christie sent an email to Helen Holden setting out concerns raised about the registered manager as a result of whistleblowing. There was a list of 16 issues relating to concerns about the registered manager.

12.24. On 28 June 2017 the claimant wrote to Michelle Richardson-Christie setting out a number of concerns about the Home Manager and other issues at the home. Within that email the claimant indicated that he was going to proceed with an Employment Tribunal claim as he had attempted to raise concerns via the Public Information Disclosure Act.

12.25. Lisa Fleming, Regional Director, Investigated the claimant's grievance. She interviewed the claimant, the Home Manager, Helen Holden, Michelle Richardson-Christie and Clare Jackson, the claimant's predecessor.

12.26. On 17 July 2017 the CQC served a warning notice on the respondent in relation to the respondent's registration to carry on activities at the home.

12.27. On 18 July 2017 the respondent applied to CQC to remove Hillview Care Home from registration.

12.28. On 20 July 2017 It was announced by the respondent that the Home was to close.

12.29. On 21 July 2017 the CQC provided a report on the home. The findings were that there were a number of concerns. Unannounced inspections had taken place on 22 May 2017, 30 May 2017 and 3 July 2017. There were substantial criticisms. It was stated, amongst other things, that there were gaps in care records

'  
"Care records were not regularly updated and some contained inaccuracies. Care plans were not always put in place when people moved into the service. This meant staff did not have the information they needed to provide safe care and support to people.

We raised concerns on the first day of inspection and ask for immediate action to be taken, especially in relation to the quality of record-keeping. All concerns remained in place on the third day of inspection."

12.30. On 26 July 2017 the Home Manager was suspended from duty whilst serious concerns raised regarding leadership of the home were investigated.

12.31. A Root Cause Analysis (RCA) investigation was carried out in respect of an incident relating to a resident, referred to as resident A in the report (and G at other points in these reasons), admitted to Hillview Care Home and his treatment between admission on 19 May 2017 and his transfer to hospital on 30 May 2017 followed by his passing away on 3 June 2017. The resident's daughter had raised a safeguarding alert with Redcar and Cleveland Borough Council. This investigation included a number of criticisms. It was stated:

"This investigation has been difficult to complete as an RCA due to late reporting of the initial incident, missing care records a lack of staff availability either due to leaving the business or under suspension from duties and subject to disciplinary investigations. However following the investigation, it can be determined that there were some direct causal factors which were lack of an appropriate pressure relieving mattress, inadequate pressure area care and not making appropriate notifications...

The detail concerning the resident's needs was not written down or communicated prior to admission. Operational Essentials was not fully

embedded in the home. No evidence of Take Ten, Weekly Clinical Review Meeting, Daily Clinical Walk Round, Shift Handovers in place. The 72 hours post admission audit identified incorrectly that required equipment was in place. The HM did not successfully obtain a pressure relieving mattress for the resident during his tenure in the home. The clinical equipment ordering process was not completed....

The care documentation for the resident was not completed consistently over the course of their stay in the home. The clinicians in the home did not follow BUPA policy and guidance in respect of pressure area care. The senior clinical management team failed to have the necessary oversight of the resident's needs on admission and during his stay in the home...

Responsibility for reporting lies with the HM. These incidents should have also been logged internally on Circle Metrics..."

12.32. On 21 August 2017 Lisa Fleming wrote to the claimant with the grievance outcome. The majority of the grievance was not upheld and the recommended action was as follows:

- "I will recommend that we address any upheld concerns raised regarding (the Home Manager) in line with our internal procedures.
- Daily clinical walkrounds must be completed 7 days per week, with no exceptions
- Supervision and appraisal tracker must be implemented for all staff members and reviewed monthly as part of MHR.
- Payment of £500 to be paid to you with regards to your welcome bonus by 25 August 2017.
- Payment of 20 hours outstanding holiday pay due by 25 August 2017.
- I have upheld the original decision to terminate your employment on the grounds of a failed probation and therefore will not be paying any monies lost between the date of your dismissal and the outcome of this grievance.
- I can confirm that as part of your dismissal no referral has been made to the NMC."

12.33. On 25 August 2017 the claimant appealed against the grievance outcome.

12.34. On 25 September 2017 Aileen Waton, the respondent's Managing Director for Scotland and North Region, wrote to the claimant indicating that she did not uphold his grievance appeal. The claimant had not attended the appeal hearing and Aileen Waton reached her decision having reviewed the investigation and having interviewed Helen Holden, Regional Director and Angela Proctor, Peripatetic Clinical Services Manager.

12.35. On 23 October 2017 the claimant issued a claim to the Employment Tribunal.

12.36. A confidential and legally privileged investigation summary into patient A (G) was completed and the first draft was sent to the MAS consultant on 18 December 2017.

12.37. On 21 December 2017 Aileen Waton, recommended referring the claimant and seven others to the Nursing and Midwifery Council.

12.38. On 22 January 2018 Aileen Waton wrote to the claimant indicating that:

“The investigation identified the following failings:

- As clinical lead in the home, you have failed to complete quality assurance documentation and care documentation resulting in reduced clinical oversight in the care home.

Had you participated in this investigation our investigator would have had the opportunity to interview you on these failings, but they did not have the opportunity to do so.

Since the conclusion of the investigation it has been determined that had you still remained in employment with BUPA the outcome of the investigation would have been that the case was referred to a disciplinary hearing. The outcome of this hearing could have resulted in your dismissal. As previously advised, in order to comply with certain statutory guidelines, your alleged conduct will be considered for referral to external bodies. For further details on this, please read the enclosed leaflet, “Summary of Requirements for External Referrals”.

12.39. On 13 February 2018 the respondent’s Legal Referrals team wrote to the claimant indicating that he had now been referred to the Disclosure and Barring Service (DBS) and the Nursing and Midwifery Council (NMC)

12.40. On 3 September 2018 the NMC wrote to the claimant. In that letter it was stated:

“The Case Examiners decided there is no case to answer and to take no further action.”

In the enclosed reasons for the decision it is stated:

“After reviewing all the information before them, the Case Examiners concluded that there is sufficient evidence to establish a case to answer on the facts... Therefore while there is a case to answer the Case Examiners are not satisfied that there is a reasonable prospect of a finding of current impairment and the matter is not referred further.”

## The law

### Protected Disclosure Claim

13. Section 43B(1) of the Employment Rights Act 1996

“(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 –

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

14. Section 47B (1)

“A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure.”

Section 103A

“An employee 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.”

15. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

### Disclosure

16. In **Cavendish Munro Professional Risks Management Limited – Geduld 2010 IRLR 37** Slade J stated:

“That the Employment Rights Act 1996 recognises a distinction between “information” and an “allegation” is illustrated by the reference to both of these terms in S43F.....It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings.....the ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating “information” would be “The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.” Contrasted with that would be a statement that “you are not complying with Health and Safety requirements”. In our view this would be an allegation not information. In the

employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 ... The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However, s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

17. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

"I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

### **Public interest**

18. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

"I accept Ms Mayhew's submission that applying the **Babula** approach to section 43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent

made the disclosures in the reasonable belief that they were in the public interest..... The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the 1996 Act by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words “in the public interest” were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: “the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest” (see paragraph 19 above)..... I reject Mr Palmer’s submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B(1). The words of the section provide no support for this contention..... In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant’s management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied”.

### **Reasonable Belief**

19. In **Darnton v University of Surrey** and **Babula v Waltham Forest College** 2007 ICR 1026 it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula** Wall LJ said:-

“... I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong... if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute... An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information

he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith”.

### **Legal Obligation**

20. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service** EAT0925/01 and 0991/01 Elias J observed: “*There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying.*” In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

21. The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect “*I am under pressure and stress*” did not amount to a statement that the claimant’s health and safety was being or at least was likely to be endangered.

22. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

“The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached.”

23. In **Goode –v- Marks and Spencer plc** UKEAT/0042/09 Wilkie J stated the judgment of the EAT at paragraph 38 to be:

“...the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure.”

### **Method of Disclosure**

24. The claimant in this case seeks to rely upon disclosure to the respondent and section 43C of the 1996 Act provides:-

“A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –

(a) to his employer.....”.



25. It is, in some cases, appropriate to distinguish between the disclosure of information and the manner of its disclosure but in so doing the Tribunal must be aware not to dilute the protection to be afforded to whistleblowers by the statutory provisions: **Panayiotou –v- Kernaghan 2014 IRLR 500.**

### **Claim for Automatic Unfair Dismissal Section 103A 1996 Act**

26. Section 103A

“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”.

27. The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

28. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J referred to the distinction between automatically unfair dismissal by reason of making a protected disclosure and detriment on the ground of making a protected disclosure as follows

“The Claimant’s claim for “ordinary” unfair dismissal under ERA section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under ERA section 103A. Section 103A provides:

“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 claim.

### **Detriment**

29. Section 103A, automatic unfair dismissal by reason of making a protected disclosure, and section 47B(1), a right not to be subjected to a detriment on the ground of making a protected disclosure, are in different Parts of the ERA, Part IX and IV respectively and use different language. The consequences of these differences for the tests in establishing claims for unfair dismissal under ERA section 103A and being subjected to detriment under ERA section 47B(1) were authoritatively determined by the Court of Appeal in **Fecitt v NHS Manchester** [2012] IRLR 64, a claim under ERA section 47B(1). These differences were explained by Elias LJ in paragraph 44 in which he held:

“ I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal

reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in *Kuzel v Roche Products Ltd* [2008] ICR 799, para 48, in the context of a protected disclosure.

Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts.”

Different tests are to be applied to claims under ERA sections 103A and 47B(1). Thus for a claim under ERA section 103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERA section 47B(1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer’s detrimental treatment of the Claimant.”

## Conclusions

30. The Tribunal has given consideration to the credibility of the claimant’s evidence. The Tribunal found that this was at times inconsistent, vague and, contradictory. He was unclear and inconsistent with regard to events on the day Clare Jackson, the former Clinical Services Manager, left. This incident was not directly relevant to the issues the Tribunal had to determine but it was relevant to the credibility of the claimant. Clare Jackson had told Lisa Fleming that the claimant had picked her up, carried her over his shoulder and placed her into a bath of food slops. The claimant denied that there was any misconduct or professional misconduct by him. In his grievance appeal he said that the staff had asked him to assist Clare to the residential area bathroom corridor which he did and he then walked back to the office. He stated that what the care staff did to her was not his concern. He denied the allegation against him yet it was clear from the CCTV footage that he had carried Ms Jackson over his shoulder through the residents’ area and placed her in the bath of food slops.

31. The claimant contended that he was not on probation. There was clear evidence that he was on a probationary period. The Tribunal accepts Aileen Waton’s evidence that all employees are subject to a probationary period and that the respondent is a large employer and that exceptions are not made. The claimant made no mention of his allegation that he was not subject to a probationary period in his grievance or appeal. In fact, he positively asserted that he was aware that he was on probation and that he had one month left of his probationary period.

32. There were further inconsistencies within the claimant’s evidence. One of which was with regard to his evidence in respect of the daily walk round forms. Towards the start of his oral evidence to the Tribunal the claimant said that he had never seen or completed these forms. He said that had completed something else which he had then put in the Operation Essentials folder in the Home Manager’s office. Towards

the end of his evidence he said that he had actually completed the daily walk round forms. One of the allegations against him within the letter confirming his dismissal was that daily clinical walk round had not been completed for two weeks. He did not appear to have asked for the completed forms to be provided during the course of the grievance procedure or by way of a request for specific disclosure in the Tribunal proceedings.

33. The evidence of the witnesses on behalf of the respondent was clear and credible. Lisa Fleming and Aileen Waton did not seek to hide responsibility for the poor levels of care and the failure of the home.

34. The Tribunal has considered each of the disclosures in chronological order.

35. The first alleged disclosure was that of Informing Lucy Campbell, nursing consultant from James Cook University Hospital, with whom the Home had a contract to provide 10 beds, on 22.03.17 that he did not think the Hospital's patients were safe. It was submitted by Mr Bayne, on behalf of the respondent, that Lucy Campbell was neither an employee of the respondent nor of the CQC and information provided to her could not be a protected disclosure under the legislation.

36. The claimant made the same disclosure to the Home Manager on the same day. He said that told the Home Manager that he had to be honest with Lucy Campbell after the numerous incidents and concerns had been raised and the Home Manager shrugged his shoulders and appeared not to comprehend what the claimant was telling him. Mr Bayne submitted that telling the Home Manager that he had been honest with Lucy Campbell was not information which tended to show health and safety had been endangered.

37. The Tribunal is satisfied that there was a protected disclosure on this date. The claimant had made a disclosure that the health and safety of residents was in danger. The disclosure had been made to the claimant's employer. The contract was not renewed and no further residents were admitted from James Cook University Hospital under the winter beds arrangement. This was coming to an end in any event and it is believed that it did not go out to tender again. The Tribunal is concerned that no further action was taken with regard to the relevant residents already at Hillview by those managing the residents, including the claimant.

38. The next alleged protected disclosure was that of informing Ann Parker, external consultant, and the Home Manager, of a massive amount of medication errors on 7 April 2017 and 27 May 2017. These were errors that the claimant had noticed in his own personal medication audits. The claimant said that these errors were not reported to the correct governing bodies and were not highlighted until the CQC's findings about Hill view were published.

39. The Tribunal is satisfied that the claimant did disclose information in this regard. He disclosed that medication errors had been found and this was clearly a danger to the health and safety of the residents.

40. The third alleged protected disclosure was that of informing the Home Manager, in May 2017 that the home was not meeting the needs of a resident because the

home was not equipped to look after him adequately. It was submitted by Mr Bayne that the raising of concerns does not, on its own, amount to the conveying of facts. There was an absence of what, if any, facts were conveyed.

41. The Tribunal finds that this was a protected disclosure as the claimant was informing his employer, via the Home Manager, of information that the resident's needs were not being met. The Tribunal has considered whether this is actually the conveying of any information and is, on balance, satisfied that information that a resident's needs are not being adequately met can be information relating to the health and safety in the home.

42. The fourth alleged protected disclosure is that of informing the Home Manager, the Regional Clinical Manager and the CQC that the claimant was unaware of a resident having been admitted. The Tribunal is satisfied that this did amount to a disclosure of information. It was submitted by Mr Bayne that the motivation for conveying that information was to defend himself from criticism about the resident's care plan rather than to protect the public interest. The question of bad faith would be relevant in respect of remedy. However, disclosures can be made for mixed motives and the Tribunal is satisfied that this information did disclose concerns about the admission of a resident which was a disclosure relating to health and safety and in the public interest.

43. The next alleged protected disclosure was the sending of an email to the Home Manager dated 3 June 2017 concerning staffing levels. The Tribunal finds that this email was a request for a discussion or "supervision" regarding his employment. The claimant did not set out any concerns or information with regard to health and safety risks. The claimant was concerned about coming in on his day off. The email is not specific enough to raise concerns about staffing issues and risks to the residents. On balance, the Tribunal finds that this was not a protected disclosure.

44. The final alleged protected disclosure is with regard to the claimant informing the Home Manager of a near miss incident involving a resident almost falling out of the sling. It involved providing the Home Manager with an incident report and a statement from a Care Assistant. The Tribunal accept that this was a protected disclosure. The claimant disclosed information about a risk to the health and safety of a resident.

45. The Tribunal accepts that a number of protected disclosures were made. In those circumstances, the issues to be considered are in respect of the consequences of those disclosures. Were they the reason why or the principal reason why the claimant was dismissed and did it significantly influence the respondent's decision to deny the claimant a right of appeal against his dismissal and the referrals to the NMC and DBS.

46. The Tribunal finds that the dismissal was unreasonable. There was no warning, no opportunity to improve and no proper discussion or explanation of the reasons for dismissal at the time. The letter confirming the dismissal gave different reasons and expanded upon those given to the claimant on the day of dismissal. Had the claimant completed two years continuous service his dismissal would have been unfair. The Tribunal is of the opinion that the respondent should accord fair and reasonable treatment to all its employees. However, that is not the issue the Tribunal has to

determine, the Tribunal has to decide whether the dismissal was for the reason or principal reason that the claimant had made public interest disclosures.

47. The Tribunal was concerned that it did not hear evidence from the Home Manager who dismissed the claimant. There was no appeal. However, the claimant's grievance was thoroughly investigated, as was his appeal against the grievance outcome which was detailed, and the conclusion was that the dismissal was upheld. There was clear documentary evidence that the Home Manager had taken advice with regard to the ending of the claimant's employment prior to the date in question and prior to the disclosure that was said to be the trigger for the dismissal. He had spoken to the MAS consultant on 1 June 2017 and indicated that he wanted to hold the probation meeting on 5 June 2017 and that there was a potential dismissal. The notes show that the consultant was concerned over the meeting and had talked through other options. The Home Manager did not heed the concerns and dismissed the claimant.

48. The Home Manager had reacted unprofessionally and inappropriately when the disclosure about the inadequate sling was made to him but his ire was expressed to be in respect of the nurse or Care Assistant who completed the incident form. No action was taken against those employees in respect of their disclosures and the Tribunal is satisfied that the respondent has established the fact that the reason for the claimant's dismissal was as a result of concerns about his performance and not in respect of any of the protected disclosures. Those concerns had come from a number of sources including Helen Holden, the CQC, and with regard to the manner in which had left his previous employment.

49. The evidence of Lisa Fleming and Aileen Waton that the claimant was not allowed an appeal against his dismissal during his probationary period as it was not provided for within the respondent's procedure was consistent. A thorough investigation was conducted and it was concluded that the decision to terminate the claimant's employment was upheld.

50. The lack of opportunity to appeal was not as a result of any disclosure. It was because the respondent's policy did not provide for an appeal during the probationary period.

51. The claimant was one of a number of employees who had made disclosures. The evidence with regard to referring the claimant to the NMC and DBS was clear. The claimant and the seven others were referred following a recommendation in the investigation and not as a result of any disclosure by the claimant. The Tribunal heard that there was an atmosphere of disclosure and around 17 disclosures had been made. The investigation recommended that eight employees should be referred to the NMC and the DBS. The evidence of Aileen Waton was clear and consistent on this point and the Tribunal accepts that the respondent has shown that these referrals were not by reason of any disclosure or alleged disclosure by the claimant.

52. The claimant said that he had been made a scapegoat. This was clearly an extremely poorly performing care home which was failing in its duty of care to the vulnerable residents. This was accepted by the witnesses on behalf of the respondent. The claimant was the senior clinician at the home at the time of some of

these serious failings. Whilst he may not have been wholly responsible and it appeared that these failings had been present before and after his employment, he did bear some responsibility. Very serious criticisms were raised by the CQC in respect of record-keeping and the administration of medicines which were within the claimant's responsibility.

53. The Tribunal is satisfied that there were a number of protected disclosures by the claimant. However, it is also satisfied that these disclosures were not the reason or principal reason for the claimant's dismissal and the claim of automatically unfair dismissal contrary to section 103A is not well-founded and dismissed.

54. The Tribunal is also satisfied that the denial of a right of appeal against dismissal or the referrals to the NMC and DBS were significantly influenced by the protected disclosures and the claim of detriment contrary to section 47B is not well-founded and is dismissed.

**Employment Judge Shepherd**

2 November 2018