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EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
EMIL KALINOWSKI	**V**	**ELIDYR COMMUNITIES TRUST LIMITED**

HEARD **AT SWANSEA CIVIL JUSTICE CENTRE** **ON: 5, 6, 7, 8 & 9 AUGUST 2024**

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS M WALTERS
MR C WILLIAMS

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**
FOR THE RESPONDENT: **MR GARRETT (COUNSEL)**

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The unanimous judgment of the Tribunal is as follows:

1. The complaints of detriment for making protected disclosures were not made out and are dismissed.

2. The complaint of automatic unfair dismissal for making protected disclosures is not made out and is dismissed.

REASONS

Introduction

1. This is a claim by Emil Kalinowski ('the Claimant') against his former employer, Elidyr Communities Trust Limited ('the Respondent'). The

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Claimant was employed as a Learning Support Worker from 8 August 2021 until 15 February 2023.

2. The Claimant presented two claims to the Tribunal on 12 December 2022 and 5 May 2023 respectively. The claims were subsequently consolidated by the Tribunal. The Claimant complained of detriment and dismissal for making protected disclosures. The Respondent resisted the claims in their entirety

3. At a Case Management Hearing on 30 January 2024 before Employment Judge Sharp, a List of Issues was agreed and case management directions made to prepare the case for the final hearing. Those issues were not amended by either party, and a copy of the List of Issues, so far as they relate to liability, is at Appendix 1.

The Final Hearing

4. The final hearing was conducted in person at Swansea Civil Justice Centre (save that the non-legal members participated by video link).

5. The Claimant was assisted throughout by Mr Skoczylas, the Polish interpreter appointed by the Tribunal. Although the Claimant's English was very good, it was agreed to make extensive use of Mr Skoczylas throughout the hearing to ensure that there was no risk of misunderstanding or misinterpretation. As such, Mr Skoczylas interpreted throughout the entirety of the hearing.

6. We heard oral evidence from the Claimant. For the Respondent, we heard from the following employees:

   6.1. Carty Fox-Robinson (Deputy Head of Care & Safeguarding)

   6.2. Huw Sparkes (Head of Care & Safeguarding)

   6.3. Thomas Thurtle (Chief Financial Officer)

7. We also had sight of a witness statement from David Sibbons, who had been the Respondent's Chief Executive Officer. Unfortunately, Mr Sibbons passed away earlier this year. As Mr Sibbons' evidence was untested, we afforded it limited weight.

8. Each witness we heard from adopted their written statement. We also had sight of a paginated bundle ('the Bundle') and received oral submissions from Mr Garrett for the Respondent and written submissions from the Claimant.

9. The Claimant was a litigant in person. The Tribunal explained the process and procedures to him, checked his understanding, encouraged

him to ask questions and gave him guidance throughout. We were satisfied that the Claimant was able to fully engage in the process and present his claim to the best of his abilities.

10. We were grateful to the Claimant and Mr Garrett for the assistance they provided and the work they had undoubtedly undertaken both before and during the hearing. We were grateful to all the witnesses including the Claimant, who attended and answered the questions asked of them to the best of their recollections. We were also grateful to Mr Skoczylas for his interpretation services.

Applicable Law

Protected Disclosures

11. So far as relevant, a protected disclosure is defined by sections 43A – 43C and 43F of the Employment Rights Act 1996 ('ERA 1996'), as follows:

> 43A Meaning of "protected disclosure"
>
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> 43B Disclosures qualifying for protection
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> …
> (5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

> 43C Disclosure to employer or other responsible person
>
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—
>
> (a) to his employer,…
>
> …

12. In Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1346 Sales LJ said at [35] (with emphasis added):

> The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub- paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)…….

13. A failure to identify a particular type of wrongdoing within a protected disclosure might provide evidence of what was or was not in the worker's mind at the time of the disclosure (per Twist DX Ltd v Armes UKEAT/0030/20).

14. Where a worker says that the information they conveyed tended to show the commission of a criminal offence or a breach or likely breach of a legal obligation, they do not have to be right either about the facts relayed or the existence or otherwise of the criminal offence or legal obligation. It is sufficient that the worker actually holds the belief and that objectively that belief is reasonable (per Babula v Waltham Forest College [2007] EWCA Civ 174; Eiger Securities LLP v Korshunova [2017] IRLR 115; Darnton v University of Surrey [2003] IRLR 133).

15. Any legal obligation should be identified and capable of verification. The worker must identify what legal obligation they had in their mind and that they believed had, was or was about to be breached (per Riley v Belmont Green Finance Ltd UKEAT/0133/19; Eiger Securities LLP v Korshunova [2017]).

16. The worker has to believe at the time he was making the protected disclosure that the disclosure was in the public interest and that belief must be reasonable (per Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979).

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Automatic Unfair Dismissal

17. An employee who is dismissed by reason (or if more than one, by the principal reason) of having made a protected disclosure is regarded as unfairly dismissed (per section 103A of the ERA 1996).

18. In Royal Mail Group Ltd v Jhuti [2019] UKSC 55, Lord Wilson held as follows (at [60]);

> In searching for the reason for a dismissal for the purposes of section 103A of the Act…, courts need generally look no further than at the reasons given by the appointed decision-maker.

19. The claim will not succeed unless the Tribunal concludes that at least the principal reason for the dismissal was that the worker had made protected disclosures. It will be for the worker to raise at least an evidential case before the burden passes to the employer to disprove that reason (per Kuzel v Roche Products Ltd [2008] EWCA Civ 380).

Prohibition on detriment

20. By reason of section 47B(1) of the ERA 1996:

> 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.

What is detriment?

21. What matters is that, compared with other workers (hypothetical or real), the Claimant is shown to have suffered a disadvantage of some kind. Detriment should be assessed from the viewpoint of the employee or worker. A threat by an employer (or its worker or agent) to take action which would constitute a 'detriment' is itself a detriment for the purposes of section 47B of the ERA 1996, provided that the threatened worker was reasonable in regarding it as being to his disadvantage (per Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).

22. It must be a detriment to which the employee or worker has been subjected in the 'employment field' (Tiplady v City of Bradford Metropolitan District Council [2019] EWCA Civ 2180).

23. It is for the Claimant to prove, on the balance of probabilities, that she made protected disclosures and that she suffered detrimental treatment form the Respondent.

Was the detriment because of the protected disclosures?

24. The test of causation is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistle-blower (per Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2011] EWCA Civ 1190).

25. The burden of proof in this regard is on the Respondent. Section 48(2) of the ERA 1996 means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the Claimant — i.e. that there was a protected disclosure, that there was a detriment and the Respondent subjected the Claimant to that detriment — the burden shifts to the Respondent to prove that the Claimant was not subjected to the detriment on the ground or grounds that he had made the protected disclosures.

Findings of Fact

26. The Respondent runs a specialist residential facility for young adults with learning difficulties. The Claimant was employed as a Learning Support Worker. According to his job description the Claimant's responsibilities included (at [141] – [142] of the Bundle):

> …Ensuring that service user care and welfare needs are assessed and met.
> …
> …Administering of medication in accordance with the Organisations / CIW policies and procedures.
> …
> …Ensure all safeguarding / protection requirements are adhered to and met, notifying line managers of any suspected safeguard issues.
> …
> …Work according to the policies and guidelines of the Organisation.

27. The Respondent operated a number of policies and procedures, including, so far as relevant:

    27.1. Handling, Storing, Administering & Disposing of Medication ([171] – 181] of the Bundle);

    27.2. Emergencies ([182] – [185]); and

    27.3. Grievance ([189] – [191]).

28. The Claimant's employment began on 9 July 2021. The facility included a number of separate residential blocks. At the relevant time, he was based in the Ty Pickwick.

29. So far as relevant, there were no issues or concerns regarding or raised by the Claimant until 15 July 2022, when he raised his first grievance (at

[354 – [355] of the Bundle, which related to his relationship with another employee and which did not form one of the Claimant's alleged protected disclosures).

30. The Claimant underwent an appraisal with Mrs Fox-Robinson on 18 August 2022 (a copy of the report was at [208] – [213] of the Bundle). There was a discussion about the concerns the Claimant had raised as part of that first grievance and the following was recorded (at [212]):

> [The Claimant] says that he on times finds it hard work with CF [the employee with whom the Claimant had raised concerns] due to her inconsistent mood. [Mrs Fox-Robinson] asked [the Claimant] if he would like her to speak to CF regarding this, he said he did not. [Mrs Fox-Robinson] then asked what she could do to help the situation he said "no". [Mrs Fox-Robinson] said if there was a possibility of him having a house move would he like to do that. [The Claimant] said "no he likes working in Ty Pickwick".

31. The 15 July 2022 grievance was investigated by Mr Sparkes (per his grievance report of 27 September 2022, at [262] – [264] of the Bundle), who informed the Claimant of the outcome of his investigation by a letter dated 12 October 2022 (at [386] – [387]). The grievance was not upheld as there was "*no evidence to support the allegations made."*

32. During the summer of 2022, a new meal plan was introduced for the residents of Ty Pickwick (per Paragraph 4 of Mrs Fox-Robinson's statement, a copy of the plan was at [214] – [217] of the Bundle). As explained by Mrs Fox-Robinson in her written and oral evidence, the meal plan arose from concerns as to the some residents' weight gain and was consulted upon with staff and management. Mr Spakes, in his oral evidence, explained that, as was standard practice, the proposed meal plan was also shared with the local authority.

33. In response to the concerns raised by the Claimant in his email to Mr Spakes of 14 September 2022 (see below), Mrs Fox-Robinson emailed staff on 15 September 2022 (an email which was subsequently forwarded to the Claimant, as he and another staff member had been inadvertently omitted form the circulation of the original email). Of relevance, Mrs Fox-Robinson said the following, which reflected her evidence to the Tribunal of the rationale for the meal plan and the work and consultation that had gone into its development (at [363] of the Bundle):

> Firstly, we would like to address the new menu. For some time prior to the implementation of the new menu we have had concerns, along with parents, about some of the residents' weights. We had the opportunity to review this over the summer break and put into place a draft three-week menu plan that would introduce some new recipes to ensure we continue to offer the residents a healthy balanced diet. This was introduced over the three weeks in the summer with the intention of starting properly when Sandra [of the

> catering staff] returned from her holiday. Sandra was asked by myself to use the menu plan as a guide and over the next three weeks to trial it. Sandra voiced her concern about some of the ingredients and was asked to substitute where she felt it was needed, this she agreed to do. After the three weeks, in fact yesterday morning, I sat with Sandra again and asked her opinion on how it had gone. She felt that that the portions were too small for some residents and that some of the meals were not liked by the residents. I gave her the autonomy to substitute any meals she felt needed to be replaced, to adjust the ingredients where necessary and to liaise with the staff any changes/feedback. Portion control is managed by staff ensuring those who do not need to watch their weight have their plates filled more, which gets around the issue of 'seconds' for some and not for others.

34. On or around 1 September 2022, a Safe Staffing Risk Assessment was undertaken for Ty Pickwick (at [218] of the Bundle). So far as relevant, the risk assessment determined that there needed to be a minimum of three staff per shift during the week and four staff per shift on weekends.

35. It was not in dispute that in addition to the employed staff, the Respondent relied upon volunteers in administering care and supervision to the residents. The Claimant submitted to the Tribunal that the reference to ‘staff’ in the risk assessment only referred to employed staff and excluded volunteers. As such and on his case, whenever he worked in a team of three which included one or more volunteer, the Respondent was acting in breach of its own risk assessment.

36. The Respondent said that the reference to ‘staff’ in the risk assessment included volunteers. There was no distinction between staff and volunteers when determining safe staffing levels in Ty Pickwick. The Respondent queried the Claimant’s own belief in such a distinction, given that he had worked numerous times as part of a team of three which included volunteers and never raised any issues or concerns previously. The Respondent also highlighted that, at the relevant time, the Claimant’s concerns about staffing levels had never raised any issues with volunteers not counting as staff or there being any breach of the risk assessment.

37. The Tribunal preferred the Respondent’s description of the risk assessment, namely that ‘staff’ included volunteers. Not only was that plausible and reasonable, it was also a matter for the Respondent how it delivered its services, subject always to monitoring and regulation by the appropriate statutory bodies. There was no evidence to support the Claimant’s contrary interpretation. Instead, there was evidence of him working in the very configurations which he now claimed to be unsafe without comment or complaint. In addition, the Respondent was right to highlight that at no time during the relevant period did the Claimant suggest that the use of volunteers did not count toward the acceptable staffing levels for Ty Pickwick.

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38. In our judgment, the Claimant's understanding of the risk assessment was mistaken. The minimum number of staff on duty did permissibly include volunteers. The Claimant accepted in his oral evidence that he was always on a shift with two other people, (whether staff or volunteers). It follows that, on the Claimant's own case, there was never any breach of the Respondent's risk assessment regarding staffing numbers at Ty Pickwick.

39. Despite the indication given at his appraisal meeting on 18 August 2022, on 12 September 2022, the Claimant emailed Mrs Fox-Robinson and Anne Davies (Acting House manager at Ty Pickwick), asking to be moved to a different house, because of the impact on him of the other employee (at [358] of the Bundle). Following discussions with Mr Sparkes, Mrs Fox-Robinson responded to the Claimant on 14 September 2022, as follows (at [359]):

> I have taken your request to Huw [Sparkes], unfortunately with the staffing situation across the board at the moment there is no opportunity for a house move at this time. However once staff numbers increase, he would be happy to revisit your request.

40. The Claimant responded to Mrs Fox-Robinson later the same day, as follows (at [359] of the Bundle);

> Hello Thank You for response
>
> If I quit my job at Coleg. coleg will lose an employee, which will worsen the staffing situation. So it's in the coleg's interest to keep the employee. I am not able to work with C. Fletcher anymore. The situation of this person's negative impact on all employees has been known for a long time. There is also too little staff for a long time, which has a negative impact on working conditions. As you can guess, it has an impact on me. The situation at home is tough as I mentioned earlier. It is stressful and exhausting enough for me. If I add the work with C.F to it, the work for today is not feasible for me. You also cannot blame me with the staffing problems that Coleg contributes to.

41. The Claimant says that this was his first protected disclosure ('PD 1'). In response, Mrs Fox-Robinson discussed the matter further with Mr Sparkes and sent the following to the Claimant on 15 September 2022 (at [360] of the Bundle):

> I am sorry that you feel so affected by everything, I have taken you last email to Huw [Sparkes] but his decision still stands. He acknowledges your request to move house but is unable to facilitate it at this time. As soon as the business needs change the opportunity for you to move will be made available to you.

42. Later in the evening of 14 September 2022, the Claimant sent an email to Mr Spakes, raising concerns about the administration of new

medication to a resident (known as Resident 1) and about changes to the diet and menu for residents as a whole from the new meal plan (at [361] – [362] of the Bundle). In the same email and because of the concerns he had raised, the Claimant stated that:

42.1. He would no longer administer drugs to residents; and

42.2. He would no longer cook for residents

43. The Claimant says that this was a protected disclosure ('PD 2'). Mr Sparkes informed the Claimant on 15 September 2022 that he would investigate his complaint in line with the Respondent's grievance policy and procedures (at [361] of the Bundle).

44. In respect of the medication for Resident 1, the Claimant was reasonably aware of the introduction by the GP of the new medication and the time for administering, since it was detailed in the handover notes (at [219] – [220] of the Bundle) and the Claimant himself had administered the very same medication at 8pm (the time directed by Resident 1's GP) on 12 September 2022 (per [225] of the Bundle). There was clear and consistent evidence of what Resident 1's GP was telling the Respondent and that information was being communicated to staff (per Mrs Fox-Robinson's email of 15 September 2022 at [363], which the Claimant confirmed in his oral evidence was forwarded to him shortly afterwards).

45. In his oral evidence, the Claimant stated that he had required some form of corroborative evidence of the GP's instruction. There was no evidence of him seeking such corroboration at the relevant time. In contrast, the Claimant administered Resident 1's medication at the advised time of 8pm on 12 September 2022 without the very corroboration he claimed to seek. There was also no evidence of the Claimant seeking such assurance in respect of any other resident or at any other time. We were compelled to conclude that the Claimant's desire for some sort of corroboration from Resident's 1's treating GP as to the instruction to administer medication in the evening was an afterthought and did not accurately reflect his thinking at the material time.

46. Instead, the Claimant was fully aware of the instruction from Resident 1's GP and followed that instruction himself on 12 September 2022. For those reasons, we were unable to find, on balance, that the Claimant could have believed that the direction from management regarding when and what to administer to Resident 1 was at odds with the GP's instruction.

47. In response to being informed that Mr Sparkes would be investigating his complaints of 14 September 2022, the Claimant emailed Mr Sibbons, as follows (per his email of 15 September 2022, at [364] of the Bundle):

> I have the right to change the investigator. So please pass the matter on to someone else.

48. The Claimant says that this was a protected disclosure ('PD 3'). In terms, the Claimant repeated his request that Mr Sparkes be replaced as the investigator into his concerns in an further email to Mr Sibbons on 18 September 2022 (at [365] of the Bundle). The Claimant says that this was also a protected disclosure ('PD 4').

49. Although not in the Bundle, reference also made to a further email to Mr Sibbons form the Claimant on 21 September 2022, which again requested a change of investigator (it was referred to in Paragraph 58 of the Grounds of Resistance, at [88], and in Paragraph 12 of Mr Sibbon's witness statement). The Claimant says that this was a protected disclosure ('PD 5').

50. The Respondent did not accede to the Claimant's request and the subsequent investigation into the Claimant's email of 14 September 2022 was set out in Mr Sparkes' report of 29 September 2022 (at [292] – [294] of the Bundle). By a letter dated 12 October 2022, Mr Spakes informed the Claimant of the outcome of the investigation and his conclusion that, despite the Claimant's concerns, no policies or procedures had been breached and there was no evidence to support the Claimant's grievance (at [388] – [399]).

51. In the meantime and by an email sent on 18 September 2022 to Mr Sibbons, the Claimant raised further concerns about the refusal of his request for a house move and what he alleged were "*long reported concerns, problems and negligence"* made by him and fellow staff members to managers, which had been ignored (at [366] of the Bundle). The email was titled "*Complain* [sic] *against Carty Fox-Robinson*". The Claimant says this was a protected disclosure ('PD 6').

52. Eleven minutes later, the Claimant sent a second email to Mr Sibbons, titled "*Complaint about breach Safeguarding"* (at [367] of the Bundle). In this second email, the Claimant reported concerns about staffing levels in Ty Pickwick (as a result of which he reported feeling threatened throughout his shift) and specifically highlighted an incident with a female resident (referred to as "Resident 2"), who had to be changed out of wet clothes. Due to the purported lack of staff, the Claimant reported that he had to assist a female colleague to change Resident 2's clothes. The Claimant says that this email was also a protected disclosure ('PD 7').

53. Resident 2's care plan at the relevant time was in evidence (at [192] – [200] of the Bundle). In particular, the care plan required "*[F]emale staff to support…with her personal care through verbal and physical prompts"* but made no distinction as to the gender of staff when assisting supporting her to change her clothes or deal with incidents of

incontinence (per Self-Care at [195] of the Bundle). It was not in dispute that a female colleague from another house attended to assist the Claimant in the evening (per [367]).

54. The Claimant should have been familiar with Resident 2's care plan. As such, he could not have reasonably believed that the events which he detailed in his second email to Mr Sibbons on 18 September 2022 disclosed a breach of that plan.

55. The Claimant's first email of 18 September 2022 was treated as raising grievances and investigated by Mr Spakes (whose investigation report of 26 October 2022 was at [307] – [309] of the Bundle). By a letter dated 31 October 2022, Mr Spakes informed the Claimant that his grievances had not been upheld, as Mr Spakes had "*not found any evidence to support the allegations made"* (at [407] – [408]).

56. On 19 September 2022, the Claimant sent an email to colleagues, wherein he raised concerns about what the residents had been provided for breakfast and lunch, following the introduction of the new meal plan (at [369] of the Bundle, albeit not fully reproduced). The Claimant says that this was a protected disclosure ('PD 8').

57. Later on 19 September 2022, the Claimant sent another email to Mr Sibbons, titled "*Re: Official complain"* [sic]. In it, he repeated his concerns about what had been provided for residents for both breakfast and lunch (at [368] of the Bundle). The Claimant reported that "*[S]tudents were deprived of the right to choose, and despite that fact that they are probably hungry, they are not able to express their needs on their own."* In the Claimant's opinion, this constituted "*a breach of safeguarding principles."* The Claimant says that the email of 19 September 2022 was a protected disclosure ('PD 9').

58. The Claimant's second email of 18 September 2022 to Mr Sibbons and his email of 19 September 2022 were treated as raising grievances and investigated by Mr Spakes (per his investigation report of 18 November 2022, at [313] – [314] of the Bundle). By a letter dated 21 November 2022, Mr Spakes informed the Claimant that these grievances had not been upheld, as there was found to be no breach of safeguarding rules and the Claimant had been mistaken about Resident 2's care plan (at [409] – [410]).

59. In his written evidence, Mr Spakes confirmed that, at the time of sending his various grievance outcome decisions to the Claimant, he failed to include the relevant investigation report. He claimed that this was an oversight, which was rectified when they were sent to the Claimant on 11 January 2023 and was in no way related to the Claimant having made the complaints in the first place (per Paragraph 65 of Mr Sparkes' witness statement).

60. The investigation reports should reasonably have been sent to the Claimant at the relevant time. They would have assisted in explaining to the Claimant why his grievances had been unsuccessful. That they were not was an error by the Respondent. However, there was insufficient evidence to suggest that these were anything other than simple oversights by Mr Sparkes. There was no evidence to support any contention by the Claimant that the failure to provide the investigation reports in a timely manner was deliberate or calculated.

61. In respect of all the grievance decisions, the Respondent afforded the Claimant a right of appeal, which he exercised (variously, at [391], [392] and [411] of the Bundle). The Respondent held a grievance appeal hearing on 20 December 2022, which the Claimant attended. It was chaired by Mr Sibbons (the minutes of the meeting were at [315] – [316]). By a letter dated 11 January 2023, Mr Sibbons informed the Claimant that his appeals had been unsuccessful and the grievance outcome decisions were upheld. The letter explained the reasons for Mr Sibbons' conclusions (at [416] – [423]).

62. The Claimant also claimed that he made a verbal disclosure to Mrs Fox-Robinson and Ms Davies, alleging that a resident had been refused an antipsychotic drug, only for it to be administered before bedtime. Mrs Fox-Robinson's evidence was that the alleged verbal disclosure never happened. The Claimant was unable to recall when it happened and was unable to provide sufficient details as to what was said. Importantly, as we have noted above, there was evidence of the Respondent treating many of the Claimant's complaints as grievances, which it proceeded to investigate and determine. There was no evidence that any alleged verbal disclosure triggered a similar response which, given the Respondent's track record of treating such complaints as grievances, supported Mrs Fox-Robinson's evidence that the verbal complaint was not made, as alleged or at all.

63. For those reasons, we found that the Claimant did not make a verbal disclosure, as alleged.

<u>The Claimant's dismissal</u>

64. As noted above, from 14 September 2022, the Claimant had indicated his refusal to administer medication to residents. That was a position which was accommodated by the Respondent, usually by ensuring that another member of staff attended Ty Pickwick whilst the Claimant was on shift to administer any prescription medication.

65. The Claimant was working the evening shift on 26 September 2022. His line manager, Ms Davies, was supposed to arrange for another staff member to attend Ty Pickwick in the evening and administer medication.

However, by her own admission, she omitted to do this and forgot that the Claimant had removed himself from administering medication (per her statement of 28 September 2022, at [289] of the Bundle).

66. It was not in dispute that, as a result, three residents were left unmedicated. It was also not in dispute that the Claimant failed to contact the relevant manager to alert them of the missed medication prior to finishing his shift on 26 September 2022.

67. Mrs Fox-Robinson became aware of the missed medication issue the following day. She concluded that the Claimant would have reasonably been aware that the three residents in question were due to receive their prescribed medication on the evening of 26 September 2022 (per Paragraph 29 of her witness statement, referring to the Staff handover Book at [285] of the Bundle and the applicable Medication Administration Records at [253] – [255]). In addition, Mrs Fox-Robinson's understanding was that the relevant emergency contact details had been available to the Claimant on the evening in question (per [256] – [258] and Paragraph 31 of her statement).

68. Mrs Fox-Robinson brought the issue to the attention of Mr Spakes, who obtained the statement from Ms Davies (referred to above) and also a statement from Andre Anjos, a volunteer who had been on the evening shift with the Claimant on 26 September 2022 (at [286] of the Bundle).

69. Mr Sparkes invited the Claimant to an investigation meeting on 28 September 2022 (the minutes of which were at [290] – [291] of the Bundle). The Claimant accepted that he had been aware that three residents had not been medicated, blamed Ms Davies for not arranging for another staff member to attend to administer their medication and accepted that he had not notified either other staff or the on-call manager of the missed medication.

70. Mr Sparkes informed the Claimant that he was suspended on full pay with immediate effect, a decision which was confirmed in writing (at [377] – [378] of the Bundle). The letter of suspension informed the Claimant that there would be an investigation of the following allegation:

> Not fulfilling your responsibilities of care

71. On 18 October 2022, the Claimant raised a grievance against the decision to suspend him (at [395] – [398] of the Bundle). Mr Sparkes responded on 20 October 2022 and reiterated that the reason for his suspension was as explained to him in the meeting on 28 September 2022, namely the alleged failure by the Claimant to notify staff or management that three residents had not received their medication. The Claimant subsequently appealed the decision on his suspension, which

was considered and determined with his other grievance appeals by Mr Sibbons (and referred to above). It was not upheld.

72. On 20 January 2023, Mr Sparkes concluded his investigation and reported as follows (at [317] – [318] of the Bundle):

> I am satisfied that there was a breach in procedure, as [Anne Davies] did not schedule a trained member of staff on shift and formal action is to be considered,
>
> I am satisfied that [the Claimant] did not follow procedures and I believe there was a 'wilfulness' not to report and formal action is to be considered.

73. On 30 January 2023, Mr Thurtle invited the Claimant to a disciplinary hearing, scheduled for 8 February 2023 (at [424] – [425] of the Bundle). That invitation included the following:

> …The purpose of the hearing is to consider an allegation against you which we consider to be most serious. The allegation is as follows:
>
> - a wilful decision on your part not to act in accordance with policies and procedures in respect of the medical administration to three residents on the 26th September 2022.
>
> …

74. The disciplinary hearing took place on 8 February 2022 (the minutes were at [319] – [320] of the Bundle). The focus of the meeting was on the allegation that the Claimant had failed to follow procedure in not reporting that three residents had been left unmediated on 26 September 2022.

75. By a letter dated 15 February 2023, Mr Thurtle informed the Claimant that the decision had been taken to dismiss him without notice on grounds of gross misconduct. The letter set out the reasons for that decision and included the following (at [438] – [440] of the Bundle):

> The reason for this decision is as follows:
>
> • you made a wilful decision not to act in accordance with policies and procedures in respect of the mis-medical administration to three residents on the 26th September 2022.

76. The Claimant appealed the decision on 28 February 2023 (at [441] – [442] of the Bundle). He was invited to an appeal hearing by Mr Sibbons (at [443] – [44]) and the appeal hearing took place on 19 April 2023 (the minutes were at 324]). By a letter dated 21 April 2023, Mr Sibbons informed the Claimant that the decision to dismiss him was being upheld and set out the reasons why (at [446] – [449]).

RESERVED JUDGMENT

Analysis & conclusions

Protected disclosures

77. The alleged protected disclosures are taken from the List of Issues. Save where indicated, we have considered them in turn.

PD 1 - Email to Carty Fox-Robinson dated 14th September 2022 tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging low staff numbers

78. As found above, the Claimant's allegation that minimum staffing levels had been compromised was incorrect. The Claimant sought to argue that the reference to staff in the risk assessment of September 2022 (at [218] of the Bundle) did not include volunteers. However, his concerns at the time about staffing levels made no such distinction and, on his own evidence, he had previously worked with volunteers as part of a team of three and not raised any concerns at the time about working in breach of any safe staffing risk assessment.

79. The Respondent had undertaken a risk assessment on staffing levels, which it then adhered to. The Claimant was reasonably aware of that fact. For those reasons, the Tribunal was unable to conclude, on balance, that the Claimant held a reasonable belief that staffing levels at the relevant time in Ty Pickwick constituted a breach of any legal obligation on the Respondent or endangered the health and safety or residents or staff.

80. We therefore concluded that PD 1 was not a protected disclosure as the Claimant had no reasonable belief of any wrongdoing, since any belief that the Respondent was acting in breach of its own staffing risk assessment could not been reasonably held.

81. To the extent that the alleged protected disclosure related to the Claimant's complaints about someone he was working with and the impact that was having on working conditions, we did not conclude that the disclosure, such that it was, was made in the public interest. It concerned, at its highest, the Claimant's personal working circumstances and did not meet the threshold to be considered, reasonably or otherwise, to be being made in the public interest.

PD 2 - Email to Huw Sparkes dated 14th September 2022, forwarded to David Sibbons and Susan Hope Bell dated 15th September 2022, tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging that the process of administering a new drug to Resident 1 as instructed by management was incorrect and not in accordance with GP instructions and that a strict diet had been implemented on the residents of Ty Pickwick house

which was not in accordance with required standards or nutritional knowledge.

PD 8 - Email to all staff dated 19th September 2022 tending to show relevant wrongdoing under s.43B(1)(b), (d) and (f) ERA alleging that students that day had been served a breakfast and lunch which he believed breached safeguarding principles.

PD 9 - Email to David Sibbons dated 19th September 2022 tending to show relevant wrongdoing under s.43(1)(b) ERA alleging that students that day had been served a breakfast and lunch which he believed breached safeguarding principles.

82. We considered PD 2, PD 8 and PD 9 together, as there was a degree of overlap and repetition regarding issues raised by the Claimant (specifically in respect of the meal plan).

83. The Tribunal accepted that, on balance, PD 2 was made in the public interest, as it related to the care of vulnerable individuals in a private care home, which was subject to regulation.

84. However, we again concluded that the Claimant could not have held a reasonable belief of any alleged wrongdoing. As found, the Claimant failed to show, on balance, that he held a reasonable belief that the direction from management was at odds with the GP's instruction and, by extension, was unable to demonstrate a reasonable belief that there was any associated wrongdoing on the part of the Respondent.

85. The meal plan introduced in the summer of 2022 was balanced and afforded residents choice. At the time of its development, the Claimant, like other staff, had the opportunity to comment upon it but chose not to. In addition, Mrs Fox-Robinson emailed staff on 15 September 2022 with an explanation for the rationale behind the meal plan, the fact that it had been trialled successfully, that feedback had been taken on board and its operation modified (at [363] of the Bundle, which the Claimant confirmed was forwarded to him at the time).

86. In his oral evidence, Mr Sparkes also confirmed that, as is standard practice, the meal plan was shared with the local authority, who raised no issues or concerns.

87. Contrary to the Claimant's allegations, the meal plan was properly discussed and consulted upon. As it was introduced in part to address issues with some residents' weight, it was perhaps understandable that there would be some initial adjustment to the new plan. However, given the open and collaborative way in which the plan was developed, trialled and implemented, the Claimant could not, in our judgment, have held a reasonable belief that its implementation placed the Respondent in

breach of any legal obligation nor that it endangered the health and safety of any of the residents.

88. We therefore concluded that PD 2 was not a protected disclosure as the Claimant had no reasonable belief of any wrongdoing.

89. We reached the same conclusions as to PD 8 and PD 9. The Claimant's awareness of the meal plan, its rationale and its development remained the same when, on 19 September 2022, he shared his views with other staff and made his complaint to Mr Sibbons. Given that prior knowledge, any belief that the meals being served to a resident breached safeguarding principles was not reasonably held.

90. PD 8 was also presented on the legal basis that information tending to show either a breach of a legal duty or the endangering of health and safety had been, or was likely to be deliberately concealed (per section 43B(f) of the ERA 1996). There was no evidence relied upon to support that contention and we were not addressed on it in any way by the Claimant. As such, we found that the Claimant's email to colleagues on 19 September 2022 did not in any way support an allegation that information was concealed, deliberately or otherwise.

91. For all those reasons, PD 8 and PD 9 were not protected disclosures.

<u>PD 3 - Email to David Sibbons dated 15th September 2022 tending to show relevant wrongdoing under s.43B(1)(f) ERA asserting an alleged right to change investigator.</u>

<u>PD 4 - Email to David Sibbons dated 18th September 2022 tending to show relevant wrongdoing under s.43B(1)(f) ERA asserting an alleged right to change investigator.</u>

<u>PD 5 - Email to David Sibbons dated 21st September 2022 tending to show relevant wrongdoing under s.43B(1)(f) ERA alleging issues with Huw Sparkes as investigator.</u>

92. We considered PD 3, PD 4 and PD 5 together, since they gave rise to the same issue, namely the Claimant's request that Mr Sparkes not investigate his grievances.

93. These alleged protected disclosures fell short of the legal requirements for protection on numerous grounds. First, they were not disclosures of information. Rather, they were requests by the Claimant to change the investigator in circumstances where, at its highest, he was alleging that Mr Sparkes would not be impartial. They were, at best, allegations, which were not supported by any evidence and simply reflected the Claimant's opinion. In our judgment, these alleged disclosures lacked

the minimum levels of factual content and specificity to qualify as disclosures of information.

94. Second, the Claimant could not have held a reasonable belief that what he was requesting disclosed any wrongdoing on the part of the Respondent. How an employer deals with grievances raised by its staff is a matter for the employer. Commonly, as here, an employer will draft, adopt and follow an internal policy or procedure. There was no provision in the Respondent's Grievance policy whereby a complainant could object to or demand the replacement of the person appointed by the Respondent to undertake the investigation. The Claimant was reasonably aware of the Grievance policy and so was reasonably aware that it did not contain a right to object to Mr Sparkes' appointment as investigator.

95. Finally, there was plainly no public interest in who investigated the Claimant's grievances. The Claimant could not have reasonably believed that there was any public interest in how the Respondent conducted its own internal investigations into grievances raised by its staff.

96. For all those reasons, PD 3, PD 4 and PD 5 were not protected disclosures.

<u>PD 6 - Emails to David Sibbons dated 18th September 2022 at 14:31 tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging that concerns reported by staff to management had not been dealt with and that his requested house move had been denied without consideration to his mental health and wellbeing</u>

97. The Claimant's email of 18 September 2022 to Mr Sibbons did not contain disclosures of information. The allegation that concerns raised by staff had not been addressed or dealt with were vague and non-specific. They did not stipulate what the concerns were, when they had been raised or by whom, how "*[M]onth by month it only got worse"* or what the "*negative impact"* on staff and students was (per [366] of the Bundle).

98. Similarly, whilst the Claimant alleged that his request for a house move had been refused "*without talking, without any mental support, without any interest in my well-being"*, he failed to provide any information as to what mental health or well-being support he believed he required or why he believed he required it.

99. Both of these complaints were, at their highest, allegations by the Claimant, which reflected no doubt his opinion and his views but which lacked the minimum levels of factual content and specificity to elevate them to discourses capable of protection.

100. In any event, the Claimant could have had no reasonable belief that these allegations disclosed any wrongdoing on the part of the Respondent:

100.1. The Claimant did not explain in his email to Mr Sibbons what the concerns or complaints were which he alleged had been raised previously by himself and staff nor did he state what wrongdoing he believed the Respondent's alleged failure to act tended to show. He provided no evidence at the time to support the allegations he was making. Reference was made to a non-specific duty of care, without providing any objective evidence of what that duty comprised or the legal basis for it. In reality, and to the extent that the complaints related to issues he had raised previously, the Claimant was well aware that they were being investigated as grievances.

100.2. It had been clearly and reasonably explained to the Claimant why his request to move houses had been turned down. That decision was clearly open to the Respondent, as it was a matter for it how it managed resources and delivered services. There was no legal obligation on the Respondent to accede to the Claimant's request to move house and he could not have reasonably believed that there was. There was also insufficient evidence that not moving the Claimant endangered his own or anyone else's health and safety. Whilst the Claimant made generic references to his mental heath, he failed to provide sufficient information or evidence in his email to Mr Sibbons of what, if any, impact his working environment was having on him.

101. In addition, the Claimant could not have reasonably believed that any alleged impact on his mental well-being of not moving house was a disclosure that was being made in the public interest. There as no suggestion in the email of 18 September 2022 that the health or well-being of any of the residents was at risk by the failure to permit the Claimant's house move. Rather, the Claimant's concerns were limited to his own well-being which, whilst of understandable importance to him, could not reasonably be considered to be in the wider public interest.

102. For all those reasons, the Tribunal did not find, on balance, that PD 6 was a protected disclosure.

<u>PD 7 - Email to David Sibbons dated 18th September 2022 at 14:42 tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging a breach of safeguarding when Ty Pickwick house was allegedly knowingly left understaffed by management and that female Resident 2 was left without an appointed female member of staff during the shift, due to a lack of staff in the</u>

college, and that the Claimant was therefore required to assist her against policy.

103. In respect of the Claimant's second email to Mr Sibbons of 18 September 2022, it did contain sufficient detail and specificity to constitute disclosures of information (both as regards staffing levels and the care of Resident 2).

104. However, in respect of both allegations, the Claimant could not have reasonably held any belief that what he alleged tended to show either that the Respondent was in breach of a legal obligation or that anyone's health and safety was in danger.

105. The Claimant was aware that, under the staffing risk assessment for Ty Pickwick, the minimum number of staff was three. He was also aware that he always worked in a team of three. It is only now that the Claimant alleges that he believed that reference to 'staff' excluded volunteers. However, we were unable to find that such a belief was reasonably held by the Claimant. He did not raise that alleged understanding at the time, even when, on his own case, he would have known that he was working in breach of the risk assessment (given the frequency with which the minimum team of three included volunteers).

106. In addition, the staffing risk assessment made no such distinction and there was no evidence of the Respondent ever communicating such a distinction to the Claimant or anyone else.

107. It follows that the Claimant could not have reasonably believed that the staffing risk assessment excluded volunteers, could not as a result have reasonably believed that he had ever worked in breach of that assessment and, by extension, could not have reasonably believed that his concerns about staffing levels disclosed any wrongdoing on the part of the Respondent.

108. As for Resident 2, as detailed above, the Claimant could not have reasonably believed that the events which he detailed in his second email to Mr Sibbons on 18 September 2022 disclosed a breach of that the care plan in place at the time.

109. To the extent that the Claimant alleged that the care of Resident 2, as described in his email to Mr Sibbons, disclosed either a breach of a legal duty on the Respondent or endangered her health and safety (or that of anyone else), he could not have reasonably believed that to be the case, given that there had been no breach of the staffing risk assessment (with which he was familiar) and there was no breach of Resident 2's care plan (with which he should have been familiar).

110. For those reasons, the Claimant failed to show on balance that his

second email of 18 September 2022 to Mr Sibbons was a protected disclosure.

PD 10 - Verbal disclosure to Carty Fox-Robinson and Anne Davies which the Claimant has failed to date tending to show relevant wrongdoing under s.43B(1)(b) and (d) alleging that a student had been refused an antipsychotic drug just for it to be administered before bedtime

111. For the reasons detailed above, we found that there was insufficient evidence to find that this verbal disclosure happened.

112. It follows that PD 10 cannot, by definition, be a protected disclosure, as it did not happen as alleged or at all.

Conclusions; Protected Disclosures

113. For the reasons we have set out above, the Claimant did not make any protected disclosures. As we have explained, some of the alleged disclosures lacked sufficient detail. One did not occur. Aspects of others could not reasonably be considered to have been made in the public interest.

114. However, the overriding shortcoming was the lack of reasonable belief on the Claimant's part that what he was disclosing tended to show any alleged wrong doing on the part of the Respondent.

115. Despite that finding, and because we heard evidence and received submissions on the issues, we nevertheless went on to determine whether the Claimant was subjected to any detriment or dismissed because of the alleged protected disclosures.

Detriment

116. As we did with the alleged protected disclosures, we considered the alleged detriment in line with the List of Issues.

The Claimant's suspension from work on 28th September 2022

117. It was not in dispute that the Respondent suspended the Claimant on 28 September 2022 or that being suspended was an act of detriment. However, the Respondent maintained that the decision to suspend the Claimant had nothing whatsoever to do with the alleged protected disclosures.

118. There was no direct evidence to support the Claimant's contention. At most, the Claimant sought to draw an inference between the timing of his complaints and the decision to suspend him.

119. In contrast, there was extensive, detailed and cogent evidence that the Respondent suspended the Claimant because it appeared that three residents had not been medicated and the Claimant had failed to inform anyone of those facts before he left his shift on 26 September 2022.

120. In addition, the Respondent took no action against the Claimant when he made his complaints or when he decided to no longer administer medication to residents. Indeed, the Respondent's response was proactive and positive – it treated the complaints as grievances and investigated them, and it accepted and managed the Claimant's decision on medication.

121. The Respondent did however take action once it became aware that the Claimant had failed to report that three residents had not received their prescribed medication. It was that failure to report which led to the Claimant being suspended, not because he had made any alleged protected disclosures.

122. It follows that there was no link between the decision to suspend the Claimant and his alleged protected disclosures.

<u>The Claimant not being paid overtime whilst on suspension</u>

123. It was not in dispute that, whilst suspended from work, albeit on full pay, the Claimant was not paid overtime. However, that was not because he had raised concerns or complaints. It was because he did not work any overtime, by reason of being suspended.

124. In effect, this was an extension of the allegation that the Claimant was suspended because of his alleged protected disclosures. Once suspended, it was inevitable that the Claimant would not be working any overtime and, therefore, would not be paid for any overtime. However, as explained above, there was no link between the Claimant's purported protected disclosures and the decision to suspended him. It follows that the consequences of the decision to suspended him (namely, that he could not work overtime and could not be paid for overtime) were similarly unrelated to the Claimant's complaints.

<u>The Claimant's grievances not being dealt with following his suspension.</u>

125. This alleged detriment was factually inaccurate. Every grievance raised by the Claimant was investigated, the Claimant was notified of the outcome and afforded a right of appeal.

126. Save for the investigation into the Claimant's grievance of July 2022 (which he did not claim to be a protected disclosure), all of his grievances were dealt with after he had been suspended.

The Respondent not taking into account the Claimant's previous complaints regarding workload and understaffing when suspending and dismissing the Claimant.

127. This allegation of detriment started from a position which, as explained above, the Tribunal did not find to be made out. The Claimant was not suspended or dismissed for making complaints about workload or understaffing. He was suspended and dismissed because he failed to alert anyone to the fact that three residents had not received their prescription medication.

128. In addition, the Claimant's complaints were fully investigated and considered by the Respondent, under its Grievance policy.

129. The Respondent was clear in its decision of 20 October 2022 regarding the Claimant's grievance against the decision to suspend him of the reasons for the suspension, as follows (at [400] of the Bundle):

> To be clear, your suspension is due to the events of 26th September and warranted in those circumstances. The suspension is not in any way linked to any other aspect of your employment.

130. The same letter went on to detail how the Respondent had considered the Claimant's mental health and well-being, both up to the time of his suspension and thereafter (at [400] – [401] of the Bundle).

131. It follows that the alleged detriment was not made out.

The Claimant's access to his work email being revoked upon his suspension.

132. The Respondent confirmed that it did revoke the Claimant's access to his work email upon him being suspended but denied that it was in any way related to the complaints he had raised. We did not understand it to be in issue that the same also constituted an act of detriment.

133. However, there was no evidence that the decision to revoke the Claimant's email access was prompted by the complaints and grievances he had raised. As set out above, the Respondent's response to those complaints had been positive and proactive – each was investigated, each was determined and the Claimant was afforded a right of appeal.

134. At no time prior to his suspension was the Claimant's email access revoked. The Respondent only revoked the Claimant's access to his work email once he had been suspended. As explained by Mr Sparkes, that was standard practice for the Respondent. In our judgment, it was

both plausible and reasonable for an employer to prevent access to work email accounts during a work-related suspension. That, and the marked contrast with how the Respondent reacted to the Claimant's complaints, led the Tribunal to accept Mr Sparkes evidence that the reason for revoking the Claimant's email access was solely because he had been suspended.

135. As already explained, the suspension was similarly unrelated to the Claimant's complaints and so, by extension, was the decision to revoke his email access.

The Claimant not being afforded the right to a genuine grievance and appeal process.

136. Contrary to the Claimant's allegation, he was afforded the right to a genuine grievance and appeal process. There was consistent evidence of the Respondent engaging in genuine grievance and appeal processes.

137. There was a procedural issue with what information was shared with the Claimant and when (in respect of the investigation reports) but, in our judgment, that did not render the processes as anything other than genuine. They were not sham procedures. The Respondent conducted a number of grievance investigations, reached associated and reasoned decisions, offered the Claimant an effective right of appeal and, thereafter, undertook an appeal hearing and issued a reasoned decision on those appeals.

138. The Claimant may not, understandably, have agreed with the various decisions reached by the Respondent in those processes but there was simply no evidence that the processes undertaken by the Respondent were anything other than genuine or that those involved on behalf of the Respondent were not acting with best intentions.

139. In addition, as explained by Mr Sparkes in his oral evidence, all the complaints raised by the Claimant were referred by the Respondent to the local authority's adult safeguarding team. That, coupled with the numerous grievance process undertaken by the Respondent, was inconsistent with a finding that the process were neither genuine nor proper.

140. As such, the alleged act of detriment was not made out.

The Claimant's relocation request being denied.

The Respondent's failure to fulfil the duty of care owed to the Claimant by denying the Claimant's relocation request.

141. We considered these two allegations of detriment together, as they related to the same issues, namely the Respondent's decision to refuse the Claimant's request to move houses.

142. It was not in dispute that the Claimant's request to move house was denied by the Respondent. However, the Respondent contended that the decision had nothing whatsoever to do with the fact that the Claimant had raised a number of alleged protected disclosures.

143. The Claimant again failed to provide any direct evidence to support his allegation. Rather, he once more relied upon inference. In contrast, there was direct evidence of the reasons provided at the time by the Respondent to the Claimant for why the request was being refused. As explained to the Claimant on 14 September 2022, it was because of staffing levels but the request would be kept under review if and when staffing levels increased (per [359] of the Bundle).

144. The explanation provided to the Claimant at the time was both plausible and clear. It was also a decision plainly open to the Respondent, which had responsibility for deploying its staff across the various houses. There was no suggestion or indication, ether in the email of 14 September 202 or otherwise, that complaints raised by the Claimant played any part whatsoever in the decision. The fact that the Respondent was prepared to revisit the Claimant's request in the future was also consistent with the reasons given for why, at that time, it was being refused.

145. In addition, the Claimant did not make his first alleged protected disclosure until after receipt of the email refusing his request to move houses (also at [359] of the Bundle). Self-evidently, even on the Claimant's case, the Respondent could not have been influenced in its decision by something which had yet to occur.

146. For all those reasons, the decision to refuse the Claimant's request to move houses was not because of any alleged protected disclosures

<u>The length of the Claimant's suspension period</u>

147. It was not in dispute that the Respondent suspended the Claimant. We did not understand it to be in issue that suspension, albeit on full pay, can constitute an act of detriment. However, the Respondent denied that the length of the Claimant's suspension period was unreasonable or inappropriate in the circumstances and denied that the length of the suspension was in any way related to the alleged protected disclosures.

148. It was appropriate and reasonable for the Respondent to suspend the

Claimant until the disciplinary process had concluded. In reality, this was perhaps better approached as a complaint as to the length of those disciplinary processes.

149. We accepted Mr Sparkes evidence that further delay was caused by the fact that he was having to deal with the Claimant's numerous grievances at the same time as undertaking his disciplinary investigation. There was, again, no evidence that the length of the suspension or the time it took to conclude the disciplinary investigation was in any way motivated by the alleged protected disclosures.

150. In addition, there was no legal obligation on the Respondent to consider the grievances in such detail or undertake such a thorough investigation into the disciplinary allegations. In reality, the Respondent could have simply dismissed the Claimant when he starting making complaints or as soon as he failed to report the missed medication of 26 September 2022. Instead, the Respondent investigated, determined and afforded a right of appeal in respect of every grievance raised by the Claimant and investigated and conducted a comprehensive disciplinary procedure, whilst paying the Claimant his full salary during the period of suspension.

151. In our judgment, the length of suspension was testament to the Respondent undertaking a full and thorough investigation into the allegations against the Claimant, followed by a proper disciplinary and appeal process. What is was not was in any way motivated, informed or directed by the fact that the Claimant had made purported protected disclosures.

Detriment: Conclusions

152. For the reasons we have given, the Respondent did not subject the Claimant to any detriment because he raised concerns and complaints. The detriments alleged by the Claimant either did not occur as alleged, did not constitute detrimental treatment or, if they were acts of detriment, were in no way because of those complaints. Indeed, we were unable to find any evidence that anything done regarding the Claimant's employment, whether detrimental or not, was in any way because he had made alleged protected disclosures.

153. Making protected disclosures in themselves does not give rise to any wrongdoing on the part of an employer. Indeed, in this case, the Respondent had full regard to what it was being told by the Claimant and investigated all the concerns raised. What is unlawful is when an employer subjects someone to detriment because of protected disclosures.

154. For the reasons we have given, the Respondent did not subject the Claimant to detriment for making his alleged protected disclosures

(which for the reasons detailed above were not, in any event, protected disclosures).

Automatic Unfair Dismissal

155. The key issue for us to determine in respect of the complaint of unfair dismissal was whether the reason, or principal reason, for the Claimant's dismissal on 15 February 2023 was that the Claimant made protected disclosures.

156. Given our findings and analysis above, this complaint must fail. The Claimant did not make any protected disclosures so, self-evidently, could not have been dismissed for that reason.

157. The Claimant did raise a number of concerns and complaints. Although we have found that they did meet the requirements to be designated as protected disclosures, did they play a material part in the Respondent's decision to dismiss the Claimant?

158. The answer to that question, in our judgment, was a resounding no. There was detailed, consistent evidence that the Respondent engaged proactively with the Claimant's complaints and investigated, considered and determined them under its grievance procedure. There was similarly clear, cogent and consistent evidence that the sole reason for the Claimant's dismissal was the Respondent's conclusion that he was guilty of gross misconduct because of his failure to report the missed medications of the evening of 26 September 2022.

159. The Respondent consistently detailed the reason for the Claimant's suspension, disciplinary allegation and decision to dismiss. It was, as one, because of the events of 26 September 2022. In addition, the fall out of the events of 26 September 2022 were not confined to the Claimant. As seen, disciplinary action was also considered against Ms Davies, because of her alleged culpability.

160. The only link between the complaints and reason for dismissal was time. They all arose within a similar time frame. However, there was simply no evidence to support the Claimant's contention that he was dismissed for making complaints. He was not. He was dismissed because he failed to report the missed medications, which the Respondent determined was a an act of gross misconduct.

161. As the Claimant was not dismissed for making protected disclosures, his complaint of unfair dismissal cannot succeed and is dismissed.

RESERVED JUDGMENT

EMPLOYMENT JUDGE S POVEY
Dated: 3 October 2024

Order posted to the parties on 4 October 2024

For Secretary of the Tribunals Mr N Roche

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RESERVED JUDGMENT

APPENDIX 1

List of Issues

Protected Disclosure

1 . Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 ("ERA")? The Tribunal will decide:

2. Did the Claimant disclose information?

3. Did the Claimant believe the disclosure of information was made in the public interest?

4. Was that belief reasonable?

5. Did the Claimant believe it tended to show that:

   a. a criminal offence had been, was being or was likely to be committed(s.43B(1)(a) ERA);

   b. a person had failed, was failing or was likely to fail to comply with any legal obligation (s.43B(1)(b) ERA);

   c. a miscarriage of justice had occurred, was occurring or was likely to occur (s.43B(1)(c) ERA);

   d. the health or safety of any individual had been, was being or was likely to be endangered (s.43B(1)(d) ERA);

   e. the environment had been, was being or was likely to be damaged(s.43B1(e) ERA;

   f. information tending to show any of these things had been, was being or was likely to be deliberately concealed (s.43B(1)(f) ERA).

6. Was that belief reasonable?

7. The Claimant says he made disclosures on the following occasions:

a. Email to Carty Fox-Robinson dated 14th September 2022 tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging low staff numbers;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it was not made in the public interest, and the Claimant did not reasonably hold such a belief, and that the Claimant did not reasonably hold the belief that the disclosure tended to show any relevant wrongdoing.

b. Email to Huw Sparkes dated 14th September 2022, forwarded to David Sibbons and Susan Hope Bell dated 15th September 2022, tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging that the process of administering a new drug to Resident Bas instructed by management was incorrect and not in accordance with GP instructions and that a strict diet had been implemented on the residents of Ty Pickwick house which was not in accordance with required standards or nutritional knowledge;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it was not in the public interest, and the Claimant did not reasonably hold such a belief, and that the Claimant did not reasonably hold the belief that the disclosure tended to show any relevant wrongdoing.

c. Email to David Sibbons dated 15th September 2022 tending to show relevant wrongdoing under s.43B(1)(f) ERA asserting an alleged right to change investigator;

The Respondent denies that this disclosure is a qualifying disclosure on

the basis that it does not amount to a disclosure of information, it was not made in the public interest and it did not relate to a relevant wrongdoing.

d. Email to David Sibbons dated 18th September 2022 tending to show relevant wrongdoing under s.43B(1)(f) ERA asserting an alleged right to change investigator;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it does not amount to a disclosure of information, it was not made in the public interest and it did not relate to a relevant wrongdoing.

e. Emails to David Sibbons dated 18th September 2022 at 14:31 tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging that concerns reported by staff to management had not been dealt with and that his requested house move had been denied without consideration to his mental health and wellbeing;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it neither relates to a relevant wrongdoing or was made in the genuine or reasonable belief that it was in the public interest.

f. Email to David Sibbons dated 18th September 2022 at 14:42 tending to show relevant wrongdoing under s.43B(1)(b) and (d) ERA alleging a breach of safeguarding when Ty Pickwick house was allegedly knowingly left understaffed by management and that female Resident B was left without an appointed female member of staff during the shift, due to a lack of staff in the college, and that the Claimant was therefore required to assist her against policy;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it was not made in the public interest, and the Claimant did not reasonably hold such a belief, and that the Claimant did not reasonably hold the belief that the disclosure tended to show any

relevant wrongdoing.

g. Email to David Sibbons dated 19th September 2022 tending to show relevant wrongdoing under s.43(1)(b) ERA alleging that students that day had been served a breakfast and lunch which he believed breached safeguarding principles.

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it was not made in the public interest, and the Claimant did not reasonably hold such a belief, and that the Claimant did not reasonably hold the belief that the disclosure tended to show any relevant wrongdoing.

h. Email to all staff dated 1 9th September 2022 tending to show relevant wrongdoing under s.43B(1)(b), (d) and (f) ERA alleging that students that day had been served a breakfast and lunch which he believed breached safeguarding principles;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it was not in the public interest, and the Claimant did not reasonably hold such a belief, and that the Claimant did not reasonably hold the belief that the disclosure tended to show any relevant wrongdoing.

i. Email to David Sibbons dated 21st September 2022 tending to show relevant wrongdoing under s.43B(1)(f) ERA alleging issues with Huw Sparkes as investigator;

The Respondent denies that this disclosure is a qualifying disclosure on the basis that it does not amount to a disclosure of information, it was not made in the public interest and it did not relate to a relevant wrongdoing.

j. Verbal disclosure to Carty Fox-Robinson and Anne Davies which the Claimant has failed to date tending to show relevant wrongdoing under

s.43B(1)(b) and (d) alleging that a student had been refused an antipsychotic drug just for it to be administered before bedtime;

The Respondent denies that this verbal disclosure took place.

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

Detriment (section 48 Employment Rights Act 1996)

9. Did the Respondent subject the Claimant to detriment?

10. If so, was it done on the ground that the Claimant made a protected disclosure?

11. The Claimant relies upon the following:

a. The Claimant's suspension from work on 28th September 2022;

The Respondent accepts that the Claimant was suspended on 28th September 2022 but denies that this was done on the ground that the Claimant made a protected disclosure.

b. The Claimant not being paid overtime whilst on suspension;

The Respondent accepts that the Claimant was not paid overtime whilst on suspension but denies that this was done on the ground that the Claimant made a protected disclosure.

c. The Claimant's grievances not being dealt with following his suspension;

The Respondent denies that the Claimant's grievances were not dealt with following his suspension.

d. The Respondent not taking into account the Claimant's previous complaints regarding workload and understaffing when suspending and dismissing the Claimant;

The Respondent denies that the Claimant's mitigation was not taken into account when suspending and dismissing the Claimant and denies that this was done on the ground that the Claimant made a protected disclosure.

e. The Claimant's access to his work email being revoked upon his suspension;

The Respondent accepts that the Claimant's access to work email was revoked upon his suspension but denies that this was done on the ground that the Claimant made a protected disclosure.

f. The Claimant not being afforded the right to a genuine grievance and appeal process;

The Respondent denies that the Claimant was not afforded the right to a genuine grievance and appeal process.

g. The Claimant's relocation request being denied;

The Respondent accepts that the Claimant's relocation request was denied but denies that this was done on the ground that the Claimant made a protected disclosure.

h. The length of the Claimant's suspension period;

The Respondent denies that the length of the Claimant's suspension period was unreasonable or inappropriate in the circumstances and denies that the length of the suspension was done on the ground that the Claimant made a protected disclosure.

i. The Respondent's failure to fulfil the duty of care owed to the Claimant by denying the Claimant's relocation request.

The Respondent accepts that the Claimant's relocation request was denied but denies that this they failed to fulfil any duty of care owed to the Claimant by doing so and that this was done on the ground that the Claimant made a protected disclosure.

Automatic Unfair Dismissal (section 103A Employment Rights Act 1996)

12. Was the reason, or principal reason, for the Claimant's dismissal on 15th February2023 that the Claimant made a protected disclosure?

13.The Respondent denies as alleged, or at all, that the reason, or principal reason, for the Claimant's dismissal on 15th February 2023 was on the ground that the Claimant made a protected disclosure.

14. The Respondent contends that the Claimant was dismissed for gross misconduct.