EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: B

Heard at: Manchester **On:** 11-15 September 2023
24 October 2023
(in Chambers)

Before: Employment Judge McDonald
Ms C Linney
Mr D Lancaster

REPRESENTATION:

Claimant: In person
Respondent: Mr L Fakunle, Senior Litigation Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that she was automatically unfair dismissed in breach of section 103A of the Employment Rights Act 1996 ("ERA") succeeds. The principal reason for the claimant's dismissal was that she had made a protected disclosure.

2. The claimant's claim that she was subjected to detriments for making protected disclosures succeeds in relation to the following detriments:

   D1 The claimant's pay allegedly being reduced by £100 per week, in or around November 2020.

   D2 The respondent refusing to allow the claimant to take annual leave during a shift she was unable to attend as a result of being in contact with someone who had tested positive for Covid-19.

3. The claimant's claim that she was subjected to a detriment for making protected disclosures fails in relation to the following detriment:

D3 The respondent re-allocating shifts the claimant was due to do to another personal assistant despite the claimant obtaining a negative Covid-19 test result.

4. The claimant's claim that the respondent failed to pay her holiday pay for holiday accrued but untaken succeeds. The claimant was entitled to 1.8 weeks of accrued holiday pay which the respondent failed to pay her.

5. The claimant's claim that the respondent made unauthorised deductions from her wages succeeds.

6. The claimant's claim that the respondent breached her contract fails and is dismissed.

7. A remedy hearing has been listed for 29 January 2024.

REASONS

Introduction

1. The respondent in this case is a disabled person by reason of a number of medical conditions which impact on her physical but not her cognitive abilities. She directly employees Personal Assistants ("PAs") to assist her with her needs.

2. The claimant was employed as a PA from 3 February 2020 until her dismissal on 10 December 2020. The claimant says that her dismissal was because she made protected disclosures to the respondent. She also says that she was subjected to detriments for making those disclosures and that the respondent made unlawful deductions from her wages, failed to pay her accrued holiday pay and breached her contract.

3. This final hearing was a hybrid hearing. It dealt with liability only. The Tribunal panel attended in person. The claimant, her witnesses and the respondent's representative attended in person. The respondent and the respondent's witness gave evidence by CVP video link.

4. We heard evidence from the parties on the first four days of the hearing. After hearing submissions from the parties on the morning of day 5 of the hearing, we reserved our decision. We considered the case in chambers on the afternoon of 15 September 2023 and on 24 October 2023. The Employment Judge apologises to the parties that absences from the Tribunal and other judicial work have led to a delay in finalising this judgment.

Anonymisation Order

5. At a preliminary hearing on 19 January 2023, Employment Judge Horne decided that this final hearing should be heard in private because the respondent is a disabled person and the case involved details of the assistance that she was given by her PAs. He decided at that hearing not to make an anonymisation order. That was because it was not clear to him to what extent any written judgment and reasons would have to include reference to the respondent's disabilities and/or specific

details of her medical conditions and treatment or assistance needed arising from them. Having heard the case and decided to reserve our decision, we considered whether we should make an anonymisation order. Although the claimant objected, we decided it was appropriate to make an anonymisation order and gave oral reasons. Those reasons were requested in writing and are attached to our anonymisation order.

6. Because of that anonymisation order, the claimant in this case is referred to in the case heading as "A", the respondent as "B". We decided it was appropriate for the anonymisation order to extend to the respondent's PAs because of the risk that naming or identifying them in our Judgment would lead to the respondent being identified. We refer to the respondent's witness, who provided ad-hoc PA cover as "C". There were 3 witnesses for the claimant in addition to the claimant herself. One of those had been a PA for the respondent for 30 months. We refer to her as "D". We decided to anonymise the claimant's second witness, E, who is the claimant's lodger. That, again, was to remove the risk of the respondent being identified by "jigsaw identification". The claimant's third witness, F, was also a PA. She provided a written witness statement but did not attend the hearing to give oral evidence.

The Issues

7. The issues in the case were identified at the case management hearing held by Employment Judge Dunlop on 15 September 2021. We have included the full list of issues in the Annex to this Judgment for reference. Because the hearing dealt with liability only we did not deal with the issues in section 4 of that list which relate to remedy.

8. We have amended the List of Issues to remove the parties' names so that it complies with our anonymisation order. We have also corrected the reference in D1 to November 202<u>1</u> which should refer to November 2020.

9. In our discussion and conclusion section which starts at para 96 below we have also dealt with the issue of time limits. That was because the respondent raised the issue that some of the whistleblowing detriment claims might be out of time. That is an issue going to jurisdiction so one we had to decide even though it was not in the List of Issues.

Preliminary Matters

<u>Reasonable adjustments</u>

10. At the case management hearing on 15 September 2021, Employment Judge Dunlop noted that the claimant has a hearing impairment and required the final hearing to take place in person. She also noted that the respondent's disabilities meant that it was not practicable for her to attend the hearing in person. Although the claimant objected to the respondent attending by video, both Employment Judge Dunlop and Employment Judge Horne decided it was in accordance with the overriding objective to allow her to do so. That is why the final hearing was a hybrid hearing.

11. To reduce any disadvantage to the claimant arising from her hearing impairment we rearranged the Tribunal room so that she was sitting facing Mr

Fakunle. That made it easier for the claimant to hear Mr Fakunle when he was cross examining her or making submissions. The claimant did not have difficulty hearing the respondent when she gave evidence by video link. We are satisfied that all parties were able to fully participate in the hearing.

The claimant's application to add documents to the final hearing bundle

12. There was a final hearing bundle of 250 pages. We refer to that as "the Bundle". References to page numbers in this Judgment are to pages in that Bundle.

13. Before hearing the evidence in the case, we considered an application by the claimant to add documents to the Bundle. The respondent objected to that application but did not object to us seeing the documents that the claimant wanted to add before reaching our decision. We decided to refuse the claimant's application. We gave oral reasons for that refusal. The claimant asked for them in writing, so we set them out here.

14. The majority of those documents were photographs showing the claimant and respondent spending time together on various day trips or at social events. The respondent submitted that these were personal documents relating to the respondent's private life. Mr Fakunle submitted that was a factor we should take into account in deciding whether to admit those photographs in evidence. There was also a business card for the respondent and the claimant's NHS Covid pass which (as far as we could see) dated from after the claimant's dismissal.

15. We decided, based on our then current understanding of the issues in the case, that those documents were not sufficiently relevant to the issues in the case to require them to be added to the Bundle. For completeness, we confirm that the same reasoning applied to the claimant's email to Lancashire safeguarding about a referral she made on 14 December 2020 which postdated the claimant's dismissal.

16. We made our decision in those terms because we accepted it might be that as we heard the evidence it might become apparent that the documents were indeed relevant to the issues in dispute. We confirmed in our oral reasons that if that happened the claimant could apply to vary our decision. She did not do so. For the avoidance of doubt, had she done so, our position would have been the same i.e. that the documents were not of sufficient relevance to the issues in the case to require them to be included in the Tribunal bundle.

Evidence

17. We had written witness statements for the claimant and three witnesses. Two of those witnesses, D and F, had been PAs to the respondent. Witness E was the claimant's lodger. Witness F did not attend to give evidence at the Tribunal hearing. As we explained to the parties, we would therefore give that witness' evidence as much weight as we considered appropriate given that the respondent had not had an opportunity to cross examine them. For the respondent, we had a witness statement for the respondent and for witness C. They both attended the hearing by videolink. Each witness was cross examined and answered questions from the Tribunal.

Findings of Fact

18. We set out below our findings of fact based on the evidence we heard and the documents we read. We found neither the claimant's evidence nor the respondent's evidence entirely reliable. We accept that is to some extent a product of the length of time since the incidents giving rise to the claim. We did not find we could give much weight to the written evidence from witness F because she did not attend the hearing to be cross-examined. We found the evidence of the claimant's witnesses D and E more reliable than that of the respondent's witness C.

Background - the respondent's healthcare needs and how she met them

19. The respondent is a disabled person by reason of a number of medical conditions. They include but are not limited to multiple sclerosis, COPD, epilepsy, asthma and diabetes. As a result of those medical conditions the respondent has a suppressed immune system and requires assistance with aspects of her daily life. Her medical conditions do not impact on her cognitive abilities and she lives in her own home. At the time of the incidents giving rise to this case, she had a Direct Payment Personal Health Budget which she used to meet her needs. She did so by using the Budget to directly employ PAs. That Budget reflected the needs identified in her Healthcare Support Plan ("the Healthcare Plan").

20. Those needs included assistance from a PA in getting from her bed to the adapted electric wheelchair which the respondent used in and out of the home. They also included ensuring she was comfortable in her chair and helping her with position changes to reduce the risk of pressure damage. The respondent had a specialised mobility car ("the Mobility Vehicle") which she required assistance to access. She also required someone to drive the Mobility Vehicle for her.

21. The respondent needed assistance with activities of daily living because of her reduced grip. She gets recurring chest infections and needed assistance to access and use nebulised salbutamol and saline up to four times daily during acute exacerbation of asthma together with regular overnight saline/ipratropium nebules. She had "rescue" steroids and antibiotics available to take if needed as arranged with the Intensive Home Support Services who would also support her as required to avoid hospital admission during any acute exacerbation.

22. The respondent has a catheter in situ. Catheter changes were carried out by the District Nursing Team but daily management of attaching and removing the night bag and weekly change of the leg bag needed to be managed by PAs on her behalf. The respondent is prone to urine infections and required the PAs to meet her personal hygiene needs because her mobility, grip and shape make this difficult for her to manage unaided. The Healthcare Plan recorded that the respondent also required use of the Peristeen bowel irrigation system to maintain bowel continence and prevent constipation. It noted that was administered by the PAs. The claimant says that one of her protected disclosures was about use of the Peristeen system so we deal with that in more detail below.

23. The respondent's Budget enabled her to directly employ a number of PAs to provide assistance with her needs. The Healthcare Plan was revised in July 2020 (pages 87-99). Prior to the revision, there were 5 PAs providing cover for 12 daytime hours each day of the week at £10 per hour. The cover was not 24/7. The Healthcare Plan envisaged night-time support being provided by "pop-in" night cover.

That was not working well for the respondent so the budget to cover it had been converted to provide an additional 60 hours' PA support per week. That made a total of 144 hours PA support per week, equating to an average of just over 20 hours per day. We find that at that point the respondent had carers present overnight but not every night.

24. The revised Healthcare Plan increased the Budget to enable 24/7 cover, i.e. 168 hours per week. The increase was a response to the respondent reporting that she experienced seizures at night associated with her diagnosis of epilepsy. She was concerned that if she experienced a seizure when she was on her own at night she might struggle to call for help and might struggle to press the emergency buzzer.

25. We find that some of the PAs, such as the claimant and D, worked regular shifts over a period of time. Others, such as C, provided ad-hoc cover when needed, e.g. if a PA could not do their regular shift. We heard reference to, but no evidence from, a PA who we will refer to as G. We find that he was both the primary PA and a friend of the respondent.

26. We find that the duties of a PA varied depending on the times they worked and the respondent's needs on a particular day or at particular times of day. They ranged from attending to the respondent's healthcare and intimate hygiene needs to going on trips out with the respondent, taking her sailing (the respondent is a keen and able ingle handed sailor) or spending time with her in her home. In very broad terms the role could range from that of a nurse providing healthcare (such as administering medication) to that of a companion. We find it was important to the respondent that the assistance she received from her PAs did not result in her home environment becoming "medicalised" or in her being treated as a "patient" or "care-user".

27. We find based on the evidence from the claimant and witness D that the respondent could be a demanding employer and that some PAs did not last long in her employment. We find that to an extent that is explained by the nature of the employment. It was not a typical employment relationship. The PAs were in the respondent's home and spending a significant part of the day and evening during their shift with the respondent. Their relationship with the respondent was important. The PAs needed to attend to her needs but also needed to ensure they respected her right to decide how she lived her life and how her needs were met. That obviously did not override the PAs rights as employees and the respondent's obligations as an employer. We do find, based in particular on the approach to the claimant's dismissal, that the respondent may not always have had those obligations in mind.

<u>The claimant's employment as a PA and her terms and conditions</u>

28. The claimant and the respondent had been friends for many years. In February 2020 the claimant agreed that she would start work for the respondent as a PA, having provided assistance on an unofficial, ad hoc basis in the past. The claimant is retired. She had been looking for part-time work which would provide her with some funds while fitting in with the projects that she wanted to undertake and enabling her to spend time with her grandchildren.

29. The claimant's employment started on Monday 3 February 2020. At that point, there was no written contract of employment. The respondent emailed the claimant a contract of employment on 9 November 2020 (pp.72-86). The claimant did not agree to or sign that contract.

30. We find the written contract reflected the reality of the claimant's terms of employment to the extent that it confirmed her employment began in February 2020; that her hourly rate was £10 per hour; and that her holiday entitlement was the statutory 5.6 weeks per holiday year. However, we find it did not reflect the reality of the claimant's terms of employment in a number of other respects.

Hours of work

31. The written contract said the claimant was on a zero hours' contract. Under the heading "Hours of Work" it said that the claimant worked shift work Monday to Sunday each week as per the fortnightly rota with appropriate breaks. It said that "start and finish times may vary in accordance with my needs and will be notified to you giving as much notice as possible". It said that the claimant was required to complete and submit timesheets. There was no evidence (or any suggestion for the respondent) that the claimant was ever required to complete and submit timesheets.

32. When it comes to the claimant's hours of work, we find that the claimant initially worked 20 hours per week, working Mondays only. In April 2020 the respondent asked the claimant to work Wednesdays as well as Mondays because the PA who had been working Wednesdays was no longer able to do so. The claimant agreed. We find that from that point the claimant's regular working days were Mondays and Wednesdays but she also on occasion did extra hours to cover for the absence of other PAs, e.g. on holiday.

33. There was a dispute about the number of hours for which the claimant was entitled to be paid for each of her regular days, The claimant said that from April 2020 each day was payable at 24 hours per day (£240) rather than the previous 20 hours per day (£200). The claimant's payslips (pp.149-171) show substantial fluctuations in the number of hours for which she was paid in each fortnightly pay period up to August 2020. However, those from 7 August 2020 onwards seem to us consistent with the claimant being paid for 48 hours per week. That includes the claimant being paid 48 hours' pay for her week's holiday in August 2020. Based on those payslips we find that the claimant did not start being paid for 2 x 24 hour days per week until the working week commencing 20 July 2020. That seems to us consistent with the revision to the Healthcare Plan increasing the respondent's budget to cover 24 hour care from July 2020.

The claimant's duties

34. We find that although the claimant could in theory be asked to carry out the same duties as the other PAs, the respondent (as she accepted in cross examination) did not initially apply the same rules to the claimant because they were friends. In particular, she did not initially require the claimant to sleep over, as other PAs did. We do find, however, that the claimant was "on call" if the respondent needed her assistance during the night-time hours of each day she worked.

35. In practice, we find that the claimant's working day would start between 8.30am and 9.30am and would end when the respondent's needs for the day had been fulfilled. That would usually be around 11.30 p.m. but could be much later, e.g. 1.45 a.m. On the balance of the evidence, we find that the PAs did not as a regular practice overlap and hand over to each other at the start of a day's shift. The PA finishing their shift would make sure the respondent had everything she needed before they left. We find the exception to that would be if the respondent was not certain whether the next PA was going to be arriving shortly, in which case the departing PA might need to wait to ensure there was cover.

36. We find that the claimant's daily tasks included making brews and sometimes breakfast in bed for the respondent, choosing her clothes for the day with her, showering the respondent, feeding her animals, shopping, putting the shopping away, doing her hair and makeup and taking her out on trips and for meals. We find that the claimant and the respondent would eat out, have takeaways or have a drink together. When they went out, the claimant would drive the Mobility Vehicle. The claimant would sit in her wheelchair in the back of the Mobility Vehicle.

Probationary period and notice of termination (pp.73 and 75-76)

37. The written contract provided that the notice of termination to be given by the respondent to the claimant was the statutory minimum notice, i.e. 1 week's notice between 1 month's service and 2 years' service. It provided that the notice of termination to be given by the claimant to the respondent was 24 weeks on completion of a probationary period, but 1 week from 1 month's service to successful completion of a probationary period. The probationary period was stated to be 3 months.

38. We find that the claimant had at no point agreed to a requirement that she give 24 weeks, notice. There was no evidence that she had been subject to any kind of probationary review. There was also no suggestion she had failed any kind of probationary period.

<u>Covid and its impact on the respondent's care</u>

39. The incidents giving rise to this case happened during the COVID pandemic. The first national lockdown came into force 7 weeks after the claimant's employment began. Various government restrictions (and relaxations of the same) were in place from that point on throughout the claimant's employment.

40. There was a dispute between the parties (relevant to one of the alleged protected disclosures) about the respondent's attitude towards COVID and the use of PPE by the PAs when in the respondent's home.

41. There was some, albeit limited, evidence that the respondent was concerned about potential COVID infection. That would be understandable given her immunosuppressed condition. That concern manifested itself when she became very angry (according to the claimant) when witness D went on holiday with her mum within Covid rules. The respondent (according to the claimant) felt that this meant that witness D was more likely to infect her.

42. On the other hand, the claimant's evidence was that the respondent did not seem to "get" social distancing, did not let staff wear masks and that staff were not provided with gloves or aprons. The evidence from witness C was that she was not prevented by the respondent from wearing a mask (she did so because of her concern about the risk of infecting a vulnerable relative). There was no suggestion from C or the respondent that the respondent required (as opposed to allowed) her PAs to wear masks. Witness D's evidence substantially corroborated the claimant's evidence. She said that the respondent did not have PPE in place until late into the pandemic when it was provided by her son who worked in the care industry. D's evidence was that although available, the respondent did not require the PPE to be used.

43. We find that the respondent's concern about COVID was not so great as to prevent her from leaving her home while it was prevalent, in contrast to others who shielded throughout that period. As one example, she visited a park with the claimant on 3 November 2020. At that date, the prevalence of COVID was such that a second national lockdown had been announced to take effect on 5 November 2020.

44. On balance, we prefer the claimant's evidence and that of witness D on this issue. Although we accept the respondent was concerned about COVID we do not find that concern led her to adapt the way she interacted with her PAs. She did not require them to wear PPE or socially distance. It seems to us that approach was consistent with the respondent's view that she did not want to "medicalise" her home environment.

<u>July 2020 – Incident with the Mobility Vehicle</u>

45. The claimant in July 2020 scratched the Mobility Vehicle when driving it through some gates. The claimant offered to pay for the damage, but the respondent did not take up that offer. We accept the claimant's evidence that she queried with the respondent whether she was covered by insurance when driving the Mobility Vehicle. We find that her main concern was her potential personal liability for the damage and what the respondent's friend and primary PA, G, would say about the damage. The claimant case was that she also raised concerns about the health and safety of the respondent, PAs and other road users. Specifically, she said she raised concerns that the respondent's wheelchair was not secured in the back of the Mobility Vehicle and that the respondent did not wear a seatbelt. On this issue we prefer the respondent's evidence. We find the discussion was about the claimant's potential personal liability and whether she was covered by the respondent's insurance if the respondent's wheelchair was not adequately secured, rather than broader issues of health and safety as the claimant suggested.

<u>The Covid Incident</u>

46. The claimant was on annual leave for 2 weeks in October 2020. She was due to return to work on Monday 26 October. On Sunday 25 October 2020 the claimant found out from her middle son that her youngest son and partner had Covid. The claimant had spent time with her younger son and partner when she visited them that weekend.

47. The claimant rang the respondent early on Monday morning to explain what had happened and to tell her she was going to get a Covid test done. There is a

dispute about how the respondent reacted. The claimant's evidence was that the respondent was furious and told the claimant to "get her arse into work because she needed her". The claimant's evidence was that she told the respondent that she should not come into work until she had a negative Covid test. She said that the respondent insisted that she did come in. The respondent's evidence was that she was the one telling the claimant not to come into work.

48. The claimant's version of the conversation was corroborated by her lodger, E. His evidence, which we accept, was that he overheard the conversation because the claimant used the loudspeaker on her phone because of her hearing impairment.

49. The respondent's version of events was corroborated by witness C. However, we did not find her evidence reliable. Her witness statement did not deal with the content of the conversation. Her evidence when questioned about how she had come to overhear the conversation and what was said was unconvincing and inconsistent.

50. On balance, we prefer the claimant's version of events. We find that the respondent was angry with the claimant for "leaving her in the lurch" and that overrode any concerns she had about COVID. That seems to us consistent with the impact not having a PA to assist her had on the respondent. It also seems to us consistent with our findings about the respondent's attitude to COVID more generally.

51. The claimant received a negative test result on the afternoon of Tuesday 27 October 2020. We find that she rang the respondent to say that she had tested negative so she would be able to work her usual Wednesday shift on 28 October. The respondent accepts that she told the claimant that she had already arranged cover for that shift. We find the claimant then asked to take the Wednesday as leave so she could receive holiday pay but the respondent refused saying that she had no holiday entitlement left. The respondent's evidence was that she checked the holiday entitlement with her payroll provider who confirmed that the claimant had already taken more holiday than she had accrued at that point. We accept the respondent did do that but find that was not until after the refusal. There was in the bundle an email exchange between the respondent and her payroll provider relating to the claimant's holiday entitlement (p.104). That was dated 11 November 2020, so some 2 weeks after the refusal. We find that the claimant had not checked with the payroll provider and did not have an accurate calculation of the claimant's untaken holiday entitlement when she and the claimant had the conversation on 27 November. However, we accept that she would have been aware that the claimant had only just taken 2 weeks' leave and had also taken a week's leave in August.

<u>Events in November 2020</u>

52. The claimant returned to work on the first Monday in November 2020. There were a number of incidents in November 2020. Taken together, we find they show the relationship between the claimant and the respondent deteriorating.

Alleged protected disclosure PD3

53. The claimant alleges that in early November she again raised concerns with the respondent about the scope of insurance cover for the Mobility Vehicle and about

the health and safety risks of the respondent's wheelchair not being properly secured in the Mobility Vehicle. Her evidence was that she raised the issue as a result of having to arrange to be added to the insurance policy for a new car owned by her son in late October 2020. We accept that the claimant queried whether she was covered by the insurance on the Mobility Vehicle in early November 2020. We do not find that she raised the wider issues of health and safety which she alleges. As in July 2020, we find her concern was purely with whether she was covered by the insurance policy when driving the Mobility Vehicle and any reference to the respondent's wheelchair being secured was in relation to the validity of the insurance as it applied to the claimant. We find that she raised that point with the respondent who assured her verbally that she was insured.

Use of the Peristeen system – alleged protected disclosure PD4

54. Early in November, the claimant and the respondent went on a trip out in the Mobility Vehicle to visit a park. There was some uncertainty about the exact date of that visit. The date is not decisive but on balance, we find it was probably on the first Monday back, i.e. 2 November 2020 because the second national lockdown was in place from 5 November 2020. We find that the respondent soiled herself on the way and so they returned home. The claimant cleaned and showered the respondent. We accept the claimant's evidence that the respondent decided that her bowels were impacted and that she would need to use the Peristeen bowel irrigation kit on a daily basis to avoid a recurrence of the issue.

55. We accept the claimant's evidence that she had never used the Peristeen kit up to that point. Witness D had also not used the kit up to that point. We find claimant's genuine perception was that the kit had been "languishing" on the floor in the respondent's wet room which the claimant regarded as "mouldy". We find that the claimant told the respondent that they should seek medical advice before starting to use the Peristeen kit.

56. The respondent insisted on using the kit without seeking such advice. She arranged for her primary PA, G to train D in how to use the kit and witness D then trained the claimant. We find the claimant again told the claimant that they should seek clinical advice before starting to use the Peristeen Kit. We find that her understanding from the Peristeen Instruction booklet was that the kit should not be used the first time without medical supervision. The training manual confirms that the patient or carer should be trained by a healthcare professional before using the Peristeen kit for the first time. The instruction booklet warns that the irrigation should always be carried out with caution. We find the respondent dismissed the claimant's concerns and insisted on doing things her way. The claimant did carry out the irrigation procedure once before her employment ended.

The requirement to sleep over

57. We find that the respondent did start to require the claimant to sleep over from early November. The respondent had not previously required her to do so. Other PAs were required to sleep over. The claimant did carry out the sleep overs, albeit reluctantly. She took her own camping mattress and left the window in the spare bedroom in which she slept open all day and all night. We find she was concerned about cross infection because the other PAs used the room to sleep over. The

respondent suggested that she required the claimant to sleep over because she had additional health issues at the time which increased the chance of her needing assistance at night. We do not accept that was the case. The Healthcare Plan recognised the need for (and funded) 24 hour care but that was in July (or at the latest August 2020). Despite that, there had been no requirement for the claimant to sleep over before November 2020. There was no evidence to substantiate a change in the respondent's needs around that time which could explain the requirement to sleep over.

Attending work with a chest infection

58. One reason given for dismissing the claimant was that she attended at work in late November with a chest infection, leading (according to the dismissal letter) to the respondent experiencing a respiratory flare up and "attendance at [we think that should be "of"] ICAT" (Intermediate Care Services). In her witness statement the respondent refers to her having "to be hospitalised" because of being infected by the claimant. There was no evidence of such a hospitalisation in early November and that description is not consistent with what she said in her response to the claimant's appeal against dismissal. In that letter (p.111) she refers only to her contacting ICAT "being on the safe side".

59. The respondent in her evidence said that the claimant had a persistent cough when she attended work in November and told the respondent that she "could not be bothered to go to the doctors". However, in the appeal outcome letter she referred to the claimant saying she had a cough and runny nose for 4 weeks and to her coughing incessantly all through the night. She did not suggest that she had raised concerns with the claimant about attending with a cold/runny nose during those 4 weeks. There is no reference in that letter to the remark about not going to the doctors. The claimant denied ever making that remark or ever having had a chest infection. She accepted she might have coughed at night when sleeping over because she had the window open in the bedroom. We prefer the claimant's evidence on this issue. We accept her evidence that she did not have a chest infection and would not have attended work if she had one being aware of the claimant's being prone to chest infections.

Written contract of employment

60. On 9 November 2020 the respondent emailed the claimant the written contract of employment we discuss at paras 27-37 above. We find that the respondent had adapted it from a template she found on the internet. We accept witness D's evidence that the respondent also issued contracts to her and to G. We also accept her evidence that the respondent did so because she was angry with the claimant.

61. There is no suggestion that the claimant signed the contract or otherwise discussed or agreed its contents.

Alleged docking of pay

62. The claimant says that from November 2020 the respondent docked her usual pay of £240 per day by £50 or £100 a week. The claimant's payslip dated 27 November 2020 records her being paid £380 gross (38 hours x £10 p.h.). Her

payslip dated 11 December 2020 records her being paid £1140.00 gross (114 hours at £10 p.h.). Her final payslip records her being paid £1140 (38 hours at £10 p.h. plus a payment in lieu of £760 (76 hours at £10 p.h.). Based on those payslips we find that from the payslip dated 27 November 2020 (which related to the weeks commencing 9 and 16 November 2020) the claimant was paid for 38 hours week (i.e. for 19 hour days) rather than the 48 hour week/24 hour days she had been paid since August 2020.

The claimant's dismissal

63. On Thursday 10 December 2020 (a non-working day for the claimant) the respondent sent the claimant a "short-term dismissal letter" (page 106). The letter stated that the "matters of concern" were:

> "(1) Inconsistent time keeping – I can see this being a huge problem once we move North (this refers to the respondent's intention to move away from the area where she and the claimant then lived).
>
> (2) Questioning my judgment and treatment regimes.
>
> (3) Coming on shift with a 'chest infection' – which has led to a respiratory flare-up and attendance at ICAT."

64. The letter stated the dismissal would take immediate effect and that the claimant would be paid two weeks' pay in lieu of notice. The letter confirmed that the claimant had a right to appeal which she should exercise by writing to the respondent within seven days.

65. We find that the respondent had sought advice from her payroll and HR support in order to prepare the letter of dismissal. There was no suggestion that the respondent had raised these issues with the claimant by way of a warning or any form of disciplinary process prior to issuing the dismissal letter.

66. The claimant exercised her right of appeal by a letter dated 17 December 2020 (pages 107-110). She challenged the lack of any disciplinary process. She said she had not been given any evidence or facts about the respondent's concerns nor had she been given an opportunity to defend herself against the three accusations. Her appeal letter addressed each of the 3 accusations in turn.

67. She acknowledged that the respondent had raised timekeeping with her but alleged that was only on one occasion, namely a Wednesday in November when witness D (who was working the Tuesday shift) was waiting for her to arrive before leaving. In oral evidence the claimant confirmed that there was perhaps one other occasion when the respondent had rung her in her car on the way to the respondent's to ask where she was. Based on witness D's evidence, we do find that the claimant arrived later than the respondent would have liked her to on several occasions. We find that the claimant took a more flexible approach to her start time than might be expected of a PA, arriving any time between 8.30 and 9.30 a.m. However, we heard no evidence that the claimant's timekeeping was notably worse later in her employment than it had been earlier. We find that other than the 2 occasions we refer to in this paragraph, the respondent had not raised the issue with the claimant.

68. When it came to the allegation of questioning the respondent's judgment and treatment regimes, the claimant accepted in her appeal letter that she had at times raised safeguarding issues with her. She said however that she had always followed the respondent's directions and said that she had always aired her concerns with the respondent in an "honest, caring and respectful manner". The claimant referred to having raised 2 concerns which she believed had led directly to her dismissal, namely the insurance of the Mobility Vehicle (i.e. PD1 and PD3) and the use of the Peristeen kit (PD4). In her letter the claimant referred to the "two issues" being of serious concern to her regarding the welfare of herself and employees. She did not refer to the COVID incident (PD2).

69. The claimant denied the allegation that she had attended work with a chest infection. We have found that she did not.

70. The respondent sent the claimant an appeal outcome letter dated 21 December 2020 (pages 111-112). She said that because of the claimant's short service it was appropriate for the respondent to exercise its discretion to vary the disciplinary procedures. Dealing with the three points raised by her in her dismissal letter and dealt with by the claimant in the appeal:

(1) The respondent said it was imperative that all members of staff arrived on time because if the respondent was left alone she was very vulnerable. She suggested that the claimant had left other PAs in a difficult position because they did not feel comfortable leaving the respondent alone because the claimant had failed to arrive on time for her shift.

(2) In relation to the questioning of treatment regimes, the respondent said that the claimant had not only questioned her treatment regimes but also "went as far as researching how long my pet dog needed exercise". The respondent said that she had managed her condition for years and knew what treatments were required. She said that none of her staff had ever questioned this in all the years that she had had staff. She said that her Clinical Lead actually stated, "it would be indeed unethical not to perform bowel irrigation whenever required". (In answer to the Judge's question at the hearing the respondent confirmed that the reason that she had dismissed the claimant was for what she called "gross insubordination").

(3) As to the chest infection allegation, the respondent reiterated her version of events and said that none of the other staff had presented with similar symptoms.

71. That appeal outcome letter confirmed the decision to dismiss was final.

<u>Findings of fact relevant to holiday pay</u>

72. There was no dispute that the holiday entitlement was of 5.6 weeks i.e. the statutory entitlement. The disputed contract of employment confirmed that that was the entitlement. It was accepted that the claimant took holidays twice during her period of employment. She took two days (i.e. one week) in August 2020 and four days (i.e. two weeks) in October 2020. Those dates all predated the Covid incident.

73. The claimant was employed for 318 days which equates to 45 weeks and 3 days, i.e. 0.87 of a full leave year.

Relevant Law

Detriment and dismissal for making protected disclosures (whistleblowing)

Whistleblowing

74. Protected disclosures are governed by Part IVA of the Employment Rights Act 1996 ("the ERA") of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(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) ……..,**
>
> **(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) ……,**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,"**

75. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

76. **Cavendish** should not be understood to introduce into s.43B(1) a rigid dichotomy between "information" on the one hand and "allegations" on the other. In The question in each case is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the

disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]" . However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a " sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 43B(1) ". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (**Kilraine** quoted by the EAT in **Simpson v Cantor Fitzgerald Europe (UKEAT/0016/18/DA)).**

77. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons.

78. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) 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;

(c) 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;

(d) the identity of the alleged wrongdoer.

79. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

80. In this case it was is that if the alleged disclosures were made, they were made to the employer. That means they will be protected disclosures under s.43C if they are qualifying disclosures under s.43B.

Whistleblowing detriment

81. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

83. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

84. In **Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA** confirmed that in deciding whether detriment was on the grounds of whistleblowing the test is whether the protected disclosure materially (in the sense of more than trivially) influences the respondent's treatment of the claimant.

85. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

86. The time limit provision appears in section 48(3). A complaint presented more than three months after the act or failure to act is out of time unless it formed part of a series of similar acts or failures ending less than three months before presentation, failing which the claimant has to show that it was not reasonably practicable for him to have presented the claim within time and that it was presented within a further reasonable period.

87. The Court of Appeal considered the time limit provisions in **Arthur v London Eastern Railway Ltd (trading as One Stansted Express) [2007] ICR 193** where the question arose as to whether a series of apparently unconnected acts could be shown to be part of a relevant series or to be similar in a relevant way because they

had all been done to the claimant because he had made protected disclosures. Giving judgment in the Court of Appeal. Mummery LJ said:

> "..in order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period…..It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find "motive" a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure."

Unfair Dismissal and whistleblowing

88. Section 103A of the ERA deals with unfair dismissal for making protected disclosures and reads as follows:-

> **"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".**

89. An employee can bring a claim of automatic unfair dismissal relying on s.103A even where (as in the claimant's case) they do not have the 2 years' continuous service required to claim "ordinary" unfair dismissal.

90. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

91. An employer with grounds to dismiss for a fair reason, such as misconduct, might still be found to have dismissed for an impermissible reason if the latter is the reason operating on his mind: **ASLEF v Brady [2006] IRLR 576.**

Unauthorised deductions and Holiday Pay

92. The right not to suffer unlawful deductions from pay arises under Part II of the ERA. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by her. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

93. The Working Time Regulations 1998 provides a minimum entitlement of 5.6 weeks annual leave. Reg.13(9) provides that it cannot be carried over in to the next holiday year. Unless the contract provides for a different holiday year, the holiday year will start on the date of employment and then start of the anniversary of that date.

94. Under WTR Regulation 14 a worker is entitled to be paid for any holiday untaken at the end of their employment. The formula used to calculate that is (A x B) – C where A is the leave to which the worker is entitled, B is the proportion of the leave year which expired before the termination date and C is the leave already taken in that holiday year.

Breach of Contract

95. Under Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order"), a claim of breach of contract can be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if -

> **(a) the claim is one to which section 3(2) of the Employment Tribunals Act 1996 applies; and**
>
> **(b) the claim is not one to which article 5 applies; and**
>
> **(c) the claim is arising or outstanding on the termination of the employee's employment.**

Discussion and Conclusions

96. Applying the relevant law to our findings of act we reached the the following conclusions on the liability issues in the case:

1. Protected Disclosures

    1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant says that she made the following disclosures:

        PD1 Around June/July 2020 verbally informing the respondent that the arrangements for transporting the respondent by car were unsafe and/or unlawful in that (a) the respondent was not adequately secured within her wheelchair whilst travelling and (b) the wheelchair was not adequately secured within the vehicle whilst travelling

        PD2 Around 25 October 2020 informing the respondent during a phone call that it would be unsafe for [the claimant] to attend work due to having been in contact with someone who had tested positive for Covid-19.

        PD3 Around early November 2020 verbally informing the respondent that the arrangements for transporting the respondent by car were unsafe and/or unlawful in that (a)

the respondent was not adequately secured within her wheelchair whilst travelling; (b) the wheelchair was not adequately secured within the vehicle whilst travelling; and (c) the claimant was not insured to drive the vehicle.

PD4 Around early November 2020, verbally informing the respondent and another personal assistant (witness D) that initiating the use of bowel irrigation procedures without these being advised by a medical practitioner was putting the respondent's health at risk.

97. Dealing with each of the alleged protected disclosures in turn.

98. In relation to PD1, we found that in July 2020 the claimant did query with the respondent about whether or not she was covered by insurance when driving the respondent's Mobility Vehicle. We found that was triggered by concerns that she might be personally liable because she had scratched the van and what G might say about the damage done. We find that raising that query did not amount to a disclosure of information to the respondent. She was asking a question about the scope of coverage of the respondent's insurance. The reference to the respondent's wheelchair not being secured was in relation to her concern that it could invalidate cover when she was driving the Mobility Vehicle rather than in relation to the safety of the respondent or other road users. Because there was no disclosure of information, there was no qualifying disclosure within the meaning of section 43B of the ERA. If we are wrong about that and there was a disclosure of information, we find that the claimant did not reasonably believe that that disclosure was in the public interest. We find that her sole concern at that point was whether she personally was covered by the insurance, not the potential danger to the respondent or to other road users.

99. When it comes to PD2, we find that this was a protected disclosure. The claimant disclosed information (her contact with a son who had Covid) which she reasonably believed tended to show that the health and safety of a person was likely to be endangered. The immediate person at risk (apart from the claimant herself) was the respondent. We find, however, that the claimant did reasonably believe that disclosure was in the public interest because the information also impacted on the respondent's other PAs and anyone else the claimant came into contact with if she did not self-isolate pending the outcome of her COVID test. Given that this event happened in October 2020 and the conditions pertaining at the time, we do accept that the claimant reasonably believed that disclosure was in the public interest.

100. When it comes to PD3, this was the second occasion when the claimant says that she disclosed information relating to the respondent's travel arrangements. We do not find that this is a protected disclosure. There was no disclosure of information. Instead (as set out in the claimant's letter of appeal against dismissal) the claimant was prompted by sorting out insurance on her son's car to question whether she would be insured to drive the Mobility Vehicle. Again, we find that the focus was on the claimant's personal liability and whether she was covered by the respondent's insurance. Since there was no disclosure of information, there was no protected disclosure. Even if there was, our conclusion is that the claimant did

not reasonably believe that this disclosure was in the public interest. Rather, she was concerned about her own potential liability if she were to have an accident while driving the Mobility Vehicle.

101. When it comes to PD4, we accept that there was a disclosure of information by the claimant reasonably believed tended to show that the health or safety of a person was likely to be endangered. Specifically, the claimant told the respondent that the Peristeen kit should not be used for the first time without the person using it being trained and supervised by a healthcare professional. We find that the claimant genuinely and reasonably believed that wrong or inappropriate use of the Peristeen kit could cause a risk to the health and safety of the respondent given it was an intimate procedure. We also accept that the claimant reasonably believed that the disclosure was in the public interest. We find the claimant genuinely and reasonably believed that the kit being used inappropriately or wrongly was not only a risk to the claimant's health and safety but also raised issues about the potential liability of the PAs who would be administering the use of the kit.

102. In summary, therefore, we accept that PD2 and PD4 were qualifying disclosures for the purposes of section 43B of the ERA but PD1 and PD3 were not.

1.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

103. We have found that PD2 and PD4 were qualifying disclosures. Since they were made to the respondent who was the claimant's employer, they were protected disclosures for the purposes of the ERA.

2. <u>Dismissal (Employment Rights Act 1996 section 103A)</u>

2.1 Was the reason or principal reason for dismissal that the claimant had made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

104. The respondent’s letter of dismissal dated 10 December 2020 (page 106) set out three reasons for dismissal. The first was inconsistent timekeeping, the second was “questioning the respondent’s judgment and treatment regimes”, and the third was coming on shift with a chest infection.

105. We have found as a fact that the claimant did not come on shift “with a chest infection”. We do not accept that that was a genuine reason for dismissal. Equally, while we have found that the claimant may have been inconsistent in her timekeeping, we do not accept the respondent’s case that that was the reason or principal reason for dismissal. The respondent had not seen that as a serious enough issue to warrant raising it with the claimant in any formal way prior to dismissal. In answer to a question from the Employment Judge, the respondent confirmed that the principal reason for dismissal was what she described as the claimant's “gross insubordination”. We are satisfied that the respondent by that was referring to the protected disclosures made by the claimant. In particular, we find that referred to the concerns the claimant raised about the use of the Peristeen bowel irrigation kit. We are satisfied that this was the “insubordination” referred to by the respondent in evidence and the “questioning my treatment regime” referred to in the dismissal letter. We find the respondent was annoyed and affronted by the claimant

telling her how to manage her own care after being her PA for less than a year. We find therefore that the principal reason for dismissal was the claimant having made protected disclosures. We find that PD4 was the primary trigger for the dismissal but have found that PD2 also contributed to the deterioration of the relationship between the claimant and the respondent.

106. Our conclusion is that the claimant was automatically unfairly dismissed for making protected disclosures in breach of s.103A of the ERA.

3. Detriment (Employment Rights Act 1996 section 48)

3.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 The claimant's pay allegedly being reduced by £100 per week, in or around November 2021.

D2 The respondent refusing to allow the claimant to take annual leave during a shift she was unable to attend as a result of being in contact with someone who had tested positive for Covid-19.

D3 The respondent re-allocating shifts the claimant was due to do to another personal assistant despite the claimant obtaining a negative Covid-19 test result.

107. When it comes to D1, we find that from August 2020 the claimant's contractual entitlement was to a payment of £480 per week for her normal working days of Monday and Wednesday, i.e. 24 hours at £10 p.h.. We find that from the payslip dated 27 November 2020 the respondent did reduce the claimant's pay by £100 per week, paying her £380 per week. We find that that was a detriment.

108. When it comes to D2, we find that the respondent did refuse to allow the claimant to take annual leave on Wednesday 28 October 2020) when she should have been working but when her shift had been assigned to another PA. because she was awaiting the outcome of a Covid test.

109. In relation to D3, the respondent did not deny that she had reallocated the claimant's shift on Wednesday 28 October 2020 to another PA. We find that she had done so before the claimant telephoned her on the afternoon of Tuesday 27 October to confirm that she had obtained a negative Covid-19 test result.

3.2 If the claimant was subjected to that detriment, was it done on the ground that she made a protected disclosure?

110. Taking the alleged detriments in reverse order, we find that detriment D3 was not done on the ground that the claimant had made a protected disclosure. We are mindful that the question is whether the protected disclosure was a material influence on the decision resulting in the detriment. When it comes to reallocating the claimant's shift, we find that it was not. Having been told by the claimant on Sunday that she would not be able to work on Monday because she had to take a COVID test, we find that the respondent reaaslitically had no option but to seek to ensure

that she had PA cover on the days when, as far as she knew, the claimant would not be in a position to work. That included Wednesday 28 October. The respondent could not have left it until the afternoon/evening of Tuesday, the day before the shift, to ensure that there was cover. The respondent's healthcare makes clear the importance of the PAs to the respondent and she could not risk being "left in the lurch" if the claimant's test did indeed turn out to be positive. The claimant's claim that she was subjected to detriment D3 on the grounds that she made a protected disclosure fails.

111. When it comes to detriment D2, we accept that the position in fact was that the claimant had not at that point accrued sufficient annual leave to have holiday entitlement left to take. We found the respondent would have been aware that was likely to be the case since the claimant had just returned from two weeks' holiday. She did not know the position for certain because we found that she did not check the position with her payroll advisers until after refusing the claimant's request. The Tribunal's experience is that it is not unusual for an employer to allow an employee to take holiday even if they have not yet accrued sufficient holiday entitlement to do so. The claimant was asking for leave on a day which would not disrupt the respondent's care, since she already had cover arranged (that's why the client was asking to take it as leave). We also take into account our findings that the COVID incident marked the start of a deterioration in the relationship between the claimant and the respondent and that she was angry with the claimant for leaving her in the lurch. Taking those findings together we do find that PD2 was a material influence on the decision to refuse the claimant leave. In relation to detriment D2, therefore, the claimant's claim that she was subjected to a detriment for making a protected disclosure succeeds.

112. When it comes to detriment D1 the respondent's position was that the reduction in pay simply reflected a reduction in the hours worked by the claimant. We do not accept that. It is not consistent with our findings of fact. Those are that the claimant continued to work the same hours in November. If anything, the hours which she actually spent carrying out her duties increased because she was required to sleep over. We find that the respondent did not take kindly to the claimant challenging her on issues about the use of the Peristeen kit We find that it was around then (following the Covid disclosure (PD2) and the Peristeen disclosure (PD4)) that there was a step change in the relationship between the claimant and the respondent. In summary, the allowances made for her because she and the claimant were friends ended. It was from then that the respondent reduced the claimant's pay and also from then that the respondent started exercising her right to require the claimant to sleep over which she had not done previously. While we accept that the correlation in time between a protected disclosure or disclosures and detriment does not in itself establish a causative link, we are satisfied in this case that the protected disclosures PD2 and PD4 were a material influence on the respondent's decision to reduce the claimant's pay. The way the claimant put it in her submissions was that this was the start of a course of "punishment". Although that may be regarded as slightly over dramatic, we do accept that it is in broad terms an accurate description of what happened.

113. Our conclusion is that the claimant was subjected to detriment D1 because she made protected disclosures PD2 and PD4, with PD4 being the main trigger for the detriment.

4. Remedy for Dismissal/Detriment

4.1 What basic award is payable to the claimant, if any?

114. A remedy hearing has been listed for 29 January 2024 at which these issues will be decided. We did not hear evidence about remedy. One of the issues we will need to decide is the extent of compensation the claimant should be awarded as a result of her dismissal. We heard evidence about the respondent's house move. We will need to hear evidence about whether that would have led to the claimant's employment coming to an end even if she had not been automatically unfairly dismissed.

115. In **Audere Medical Services Ltd v Sanderson EAT 0409/12** the EAT confirmed that, as matter of principle, there was no reason why a 'Polkey' reduction or a reduction for contributory fault could not be made in cases of automatically unfair dismissal, provided the circumstances warrant it. We will need to hear submissions about whether our findings about the deterioration in the relationship between the claimant and the respondent and the reason for it mean that the claimant could have been fairly dismissed at some point in the future and/or that she contributed to the dismissal.

116. At the remedy hearing we will hear submissions about whether the ACAS Code of Practice on Disciplinary and Grievances applied and, if so, whether and to what extent it will be just and equitable to increase or decrease any compensation awarded. We will also hear evidence from the claimant to determine what injury to feelings compensation (if any) should be awarded in relation to the protected disclosure detriment claims which succeeded (detriments D1 and D2).

5. Holiday Pay (Working Time Regulations 1998)

5.1 What was the claimant's leave year?

117. From start of employment i.e. 3 Feb 2020 to 2 February 2021

5.2 How much of the leave year had passed when the claimant's employment ended?

118. 45 weeks and 3 days

5.3 How much leave had accrued for the year by that date?

119. 4.8 weeks (i.e. 0.87 of the full year entitlement)

5.4 How much paid leave had the claimant taken in the year?

120. 3 weeks

5.5 Were any days carried over from previous holiday years?

121. .No

5.6 How many days remain unpaid?

122. 1.8 weeks

5.7 What is the relevant daily rate of pay?

123. To be decided at the remedy hearing.

6. Unauthorised Deductions

6.1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

124. Yes. We find the claimant's normal contracted hours at the time of dismissal were Monday and Wednesday payable at £240 per day. She was paid for 24 hours a day whether she slept over or not. That means there was an unauthorised deduction of £100 per week from the payslip for 27 November 2020 onwards when she was paid at the reduced rate of £380 per week/£190 per day.

7. Breach of Contract

7.1 Did this claim arise or was it outstanding when the claimant's employment ended?

125. Yes

7.2 Did the respondent underpay the claimant for her notice period in the sum of £200?

126. No. The claimant's contractual (and statutory) entitlement to notice was 1 week. That meant she was contractually entitled to notice pay of £480. She was paid £760 in lieu of notice. The respondent chose to pay in excess of her contractual entitlement. Although the amount paid did not equate to 2 weeks' notice as the respondent suggested, it was more than the amount payable to the claimant under her contract of employment. There was no breach of contract.

7.3 Did the respondent do the following:

7.3.1 Require the claimant to sleep at the respondent's house during her shifts, whereas she had previously been able to return home at the end of the evening?

127. We find that the respondent did so require from November 2020 onwards.

7.4 Was that a breach of contract?

128. No. We find that the claimant's contract required her to provide 24 hour cover and that could include providing it by sleeping over. That requirement was the same for all PAs. The claimant's pay from August reflected that, being based on 24 hours per day. The respondent did not initially exercise the right to require the claimant to sleep over because they were friends. Instead, she required the claimant to be on call. We find she could have required the claimant to sleep over from the start of her employment. The respondent's attitude changed from November 2020. From that point she treated the claimant the same as other PAs when it came to the requirement to sleep over. That was not a breach of contract but might have been a

whistleblowing detriment had it been pleaded that way. It was not. We find the fact that the claimant did carry out the sleepovers consistent with that being the requirement under her contract. The breach of contract claim fails.

Time limits

129. Although not included in the original List of Issues, the respondent pointed out in its amended response that there were time limit issues potentially arising in relation to the detriment claims. Based on our findings, we find that detriment D2 is potentially out of time. It occurred on 27 October 2020. If it is a one-off incident rather than one of a series of similar acts then a claim in relation to it should have been brought by the end of January 2021. The claimant did not start early conciliation in this case until March 2021. Unless detriment D2 forms part of a series of similar acts, therefore, it is out of time unless it was not reasonably practicable for the claimant to bring a claim in relation to it sooner than she did.

130. The claimant's case in submissions was that detriment D2 was the first step in punishing her for the Covid incident. Her case is that the other treatment to which she was subjected, namely deduction from her pay (i.e. detriment D1) and the requirement that she now sleep over (not pleaded as a separate detriment but as part of the breach of contract claim) were other examples of the respondent punishing her and therefore part of a continuing act. We cannot take the requirement to sleep over into account as we have not found that it was a whistleblowing detriment. We can take D1 into account.

131. The case of **Arthur** says that we must take into account all the circumstances surrounding the acts to decide whether they from a series of similar acts. In this case, detriments D2 and D1 were both decided on by the same person, the claimant's employer. We have found that there were common reasons why D2 and D1 took place, namely protected disclosures PD2 and PD4. It does not seem to us that **Arthur** suggests that the detriments have to be acts of the same kind to be a "series of similar acts". Quite the opposite. We find that D2 and D1 were part of a series of similar acts. We accept the claimant's submission on this point.

132. The time limit therefore runs from the last of those acts, which was the final deduction from the claimant's pay. That occurred when she received her final pay on 18 December 2020. Early conciliation was begun on 8 March 2021, so within three months of that date. The Early Conciliation Certificate was issued on 19 April 2021. The claim was issued on 18 May 2021 so was within time, taking into account the extension of time arising from early conciliation. That means the claims relating to D2 and D1 were brought in time.

Employment Judge McDonald
Date: 18 January 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
19 January 2024

FOR THE TRIBUNAL OFFICE

Annex
List of Issues

1. Protected Disclosures

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

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

PD1 Around June/July 2020 verbally informing the respondent that the arrangements for transporting the respondent by car were unsafe and/or unlawful in that (a) the respondent was not adequately secured within her wheelchair whilst travelling and (b) the wheelchair was not adequately secured within the vehicle whilst travelling.

PD2 Around 25 October 2020 informing the respondent during a phone call that it would be unsafe for [the claimant] to attend work due to having been in contact with someone who had tested positive for Covid-19.

PD3 Around early November 2020 verbally informing the respondent that the arrangements for transporting the respondent by car were unsafe and/or unlawful in that (a) the respondent was not adequately secured within her wheelchair whilst travelling; (b) the wheelchair was not adequately secured within the vehicle whilst travelling; and (c) the claimant was not insured to drive the vehicle.

PD4 Around early November 2020, verbally informing the respondent and another personal assistant (witness D) that initiating the use of bowel irrigation procedures without these being advised by a medical practitioner was putting the respondent's health at risk.

1.1.2 Did she disclose information?

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

1.1.4 Was that belief reasonable?

1.1.5 Did she believe it tended to show that:

1.1.5.1 a criminal offence had been, was being or was likely to be committed;

1.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

1.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

1.1.5.5 the environment had been, was being or was likely to be damaged;

1.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed?

1.1.6 Was that belief reasonable?

1.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. Dismissal (Employment Rights Act 1996 section 103A)

2.1 Was the reason or principal reason for dismissal that the claimant had made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

3. Detriment (Employment Rights Act 1996 section 48)

3.3 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 The claimant's pay allegedly being reduced by £100 per week, in or around November 2020.

D2 The respondent refusing to allow the claimant to take annual leave during a shift she was unable to attend as a result of being in contact with someone who had tested positive for Covid-19.

D3 The respondent re-allocating shifts the claimant was due to do to another personal assistant despite the claimant obtaining a negative Covid-19 test result.

3.4 If the claimant was subjected to that detriment, was it done on the ground that she made a protected disclosure?

4. Remedy for Dismissal/Detriment

4.1 What basic award is payable to the claimant, if any?

4.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.3.1 What financial losses has the dismissal caused the claimant?

4.3.2 Has the claimant taken reasonable steps to replace her lost earnings, for example by looking or another job?

4.3.3 If not, for what period of loss should the claimant be compensated?

4.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.3.5 If so, should the claimant's compensation be reduced? By how much?

4.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.3.7 Did the respondent or the claimant unreasonably fail to comply with it?

4.3.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

4.3.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

4.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.4 What injury to feelings award is payable to the claimant?

5. Holiday Pay (Working Time Regulations 1998)

5.1 What was the claimant's leave year?

5.2 How much of the leave year had passed when the claimant's employment ended?

5.3 How much leave had accrued for the year by that date?

5.4 How much paid leave had the claimant taken in the year?

5.5 Were any days carried over from previous holiday years?

5.6 How many days remain unpaid?

5.7 What is the relevant daily rate of pay?

6. Unauthorised Deductions

6.1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

7. Breach of Contract

7.1 Did this claim arise or was it outstanding when the claimant's employment ended?

7.2 Did the respondent underpay the claimant for her notice period in the sum of £200?

7.3 Did the respondent do the following:

7.3.1 Require the claimant to sleep at the respondent’s house during her shifts, whereas she had previously been able to return home at the end of the evening?

7.4 Was that a breach of contract?

7.5 How much should the claimant be awarded as damages?