



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**A Elliston**

**v Precious Homes Limited**

**Heard at:** Watford (by CVP)

**On:** 13, 14 and 15 April 2021  
and in Chambers on 22 April 2021

**Before:** Employment Judge Bloch QC

**Members:** D Sutton  
M Bhatti, MBE

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Ms R Mellor, Counsel

## **COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

*This has been a remote hearing. The form of remote hearing was by video (CVP). A face to face hearing was not held because all the issues could be determined fairly in a remote hearing and no party objected to the hearing being by video.*

## **RESERVED JUDGMENT**

1. The claimant's complaints under s.47B Employment Rights Act 1996 ("ERA") in relation to the following alleged detriments are out of time so that the tribunal does not have jurisdiction to hear such complaints:
  - 1.1. Decision to place the claimant on a Performance Improvement Plan ("PIP") on 24 October 2018;
  - 1.2. The making of a safeguarding report to Brent London Borough Council ("the Council") on 5 November 2018 and 11 December 2018;
  - 1.3. The allegation that Ms Anna Koerner of the respondent conducted herself in a hostile manner to the claimant.

2. The claimant's (remaining) complaints of :
  - 2.1. (other) detriments contrary to s.47B ERA; and
  - 2.2. constructive unfair dismissal, within the meaning of s.94 ERA;are not well founded and are accordingly dismissed.

## REASONS

1. We were provided with a bundle of 506 pages and the claimant produced a further bundle of 70 pages. We read witness statements and heard evidence from the claimant and on behalf of the respondent: Wendy Gennings (Head of HR), Fergal Cawley (Chief Executive Officer) and Marcus Foster (Director of People).
2. The claimant brought two claims against his former employers, Precious Homes Limited ("the Respondent"):
  - 2.1 under s.47B ERA; and
  - 2.2 for constructive unfair dismissal, within the meaning of s.94 ERA.
3. The claimant was employed as a Support Worker by the respondent from 1 June 2017 until 20 January 2020 when his employment was terminated by his resignation. The claim in respect of detriment under s.47B ERA was presented on 8 April 2019, when the claimant was still employed by the respondent. The matter came before Employment Judge Postle on 26 February 2020 at a preliminary hearing. By this time the claimant had resigned and he indicated that he would be issuing a claim for constructive unfair dismissal, which he did on 17 April 2020. The two claims were heard together.
4. The claimant worked at one of the respondent's sites (of which there were forty two). The respondent is a provider of services to adults with learning, behavioural or other challenges, in care homes to assist them with independent living. These users rent their accommodation from landlords, and not the respondent. There are many different service users with different needs and it was accepted by all parties that this can be a challenging environment in which to work.
5. The claimant was based at The Avenue where he worked together with approximately 14 other members of staff. He was a key worker for a user referred to in the evidence as "DB". He was required to familiarise himself with the care plans of other residents. The care plans must be prepared to identify each service user's needs as well as any risks they pose. Care homes also prepare risk assessments to develop strategies for risk management.

6. At the Preliminary Hearing the claimant was represented by a solicitor, as was the respondent. The issues which fell to be determined by the tribunal were identified as follows:

“Protected disclosures

- (i) Did the claimant make disclosures of information on 5 November 2018 regarding the following concerns?
  - (a) Disclosure A: Failure to provide emergency exits for flats 7 & 8;
  - (b) Disclosure B: Fire Safety Drill on 10 October 2018 being deemed successful even though one client (JS) remained in his room.
  - (c) Disclosure C: Failure to implement a clear protocol in place for client emergencies when staff have had to take clients to hospital.
  - (d) Disclosure D: Failure to implement an effective Duty On-Call system, resulting in staff being unsure whether to call during an emergency for fear of being labelled or feeling that they were disturbing management.
  - (e) Disclosure E: The claimant’s “Nourish” (electronic record) entry with respect to client DB’s care plan being deleted by the manager (Anna Koerner) on or about 29 October 2018.
  - (f) Disclosure F: An incident report that the claimant wrote regarding client SD on Wednesday 24 October 2018, in which SD assaulted the claimant several times ...
- (ii) The respondent concedes that the disclosures made on 5 November 2018 and in early 2019 do amount to qualifying disclosures.
- (iii) Did the claimant also raise the following disclosures of information regarding safe-guarding on 5 November 2018:
  - (a) Incident on Wednesday 25 July 2018 about the capacity of client HH to attend hospital unaccompanied.
  - (b) Incident on Sunday 29 July 2018 concerning safety concerns about giving medication to client SD and staff levels.
  - (c) Incident in August 2018 and concerns raised by the Claimant about agency staff not being trained to give medication (if the Claimant was required to take SD to football).
  - (d) Incident on Wednesday 5 - Thursday 6 September 2018 regarding failure of management to provide support when emergency services were called following concerns about client SD.
  - (e) Tired staff worked who in excess of 12 hours having to take a client to the hospital.

- (iv) Did the claimant make the same disclosures of information again to manager Jonathan Irving on 4 January 2019 and then in a written grievance on Monday 7 January 2019?
- (v) Did the claimant reasonably believe that the disclosures tended to show one or more of those specific types of wrongdoing? (health and safety and or compliance with a legal requirement) (s.43C ERA 96)?
- (vi) Did the claimant hold a reasonable belief that the disclosures were made in the public interest? ... (The Enterprise and Regulatory Reform Act 2013, s 17 to 20).
- (vii) Did those disclosures therefore amount to Protected Disclosures as per Employment Rights Act 1996, s.43(1)(b) (Failure to comply with legal requirement and or (d) (the health or safety of any individual has been, is being or is likely to be endangered)?

The judge went on to identify the alleged detriments.

#### Detriments

- (viii) Did the respondent subject the claimant to the following unlawful detriments as a result of making the Protected Disclosures complained of?
    - (a) The respondent filed a safe-guarding report against him on or about Tuesday 11 December 2018. Does the tribunal have jurisdiction to consider this detriment if the ACAS EC application was brought on 28 March 2019, outside the 3 month time limit?
    - (b) Anna Koenner conducting herself in a hostile manner to the Claimant, causing him stress and anxiety.
    - (c) Asking the Claimant if he wished to be relocated to another work location on about Tuesday 5 November 2018, on Monday 7 January 2019 and then by a voice mail in February 2019, to a difficult and more dangerous work location rather than addressing his concerns.
    - (d) Conducting the grievance meeting on 29 April 2019 against the Claimant in an aggressive manner in which he was questioned and falsely accused of having discussed his grievance and solicitor's advice with colleagues and threatened with disciplinary action as a result."
7. It was common ground that to the list of detriments ought to be added the decision (by Anna Koenner) to place the claimant on a PIP on 24 October 2018.
8. At the outset of the hearing matters were considerably simplified by the respondent conceding that all the matters alleged by the claimant to be Protected Disclosures were such. That applied to both those conceded at the Preliminary Hearing to be qualifying disclosures and the additional disclosures of information regarding safeguarding on 5 November referred to above in paragraph (iii) (a)-(e) of the list of issues.

9. Accordingly, the principal focus of the hearing regarding the detriment claims was whether the alleged detriments listed above (with the addition of that regarding the PIP), qualified as “detriments” within the meaning of s. 47B ERA and (if so) whether they were causally related to any of the Protected Disclosures. There were also an issue as to whether certain of the detriment claims were out of time.
10. It is convenient to list those detriments in the order that they are summarised in the respondent’s written submissions (at paragraph 7):
  - (a) The decision by Anna Koenner (“AK”) on 24 October 2018 to place the claimant on a PIP;
  - (b) The making by AK of safeguarding reports to Brent London Borough Council. The claimant identified two (5<sup>th</sup> November 2018 and 11<sup>th</sup> December 2018);
  - (c) AK conducting herself in a hostile manner. The claimant confirmed in evidence that there was no such behaviour that he relied upon beyond 31<sup>st</sup> October 2018, as set out in his further and better particulars;
  - (d) asking the claimant if he wanted to be relocated to Verney Street, another site in November 2018 and January and February 2019;
  - (e) Wendy Gennings, (Head of HR at the respondent), conducting the grievance meeting in an aggressive manner and falsely accusing the claimant of having discussed suing the company with other member of staff.

### **Background facts**

11. As indicated above, the detriment claim arises from the claimant having made disclosures to the respondent at a meeting on 5 November 2018 (and a subsequent letter) and by a written grievance on 7 January 2019 following a conversation with Jonathan Irving (then Director of Operations) on 4 January 2019.
12. After the meeting on 5 November 2018, the claimant asked for mediation with AK. On 7 January 2019 the claimant asked for the matter to be raised as a formal grievance, following an invitation by Jonathan Irving and Ginette Collendavelloo (“Ginette”), an HR manager, to raise a formal grievance.
13. It took several weeks to arrange a grievance meeting. There was some delay and the respondent made an apology in relation to some of that delay. We do not believe that anything turned on this delay. Solicitors for the parties exchanged correspondence on 22 March 2019 and 27 March 2019 by which time AK was no longer employed and the respondent confirmed that the PIP would be deleted.
14. A grievance meeting was held on 29 April 2019. It was conducted by Jonathan Irving. A long transcript of that meeting appeared in the bundle. There was considerable discussion with the claimant as to whether or not it

was necessary for the tribunal to listen to a recording of that meeting, given that the claimant challenged the complete accuracy of that minute. In the end the claimant sensibly accepted that the tribunal should listen to only limited excerpts from that recording. This exercise did not demonstrate material inaccuracy or omission in the transcript and listening to the voices of the parties to that meeting did not take the matter much further.

15. On 14 May 2019, the claimant received the grievance outcome letter. By then AK no longer worked for the respondent and the claimant had a new manager, Abasse Djamaldinin. The outcome was that his PIP was removed. Reference was made to his better working relationship with the claimant's new manager.
16. The claimant appealed the decision and this appeal was heard by Fergal Cawley, the Chief Executive Officer of the respondent, on 5 June 2019. On 14 June 2019 the outcome letter was issued. Apology was made for the unacceptable delay in dealing with the claimant's grievance. Mr Cawley highlighted that the only proposed resolution which the claimant sought was "an answer" and he pointed out that on the whole the complaints had (as the claimant had himself confirmed) been resolved and should no longer be an issue. No further information had been provided to justify overturning the grievance outcome. While the claimant did not like that a manager could amend or delete notes on the "Nourish" system, that was the company's system and procedure. Further, he provided an answer to the claimant's concerns:
  - 16.1 the PIP had been removed;
  - 16.2 the respondent had no discretion not to make a safeguarding report; but in any event the respondent did not take any action in respect of the allegation made against the claimant, since the respondent did not believe it;
  - 16.3 he had listened to a recording of the grievance hearing and did not believe that Wendy Gennings had been aggressive.
17. Shortly afterwards, the claimant was off work on sick leave from 2 July 2019 to 16 July 2019. This followed an incident at work concerning SD in which the claimant injured his hand. Also in 2019 another service user (DOS) had thrown a dart at the claimant. On his return to work he was not required to work with DOS. He was not transferred to Verney Street until August 2019. The claimant's own evidence was that he was there for only two hours before returning to The Avenue.
18. On 11 September 2019, the claimant was assaulted by SD in the office. He appeared to have pressed a plastic pen against the chest of the claimant who went off on sick leave on that date and never returned to work.
19. On or about 7 January 2020 the claimant attended an interview for a new job with MIND. He obtained new employment which was confirmed by an offer letter of 20 January 2020, at a higher annual rate of pay (£22,500 as

opposed to £14,500) and he told the tribunal the job had more friendly hours (9 to 5) and “better terms”.

20. After he had received this offer of employment by MIND, the claimant resigned by letter dated 20 January 2020. The letter of resignation comprised also a grievance - and a grievance hearing took place on 5 February 2020 resulting in a grievance outcome letter provided by the respondent. Mr Foster concluded that the claimant had not made clear what he was looking for as a resolution to his grievance but concluded by saying that he would ensure that the respondent would take appropriate action to improve its procedures in the future. The claimant appealed the decision and the outcome of that grievance appeal was sent to the claimant on 23 April 2020. The claimant’s appeal was not upheld.
21. In his resignation letter the claimant identified the breaches alleged against the respondent as:
  - (a) failure to deal with the Protected Disclosures.
  - (b) failure to safeguard confidential data; and
  - (c) the assault by SD and the respondent’s failure to take it seriously or put in to place appropriate measures to protect his safety and wellbeing.

He maintained that he had consequently lost trust in the respondent and therefore resigned.

### **The issues**

22. In relation to the detriment claim under ERA s.47B, the issues were whether:
  - (a) the complaints were presented in time and if not, whether time should be extended, on the basis that it was not reasonably practicable for the claimant to have brought such claims in time (s.48(3) ERA);
  - (b) the alleged detriments were on the ground that the claimant had made a Protected Disclosure (contrary to s.47B ERA).
23. In respect of the claim for constructive unfair dismissal, issues were:
  - (a) whether the matters relied on by the claimant were breaches of the employment contract that were so fundamental that the claimant was entitled to resign;
  - (b) if so, did the claimant resign in response to the alleged breaches;
  - (c) did the claimant delay too long in resigning and/or did he affirm the contract?

## The law

24. In relation to the constructive unfair dismissal claim the respondent referred to the guidance of Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 833. Lord Justice Underhill said that it was sufficient for a tribunal to ask itself the following:

“1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his or her resignation?

(b) Has he or she affirmed the contract since that act;.....

3. If not, was the act (or omission) by itself a repudiatory breach of contract?

4. If not, was it nevertheless a part ... of a course of conduct comprising several acts or omissions which viewed cumulatively amounted to a (repudiatory) breach of the Malik term?

5. Did the employee resign in response (or partly in response) to that breach?

## The evidence – the detriment claim

25. The respondent submitted witness statements from Wendy Gennings, Head of HR; Fergal Cawley, Chief Executive Officer and Marcus Foster, Director of People (since 14 October 2019). Ms Gennings was the person who conducted the grievance meeting on 29 April 2019. Mr Cawley heard the claimant's grievance appeal on 5 June 2019 and Marcus Foster conducted the grievance meeting on 6 February 2020 after the claimant had resigned from his employment.

26. It is not necessary to set out in detail the evidence contained in the witness statements. Each of them gave evidence confirming what they had said in their witness statements and were cross-examined.

27. The tribunal regarded each of the respondent's witnesses as witnesses of truth doing the best they could to recollect matters, assisted by a substantial bundle of documents which had been produced and agreed for the hearing. The claimant at a late stage before the hearing, produced a further bundle of 70 pages which he had obtained from Brent Borough Council and which referred to a safeguarding report which had been filed in respect of the claimant. The respondent did not take formal objection to the inclusion of this document in evidence but it had not had much time to take instructions on its content. The claimant had (as he told the tribunal) obtained these documents following a DSAR (data subject access request) against the Council.

28. The claimant produced a detailed witness statement (headed “Details of Complaint”) in which he set out his case. The claimant was, it seemed to the tribunal doing his best to recollect the truth of what had occurred although in some respects (as appears below) his evidence was not accepted by the tribunal



29. The claimant was cross-examined in the course of which he made various concessions.
30. In particular, he accepted that the PIP could not have arisen as a result of his disclosures, as it was put in place on 24 October 2018 before he had made the disclosures of 5 November 2018. Also, as regards the safeguarding reports, he accepted that in regard to the safeguarding report which was submitted on 5 November 2018 (by someone other than the person to whom he was making the disclosures) that the safeguarding report could not have been made by reason of his disclosures made at the same time on that day. He accepted also that there was a duty on the part of the respondent to make safeguarding reports and eventually, with some reluctance, he accepted the evidence on behalf of the respondent that such reports have to be passed to the Council once a safeguarding complaint has been made. It is not for the respondent first to investigate the report. He accepted that the procedure was to file the report first with the Council and then later on (if appropriate) carry out any relevant investigations.
31. He also accepted that in initially asking the claimant whether he wished to work at Verney Street, Mr Irving might have been trying to be supportive of him. He also accepted that in relation to the telephone message by Mr Irving regarding Verney street, it was muffled and he could not hear exactly what was being said in that regard. He did however say that he had at some stage been told to go to Verney Street. He accepted that the suggestion in relation to Verney Street could not have been made in order that his manager, who was then Mr Abasse, would be rid of him. Mr Abasse was the manager of both The Avenue and the Verney Street sites. As set out above (in circumstances not precisely clear for the tribunal) the claimant did not go to Verney Street until much later in the year and did so for only three hours. His departure from Verney Street seemed to occur as a result of his taking issue with the way in which one of the service users was being dealt with.
32. In cross-examination the claimant also confirmed the matters referred to in his further and better particulars relating to his alleged treatment by Ms Koenner occurred no later than 31 October 2018. (That was not entirely clear from the document but he explained that the end date of 31 October related to all the information referred to in the list of the further and better particulars referred to below the reference to that date).
33. In evidence he confirmed in terms that the alleged hostile behaviour of Ms Koenner occurred before the meeting of 5 November 2018 at which the Protected Disclosures were made. Further, in evidence the claimant said that he suspected that AK's behaviour changed towards him after he had raised certain issues about one Lukas on 5 October 2018. He believed that that was the case because AK and Lukas were good friends and AK did not like him criticizing Lukas.
34. The first safeguarding report (detriment (b)) was (as appears above) made on 5 November 2018 at the very moment that he was in his meeting with

Ginette (to whom he made the disclosures) on 5 November 2018. He accepted that therefore the alleged detriment would not have arisen because of the disclosure made at the same time to Ginette, the disclosure being made by someone else.

35. As regards the second safeguarding referral on 11 December 2008, as the claimant accepted (see above) the reason for the safeguarding referral was that the respondent had no option but to submit the protocol before investigating anything. The claimant accepted this in evidence, as he had done in the course of his grievance hearing.
36. The claimant further accepted that by the time of the grievance hearing on 29 April 2019 he had been told that nothing further was happening in regard to that report.
37. The claimant questioned whether AK or someone who allegedly witnessed his behaviour (RN) was there at the time, given that the rota suggested that neither of them were there on the day. Given the claimant's acceptance that the respondent was duty bound to submit the report once a complaint had been made, this seemed to be a reiteration of the argument that the respondent should have checked matters before submitting the report although, he conceded that that was not what the respondent was required to do.
38. The claimant placed emphasis on the 70 page bundle containing the DSAR documents received from the Council which indicated that the matter was not closed when the respondent said it was. The respondent pointed out that this document had not been created by or for the respondent. The information in it could not be verified or subjected to examination as part of the proceedings because it had not been submitted by the respondent. The respondent simply did not know what information in it was being exchanged or by whom. As far as the respondent was aware or concerned this safeguarding was raised in accordance with the protocol and had been closed at the latest by April 2019. The tribunal was unable to accept (if that was what the claimant was suggesting) that the respondent had knowingly told the claimant that the matter was closed when it was not. That was unsupported by the evidence.
39. As regards the Verney Street transfer alleged detriment, the claimant's own response on 18 December 2018 was to thank the respondent for the offer. Further, the incident in February was very unclear given the "muffled voicemail in which Verney Street was mentioned". It was unclear whether this was in fact an offer as the claimant and Jonathan Irving did not actually speak. As set out above, in the event the claimant was not made to move to Verney Street until a substantially later date - and then for less than one day.
40. In relation to the alleged detriment regarding the manner of conduct of the grievance meeting on 29 April 2019, the claimant accepted that in his grievance appeal letter he had made no reference to this.

### Submission regarding the detriment claim

41. Ms Mellor provided written and supplementary oral submission to the tribunal and the claimant made brief oral submissions. The claimant's submissions were supportive of the pleaded claim and his witness statement and no disrespect is intended by not repeating them in detail here, since his position is set out elsewhere in these reasons when referring to the issues and his evidence. No disrespect is meant to the respondent in not setting out its submission in fuller detail.
42. For the reasons which appear below it will appear that the tribunal largely accepted the submissions made by Ms Mellor on behalf of the respondent.
43. She pointed out that the detriments (a) and (c) referred to in paragraph 10 above, (the decision to place the claimant on a PIP on 24 October 2018 and AK conducting herself in a hostile manner (before 31 October 2018) occurred prior to (first) the date on which the claimant made the Protected Disclosures, 5 November 2018. There could therefore be no causal link, (as the claimant accepted in cross-examination). Nor (for similar timing reasons) could there have been any causal connection between the first safeguarding report (detriment (b)) and the Protected Disclosures.
44. It was clear that detriments (a), (b) and (c) referred to above (the PIP, the safeguarding reports, and the alleged hostile conduct of AK) were all out of time. There was a question of whether the acts were continuous with acts which were in time. The claimant did not specifically contend that this was the position but the tribunal thought it appropriate to draw this possibility to his attention, given that he was unrepresented. The respondent however pointed out that the claimant's evidence itself suggested that the detriments (a), (b) and (c) were all done by AK and were distinguishable because they were allegedly motivated by her friendship with Lukas. The respondent further submitted that in any event, given the passage of time between the detriments, the nature of the detriments (which were alleged to be very different) and the people involved, (there had been no suggestion that the individuals knew each other well or had any particular collective issue with the claimant), these acts were not continuous. In particular, it was submitted that detriment (e) ie the conduct of the grievance hearing by Ms Gennings, was separate from the earlier detriments both because of the passage of time and the difference of personnel involved.
45. Further, the respondent contended that the claimant had given no explanation as to why it was not reasonably practicable for him to bring his claims in time. He had given no evidence that it was not reasonably practicable for him to avail himself of the relevant information he would have required to issue his claim in time. It was clear that he was capable of internet research, drafting documents that were in the bundle, and particularly those which formed the basis of his pleadings. In any event, he did not issue his claim within a reasonable timeframe thereafter so, even if it

was not reasonably practicable to bring his claim within the primary limitation period, he did not issue it until May of 2019.

46. In regard to the alleged detriment (d) (referred to in paragraph 10 above) , it was submitted that there was no detriment involved in his being requested whether he would wish to work at Verney Street. It was not to his disadvantage. The evidence was that the claimant's own response on 18 December 2018 was to thank the respondent for the offer. As indicated above, the incident in February was very unclear given the "muffled voicemail in which Verney Street was mentioned". It was unclear whether this was in fact an offer as the claimant and Jonathan Irving did not actually speak. As set out above, in the event the claimant was not made to move at that time. Further, it was inherently unlikely that there was any causal link between a new manager having a discussion about the claimant moving to Verney Street and disclosures which had been made four months before. We accepted these submissions.
47. With regards the detriment ((e) in paragraph 10 above) alleged in relation to the grievance meeting, the respondent submitted there had been no such detriment relying on Wendy Gennings' evidence and the transcript.

#### **Conclusions regarding the detriment claim**

48. The tribunal accepted the respondent's submissions.
49. For the reason set out above, the alleged detriments (a), (b) and (c) were out of time, they were not part of continuous acts so as to bring them within time and the claimant did not contend that it was not reasonably practicable for him to have presented his claims in time. We further accepted that he did not issue his claim within a reasonable time in any event (if, as we did not accept) it was not reasonably practicable for him to bring the claim in time.
50. The tribunal concluded that none of the detriments alleged by the claimant were such, within the meaning of s.47B ERA. In particular, the PIP was removed, the safeguarding reports were a matter of duty for the respondent to report to the Brent London Borough Council and AK did not conduct herself in a hostile manner as far as the tribunal could tell. While it is fair to say that at time Ms Gennings did appear to be exasperated and possibly short with the claimant, this did not in the judgment of this tribunal amount to a detriment. The claimant was given the opportunity of giving his grievances a full airing. It is not surprising that the parties at times were speaking across each other and again not surprising that the respondents were concerned to find out from the claimant what resolution it was that he wanted from his grievance. Looking at matters in the round, while the meeting lasted one and a half hours and was at times robust on both sides, it did not in the tribunal's judgment, go so far as to amount to a "detriment), and in any event not one which was connected with the disclosures which had been made in November. Further, the matter relating to relocation at Verney Street was (for the reasons submitted) not a detriment .

51. However, the tribunal finds in any event, that detriments (a), (b) and (c) (PIP, safeguarding report (the one made on 5 November 2018) and AK conducting herself in a hostile manner) could not have been and were not causally related to the disclosures which were made on 5 November 2018, those alleged detriments having occurred either before 5 November 2018 or in regard to the safeguarding report of 5 November 2018, being contemporaneous with and unrelated to it.
52. Independently of the above conclusions, the tribunal concluded that none of the alleged detriments referred to in paragraph (a) to (e) was causally related to any of the Protected Disclosures. There was no evidence that any such behaviour constituting the alleged detriments was caused or influenced by any of the Protected Disclosures and we concluded that there was no such causal link
53. Therefore, on all those grounds, the claimant's claims of detriment under s.47B ERA failed.

#### **The constructive unfair dismissal claim**

54. As set out above, the claimant relied on the following alleged breaches: by the respondent –
  - 54.1 failure to deal with Protected Disclosures,
  - 54.2 failure to safeguard confidential data; and
  - 54.3 the assault by SD and failure to provide a safe system of work.

#### **Evidence and findings regarding the constructive dismissal claim**

##### **(1) Failure to deal with Protected Disclosures**

55. As to the first alleged breach (failure to deal with Protected Disclosures), on the evidence the tribunal accepted that the respondent did deal with the claimant's Protected Disclosures. We accepted the evidence that:
  - 55.1 as soon as the claimant raised the issues on 5 November 2018, it was the respondent who said that the claimant should raise a formal grievance. That indicated that the respondent took the matters complained of seriously;
  - 55.2 the claimant had accepted in the grievance appeal meeting that that all the concerns that he had raised had in fact been implemented;
  - 55.3 at that meeting it was explained how his specific concerns had been dealt with, in particular, that:
    - 55.3.1 there was now a fire exit between flats 7 and 8;
    - 55.3.2 the fire drills had been implemented;
    - 55.3.3 the "doubling up" of staff for medication purposes had been implemented; and

- 55.3.4 the On-Call system had been implemented by June 2019, which dealt with the complaint which he had raised;
- 55.4 at that meeting the claimant accepted in general terms that when he had an issue, the respondent started to implement it. However, in his oral evidence the claimant sought to row back somewhat from this position regarding the On-Call procedure suggesting that a document in the bundle had been fabricated. There seemed to be no basis for this allegation. Further, the claimant accepted that by June 2019 (by the latest) he knew that there was an On-Call system. He referred to earlier issues of other staff also not knowing about the system but even on his own case he knew seven months before resignation that it did exist and there was no evidence of issues being raised relating to On-Call after 2018. The claimant also disputed the fire exit issue in relation to flats 7 and 8, appearing to suggest that he had specifically identified the need for a fob to allow access out and would not accept that a fire door sufficed. That was inconsistent with what he had said at the appeal hearing and we rejected this contention in any event. A fire door had been added. Further, there was no evidence of any failed fire safety testing;
- 55.5 that the PIP was removed and the manager who put it in place had left, so the respondent took the view that there was nothing more to be done; and
- 55.6 that the safeguarding referral was out of the hands of the respondent once an allegation had been raised, as the claimant himself accepted.
56. The position of the claimant was somewhat difficult to understand in relation to his allegations of these breaches. He accepted that the respondent had generally, in relation to his Protected Disclosures, implemented systems regarding the issues which he had raised. At times it appeared to the tribunal that he was more concerned that he had not been given full acknowledgment for having made the suggestions which resulted in various procedures being implemented by the respondent. That was a matter of industrial relations and not a breach of contract, still less serious breaches of contract. Significantly, the claimant was thereby confirming that the claimant dealt with his concerns comprised by the Protected Disclosures.

## **(2) Failure to safeguard confidential information**

57. This claim was not particularly well articulated. The claimant had raised issues relating to his personal information on 7 January 2019 when he referred to personal details leading to staff being currently on the office computers. However, in his oral evidence the claimant said that the respondent had changed the GDPR protocol after he raised this. Accordingly, on this basis, if there had been a breach it was resolved on the claimant's own case shortly after January 2019.

58. The second occasion on which the claimant raised this matter was on 28 August 2019. He referred to an email by himself dated 28 August 2019 addressed to Mr Djamaldinin in which he said that it had been brought to his attention that there had been another GDPR breach with respect to his personal information held on his personal file at The Avenue. He had been informed that several staff members had been granted access to his personal file and as such his DOB (date of birth) and address were made available amongst other sensitive information. This resulted in “staff Googling my house. In answer to tribunal questions the claimant said that this disclosure had taken place because there was a debate amongst the staff about the number of properties owned by the claimant and so someone had accessed his file to prove where he lived. However, there was no complaint (whether of data protection or GDPR or confidential information) of failure to safeguard data beyond that date, which was five months before his dismissal. Further, the claimant did not raise a concern with the ICO which might be indicative of his not regarding the matter as of particular seriousness.

**(3) Failure to provide a safe system of work**

59. As regards the third complaint, it was common grounds that the claimant was assaulted by SD on 11 September 2019 and that he had been injured by SD previously (as had a colleague). As set out above, it is in the nature of the job and the vulnerability of service users that there are risks of this kind. That is a matter for the assessment of individual service users in the care plan, which in this case made it plain that SD posed a risk of becoming angry and displaying challenging behaviour. The risk of his potentially attacking staff was also identified as there was a history of physical aggression towards staff and other service users. The respondent prepared risk assessments and mitigated against that risk. The claimant accepted that risk could not be reduced to zero. The risk assessment in place at the time was one with recommendations to manage SD when his behaviour escalated and this risk assessment was reviewed after the incident involving the claimant. The respondent relied upon its training of employees to deal with difficult behaviour and that when the claimant previously raised issues about DOS, who had thrown a dart at the claimant, on his return to work the claimant asked not to work with DOS and was taken off DOS’s rota. The respondent had internal procedures, multi-disciplinary teams and social services to provide additional support according to the needs of the service user.
60. Accordingly, it seemed that the respondent did have a process in place which uses other agencies alongside to ensure that service users are properly cared for and staff are safe. The claimant did not suggest a viable or practicable alternative system that could have been put in place. While he did contend that SD could have been removed from The Avenue the respondent explained the difficulties involved with that course which is a matter of last resort. In particular, as set out above, the relevant leases are not with the respondent. In the respondent’s view, matters had not reached such a pitch that ejection procedures had to be put in place.

61. The claimant did not meet with the respondent to discuss what steps should be taken or that he wished to be in place prior to returning to the respondent. It was not alleged by the respondent that the onus was on the claimant but the respondent had to take into account the fact that the claimant was submitting fit notes and this naturally inhibited contacting employees during the time covered by those notes.
62. The respondent had in fact arranged a managing ill-health meeting to take place on 22 January 2020. The claimant was aware of this by 16 January 2020 at the latest. The respondent suggested that this would have been an opportunity to discuss with the claimant how he was getting on and what steps could be taken to help him to return to work.
63. The respondent gave evidence (which was unchallenged) that the attrition rate of jobs at the respondent and the sector at large, is as much as 35 to 40 percent because the job is so challenging.
64. It was common ground that the claimant commenced a search for alternative work in January and by 7 January 2020 he had secured an interview. By 20 January 2020 he had secured a job. The new job as a Community Outreach Worker was seen by the claimant as being "safer". It came with significantly higher salary (£22,500 as opposed to £14,500) and had more regular hours. The claimant had also given evidence about childcare which although he was able to cope together with his wife, was the cause of his always being late for meetings. Accordingly, a more regular "9 to 5" job would have been more to his liking.

#### **Submissions regarding the constructive dismissal claim**

65. Again the tribunal had regard to the claimant's brief oral submissions (which were inherent in the evidence he had given) and the written and oral submission of the respondent. Again no disrespect is intended by not setting out the claimant's position, which is set out elsewhere in these reasons when referring to the issues and his evidence, not to the respondent in not setting out their submissions in fuller detail.
66. Ms Mellor submitted that (based on the above facts) there had been no repudiatory breaches of contract as alleged by the claimant.
67. Ms Mellor further submitted that that even if there were repudiatory breaches, the claimant had through delay affirmed the contract of employment. The last act the claimant relied upon was the alleged assault and failure to provide a safe system of work. That occurred on 11 September 2019 and the claimant resigned on 20 January 2020. While the respondent accepted that that the claimant was on sick leave, nonetheless it contended that the duration was a significant period of time in the context of the claimant's length of service during which time the claimant had not raised a grievance or communicated his dissatisfaction with returning to work, nor did the claimant's evidence that he was looking for alternative work throughout the four months provide a good reason for delaying.



68. She submitted that the delay was also relevant as showing these alleged breaches were not the reason for the claimant's resignation.
69. Ms Mellor referred to the uncontested evidence regarding his job search in January 2020 and in particular that the new job was seen by the claimant as being "safer", with significantly higher salary and had more regular hours. She contended that the claimant had not resigned because of any alleged breaches but because it was a challenging job in which he accepted that he experienced particularly unpleasant incidents – and the prospect of a more attractive job. She referred to the timeline indicating that he did nothing for three months and spent the fourth month securing a more desirable post.

### **Conclusions regarding the constructive dismissal claim**

70. The tribunal accepted the respondent's abovementioned submissions (and the evidence on which it was based). For these reasons the tribunal did not accept that:
  - 70.1 the claimant failed to deal with the Protected Disclosures, or
  - 70.2 the claimant failed in a way which amounted to a repudiatory breach of contract to safeguard the claimant's confidential information; the evidence of breach was somewhat tangential/third hand and in regard to the first instance, was seemingly resolved; any breach was in any event not on its face sufficiently serious to amount to a repudiatory breach of contract and the absence of complaint until the claimant resigned several months later, indicates that it was not of such seriousness (or regarded by the claimant as such) so as to amount to a repudiatory breach; or
  - 70.3 that it failed to provide a safe system of work.
71. Accordingly the tribunal rejected each of the claimant's allegations of repudiatory breaches of the employment contract on the part of the respondent.
72. As to the contentions of affirmation and the true reason for the resignation, the tribunal had regard to well-known caselaw indicating a more 'lenient' approach towards delay by an employee accepting a repudiatory breach of an employer while the employee seeks to secure alternative employment - compared with delay in the commercial context between alleged fundamental breach and the acceptance of those breaches by termination of the contract. It will not always be the case that because an employee takes time to find another job, that it will be assumed that he or she has affirmed the contract or waived his or her entitlement to treat the contract as at an end – or that the real reason for resignation is necessarily to be seen as the obtaining of a new job rather than accepting repudiatory breaches of contract

73. The tribunal concluded (on balance) that having regard in particular to the fact that the claimant was on sick leave throughout that period, it was going too far to say that he (positively) affirmed the contract between 11 September 2019 and 20 January 2020.
74. However, in this case, the combination of the length of the delay (four months) and the claimant securing a job which was considerably more desirable to him led the tribunal to conclude that the real reason for his resignation was the obtaining of the new job rather than that he was responding to alleged repudiatory breaches as entitling him to walk out on the basis of a constructive dismissal. That job search was to be seen also in the context of the challenging job in which the claimant had experienced particularly unpleasant incidents – even if there was (as found by the tribunal) no fundamental breach of contract by the respondent in regard to these incidents. Accordingly the resignation was not a “forced” resignation but a voluntary one by the claimant for the purposes of obtaining substantially preferable employment.
75. Accordingly, the tribunal regarded the constructive dismissal claim as not well founded and dismissed it.

### **Conclusion**

76. In all the circumstances the tribunal concluded that all claims in this case fell to be dismissed.

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Employment Judge Bloch QC

Date: 25 May 2021

Sent to the parties on: 28 May 21

For the Tribunal Office