



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Graves

**Respondent:** Chestnut Homecare Ltd

**Heard at:** Leeds

**On:** 14, 15, 16, 17 February  
2022  
18 February 2022 (in  
chambers)

**Before:** Employment Judge Jones  
Mr D Crowe  
Ms G Fleming

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mrs M Peckham, solicitor

# JUDGMENT

1. The complaint that the claimant was constructively unfairly dismissed for having made protected disclosures is not well founded and is dismissed.
2. The complaint of direct disability discrimination is not well founded and is dismissed.
3. The complaint of the breach of the duty to make reasonable adjustments to the claimant as a disabled person is not well founded and is dismissed.
4. The complaints for holiday pay, notice pay and arrears of pay are dismissed upon withdrawal.

# REASONS

1. The findings of the Tribunal are unanimous.

## Introduction

2. These are claims for unfair dismissal for having made public interest disclosures and disability discrimination by way of direct discrimination and a breach of the duty to make adjustments. The claims for monies owing was withdrawn.

## The Issues

3. The issues are comprehensively set out in the Order of the preliminary hearing of Employment Judge Evans on 19 July 2021.

## The Evidence

4. The claimant gave evidence. The respondent called Mrs Lesley Wesley, Care Manager, Mr Benjamin Gibbons, Operations Manager and Ms Jane Brownjohn, Care Co-ordinator. The parties submitted a file of documents of 582 pages to which a few were added during the hearing.

5. The evidence of both parties lacked reliability in several respects. There were contradictions and inconsistencies between the statements and the evidence. There were few contemporaneous notes and, when there were, these were often not consistent with what the witnesses recalled. In respect of many of the alleged protected disclosures and detriments or breaches, the claimant was unable to recall the dates on which these occurred. Her witness statement makes no mention of many of them. Mrs Wesley's recollection of what had been discussed and when was unclear and, in parts contradictory.

6. An example of the difficulties of recollection was Mr Gibbons' evidence that he said the claimant shouted and was upset in the phone call in which she resigned, but in his witness statement he said the resignation was without animosity. Another example was of the handwritten account the claimant said she had given to Mrs Wesley of her mental health and early life at the commencement of her employment. It had not been disclosed when she requested it and so the claimant had attempted to reproduce a replica in a 5 paged typed document. It is what she now provides to new employers. During the hearing the respondent found the handwritten document. The claimant agreed it was what she had been referring to. It is a short, one-page note. It briefly refers to her early life difficulties but does not mention mental health. The claimant had been adamant it had.

7. These difficulties are not unusual because the memory is notoriously fallible, even when the witness is convinced that it is accurate, but it presented a difficulty to the Tribunal in its primary task of finding facts; that is reaching a view upon what had probably happened with respect to the allegations. Whilst this can be a problem for both parties (subject to what is said below about the burden of proof in discrimination cases) it is a particular problem for the claimant who has the burden to prove events occurred as she alleged.

8. We have set out a brief history in the following section headed *Background* and deal with each allegation from the list of issues in the *Analysis*.

## **Background**

9. The respondent is a company that provides domiciliary care services. The claimant was employed by the respondent as a carer/support worker from 25 November 2020 until 29 December 2020 when she resigned.

10. The claimant applied for a post as a carer/support assistant by written application of 16 November 2020. In her application form she disclosed she had a disability of dyslexia. In another part of the same form she declared that she did not believe she had a disability and wrote, "*I do have dyslexia but it doesn't stop me being able to do my job*".

11. On 25 November 2020 the claimant attended an induction day with Ms Brownjohn and Mrs Wesley. There was discussion about requirements and policies and how training would be provided. Some of the training was provided then, such as in respect of lifting clients and using equipment for that purpose such as hoists and slide sheets. The claimant was informed by Mr Gibbons that part of the training was to be done online and the modules were stored on a system called Atlas which he explained. Mr Gibbons had dyslexia and had a discussion with the claimant about this.

12. On 27 November 2020 the claimant shadowed a colleague as part of the learning.

13. On 4 December 2020 the claimant completed the Atlas and Medicines training and two further modules on 7 December 2020.

14. On a date in December 2020 which she could not identify, the claimant telephoned Mrs Wesley to express concerns about her colleague Emma. It concerned a visit to the home of a client, P. She made three calls. She stated that she believed Emma had stolen a ring from P's home.

15. On 28 December 2020 the claimant contacted the office to report her suspicion that her colleague Emma had stolen from a client's handbag.

16. On 29 December 2020 the claimant resigned verbally and sent written confirmation by email on 30 December 2020.

17. On 1 January 2021 the claimant reported concerns about the respondent to the CQC.

## **The Law**

### Discrimination

18. By section 39(2) of the Equality Act 2010 (EqA):  
*An employer (A) must not discriminate against an employee of A's (B)—*  
(a) *as to B's terms of employment;*

- (b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
- (c) *by dismissing B;*
- (d) *by subjecting B to any other detriment.*

19. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

### Disability

20. Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to undertake normal day-to-day activities. By section 212(1) of the EqA substantial means more than trivial or minor.

21. Guidance on the definition of disability has been issued by the Secretary of State pursuant to section 6(5) of the EqA.

### The duty to make adjustments

22. Section 20 of the EqA provides:

- (1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

23. By paragraph 2 of Schedule 8 of the EqA, "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

24. Direct discrimination is defined in section 13 of the EqA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.

25. By section 23 of the EqA, on a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to each case and the circumstances relating to a case for the purpose of section 13 shall include a person's abilities if the protected characteristic is disability.

26. Section 136(1) of the EqA concerns the burden of proof: *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

27. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. Establishing a detriment and a protected characteristic are not of themselves sufficient to shift the burden, see **Bailey v Greater Manchester Police [2017] EWCA Civ 425**. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination.

### Unfair dismissal

28. By section 94 of the ERA an employee has the right not to be unfairly dismissed.

29. A dismissal is defined by section 95 of the ERA and includes the employee terminating the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, section 95(1)(c). This is known as a constructive dismissal.

30. In order for there to be a constructive dismissal, the employee must have resigned because her employer has committed a fundamental breach of contract and she must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** and **Buckland v Bournemouth University [2010] IRLR 445**. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see **Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420** and **Leeds Dental Team Ltd v Rose [2014] IRLR 8**.

31. There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see **Malik v BCCI SA (in liquidation) [1998] AC 20**.

32. Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see **Lewis v Motorworld Garages Ltd [1986] ICR 157**. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see **Omilaju v London Borough of Waltham Forest [2004] ICR 157** and **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**.

33. By section 103A of the ERA an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

34. A qualifying disclosure is defined in section 43B of the Employment Rights Act 1996. It involves the disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show a defined form of wrongdoing. This includes that a criminal offence has been, is being or is likely to be committed, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which it is subject, the health and safety of an individual has been, is being or is likely to be endangered, or information tending to show any of these things has been, was being or was likely to be deliberately concealed.

35. Information may include an allegation but a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure<sup>1</sup>.

36. If a disclosure relates to a matter where the interest in question was personal to the employee, it is still possible that it might satisfy the test that it was, in the reasonable belief of that employee in the public interest as well his own personal interest. That depends on factors such as the numbers of those affected by the interest, the nature of the interest affected, the nature of the wrongdoing, the identity of the wrongdoer and the extent to which interests were affected by the wrongdoing disclosed<sup>2</sup>.

## Analysis

### Protected disclosures

1. *Between 14 and 31 December 2020 the claimant told Lesley Wesley, her manager, that other carers were moving service users using unapproved techniques including the hooking manoeuvre and were failing to use slide sheets. The claimant told Ms Wesley this either in a face-to-face conversation or by telephone.*

37. The claimant provided no evidence in her statement about this allegation. In cross examination she could not remember the date she had discussed this but said because it had been shortly after the training, it was fresh in her mind. She did not explain what had been said. Mrs Wesley recalled a discussion with the claimant in which the claimant had said other carers had been using bedsheets to move a patient. She did not recall any discussion about any other form of lifting. She said she ordered and supplied slide sheets as a consequence of this discussion.

38. Although both accounts are lacking in detail and there is no record made at the time to assist, we have concluded that the account of Mrs Wesley is more likely to be correct, because she recalled more specifically what had been said and how she had dealt with the problem.

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<sup>1</sup> Kilraine v London Borough of Wandsworth 2018 ICR 1850,

<sup>2</sup> Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979

39. We are not satisfied this information, the use of bedsheets to move a patient, tended to show any wrongdoing of the type required by section 43B. There was no legal obligation in respect of that particular handling technique. The use of bedsheets was not a health and safety risk, at least in the way it was described to us. There were more suitable ways to move a client and slide sheets were clearly preferable, but we do not find the information tended to show the health and safety of a person had been, was being or was likely to be endangered. with such lack of detail.

40. This was not a qualifying disclosure

2. *On 4 December 2020 the claimant told Ms Wesley that she had found medication on the floor at the home of the service users SM and CM which she believed had been left there by other carers. The claimant told Ms Wesley this by email.*

41. The email which contains several matters states, *"Pills found on the floor. Do I report this to the office"*.

42. The claimant said there had been discussion about this and Mrs Wesley agrees that she called the claimant after receiving the email. The account of both the claimant and Mrs Wesley about what was said is very unclear.

43. This information in the email (which is how the allegation is pleaded) may tend to show the endangerment of health and safety, albeit that involves an element of conjecture. The claimant's principal concern in the email seems to be more about the proper procedure to record the matter rather than an expression of concern about the wellbeing of the clients. There is no other wrongdoing which this tends to show, such as breaches of legal obligations or criminal offences.

44. Taking a broad view of what information may tend to show, we are satisfied that it was reasonable of the claimant to believe this information had health and safety consequences and that she reasonably believed informing Mrs Wesley of this was in the public interest, that is for the well-being of the service users.

45. We find this was a qualifying disclosure.

3. *On 4 December 2020 the claimant told Mrs Wesley that she had noticed that a number of service users' MAR charts had not been filled in as required. Some of the medication involved was controlled so as to require a double signature. The claimant told Mrs Wesley this either in an email.*

8. *On a date or dates in December 2020 the claimant told Ms Wesley by phone that other carers had signed her name on MAR charts.*

46. We deal with allegation 3 and the first part of 8 together.

47. In her email the claimant said, *"MAR charts. If someone refuses to take medications do I contact the office for doctor to be contacted. Does this include creams for sore bottoms etc. Signing for someone else on the MAR chart. It's just come up in training. It says never sign for someone else. This has been done in some cases. I don't want to step on anyone's toes or get anyone in trouble at all. I just want to make sure that I'm doing everything correctly. Reason being is I had an*

*allergic reaction to diclofenac in A&E and had previously been completely fine with it. It was that bad I had to have a shot of adrenaline so I'm very conscious of how quick some meds can turn around to a point it's life threatening".*

48. The claimant said she had spoken to Mrs Wesley about what she should be doing about compiling the MAR chart for the service users SM and CM, but was not able to say when. Mrs Wesley replied to the first part of this query by email. With respect to the rest, she recalled a discussion on the telephone. Her subsequent enquiry with Miranda, the co-worker, confirmed that Miranda had signed the form instead of the claimant. She said it had been a mistake. Mrs Wesley required her to undergo retraining.

49. Mrs Wesley said that SM and CM self-medicated. The compilation of their MAR chart was to record that the carers had witnessed the medication having been taken, not recording that the carers had administered it themselves. Mrs Wesley said that none of the clients who the claimant dealt with took controlled drugs. In addition to retraining, a reminder was sent to all staff about the proper procedure for personally signing MAR charts.

50. We are satisfied the information the claimant conveyed to Mrs Wesley tended to show health and safety of clients might be endangered from incorrect record keeping. In addition the forgery of such a record might amount to a criminal offence. The belief in the wrongdoing was reasonably held by the claimant and she had a reasonable belief it had been made in the public interest. This was a qualifying disclosure.

*4. On a day in December 2020 the claimant told Mrs Wesley by phone that she thought that Emma might have stolen an initialled gold ring from a service user PT.*

51. In her statement the claimant said she had reported this in a phone call on the day she had attended with Emma to the client P. In a later call she said Mrs Wesley had spoken to Emma who had informed her it was her grandmother's. She said Mrs Wesley shouted at her, that she had dealt with it.

52. Mrs Wesley said there had been three calls from the claimant. In the first the claimant had said Emma had been looking through drawers at P's house and not helped her with care for P. Later on, in the afternoon, she rang and said something had been taken, a ring or something. Days later she called and said it was definitely a ring. She denied shouting at the claimant.

53. We are satisfied the claimant did convey her belief that something had been stolen by Emma in the course of three phone calls and that it was a ring. It is information which tends to show a criminal offence has been committed.

54. We are not satisfied the information the claimant disclosed was part of a reasonable belief. In her witness statement she stated Emma chose to sort out 6 drawers, moving P's clothing whilst she was left to tend to P's personal care. She needed help moving P and eventually Emma assisted and then returned to sort out the drawers. She said she felt something was not right. In evidence she said Emma was acting shiftily and there were valuables in the drawers, having seen some vintage jewellery and silverware. After two further house calls, she stated Emma

had shown her a photograph of some gold jewellery with black onyx and said she had found it in the road. The claimant stated she told Emma she would have to hand it in and Emma said a police sergeant had told her should keep it for up to a week. In her evidence she said that she believed Emma had sold the ring at a cash converter shop or left it with a friend between the house visits. She believed Emma was a kleptomaniac who was showing off her dishonesty.

55. We accepted the account provided by Mrs Wesley that there were three calls. We find that at the time of the first call the claimant was exasperated with Emma for not helping her but made no mention to Mrs Wesley of any suspicious behaviour. That is consistent with what the claimant said, when cross examined. The first allegation of theft, in the second call, was not precise. It is likely to have been made after the claimant had been shown a photograph of some jewellery by Emma. This was some time later in the same day. Two further house calls had been made by then. They were some distance from P's house. The description in the witness statement is not of a ring but of jewellery. The list of issues records an allegation of an initialled ring. There is no mention of this in the statement, only to black onyx. In her evidence the claimant said she thought the initial was K.

56. There is a lack of clarity about what precisely the photograph depicted. There are different descriptions at different times, lacking consistency. The belief that what the claimant had seen in the photograph was the proceeds of crime from P's house is based on little more than a hunch. The suggestion Emma had sold the ring after having taken it and photographed it before doing so within this limited timeframe is speculative, based upon an assumption, as is the idea a photograph was shown to her as a way of bragging about the crime. There was nothing to connect the content of the photograph to P other than the claimant says she had seen some sort of jewellery at P's house. She had not seen the ring at P's house and the ring she described at one stage as initialled was not P's initials. When P's relatives were subsequently contacted by Mrs Wesley they said nothing had been taken, there was nothing valuable at P's house and nothing in the drawers. In the light of that, we find it unlikely that the claimant had seen similar valuables in P's home.

57. The claimant says that her difficult life experiences and early involvement with criminal elements has given her an awareness or intuition of nefarious behaviour which gave her an insight that Emma was stealing. Whilst we accept that the claimant genuinely suspected Emma of theft, the account she has provided gives no sound basis for that belief and is speculation.

58. There was no qualifying disclosure.

*5. On or around 28 December 2020 the claimant told Jane, the senior on-call carer, that she believed that Emma had stolen from the handbag of SM.*

59. The claimant has not recounted what she told Ms Brownjohn in her witness statement. Her statement focusses upon what Ms Brownjohn said to her, including a remark by Ms Brownjohn about Emma having done something like this before with respect to £100. Our task is to decide in the first instance what information the claimant disclosed, not what was disclosed to her.

60. In evidence Ms Brownjohn said the claimant had said that she was concerned because she had walked into SM's room and Emma was leaning over a

chair and she suspected she had stolen something. Ms Brownjohn asked if she had seen her steal anything and she said no. Ms Brownjohn logged the call: "A worry over 2<sup>nd</sup> carer's actions in s/user home". In the next column she wrote that the outcome was the Director would be informed.

61. We find this is what the claimant had said. This was not information which tended to show that a form of wrongdoing had occurred. Leaning over a chair did not tend to show theft and the claimant's belief of an act of theft is not information which tends to show a crime was committed. It is a general allegation of a belief and devoid of sufficient factual content to convey enough information to identify criminal behaviour. It does not amount to a qualifying disclosure.

62. Although not pleaded as a protected disclosure, the claimant says she had a further similar call with Mrs Wesley, the following day. She had asked Ms Brownjohn not to pass on her concern to Mrs Wesley because she thought Mrs Wesley favoured Emma and would not take her complaint seriously. That was why the log referred to the matter being taken to Mr Gibbons, the Director. The claimant had rung on 29 December 2020, because she learnt that she was on a rota to work with Emma that afternoon. She regarded that as unacceptable in the light of what she had reported, so rang the office. Mrs Wesley answered. She had only been told there was an issue concerning Emma by Mr Gibbons but not what it was. The claimant asked her if she had heard about Emma and then told her that she suspected her of stealing from a handbag having seen her with her hands down the chair where the bag was.

63. This information would tend to show a criminal offence had been committed, because of the reference to Emma's hands in someone else's bag. There would need to be an explanation for that, which could have been innocent, but it could raise a suspicion of dishonesty.

64. Even if this had been pleaded as a qualifying disclosure, we would not have found it was one. There was not a reasonable belief of theft. The claimant had seen Emma in the room leaning over a chair. She said later, to her sister in law and in the claim form, that she had caught Emma with her hands in SM's handbag. This was not the case. After Emma had left the room the claimant said she found the handbag, described on another occasion as a purse, at the side of the chair.

65. The claimant was suspicious because of the earlier incident concerning the ring, which we have found was an unreasonable belief of theft. That influenced her view of what Emma might have been doing in SM's home. Seeing a carer leaning over a chair in the proximity of a bag of a service user does not reasonably establish that an act of theft had been or was being committed. There was no reason Emma should not have been in the living room of the service user or where she was seen by the claimant. The escalation in the claimant's language describing what the claimant had actually seen to saying that the carer had been caught in the act with her hands in S's bag was an unsatisfactory leap in her thinking. It was to jump to an unacceptable conclusion.

*6. On a number of occasions in December 2020 the claimant told Mrs Wesley either face to face or on the phone (and on one occasion in the presence of Tina, a senior carer) that other carers were not washing service users properly. She pointed out that a result of this had been that faeces had been left on a pressure sore wound on the buttocks of service user PT.*

66. Mrs Wesley had no clear recollection of these conversations. They are not included in the witness statement of the claimant. We are not able to find this information was disclosed, on the evidence we heard.

*7. On a date in early December the claimant told Ms Wesley by phone that she had been left to complete by herself a call for two service users, SM and CM, who needed two carers to move each of them.*

67. The claimant produced some text messages during the hearing, one of which related to 23 December 2020. Miranda had sent a text to the claimant to say that Nikita had asked for her to make a start at SM's as they were covering for Miranda because she was poorly. This was the occasion of the alleged disclosure.

68. Mrs Wesley had no recollection of the call. The claimant said another carer arrived just before the visit concluded.

69. We are not satisfied the claimant made a call in the terms set out above. Any lifting could have been delayed until the replacement carer arrived, as the claimant anticipated in the text. It is not unexpected for a co-worker to ring in sick. The claimant sent a text wishing Miranda well. It is therefore highly unlikely the claimant would have contacted Mrs Wesley in these terms.

*8. On a date or dates in December 2020 the claimant told Ms Wesley by phone that other carers had signed her name on MAR charts, that other carers were giving service users pain relief without first asking them if they wanted it, and that a carer, Amy, had deliberately heated up two microwave meals for SM and CM so that there was enough food for her to eat also, SM and CM having very small appetites.*

70. The first part of this allegation is addressed above and has been found to be a protected disclosure. Mrs Wesley had no recollection of the remainder. It is not included in the witness statement of the claimant. The claimant has not proven on a balance of probability that this information was disclosed.

#### Summary – protected disclosures

71. We have found that the disclosure relating to the pills which were found on the floor and the inappropriate or misuse of the MAR charts were qualifying disclosures.

72. These were made to the claimant's employer and are protected. The remainder of the alleged disclosures were not qualifying.

#### Alleged acts or failures to acts which constitute contractual breaches or discriminatory detriments

1. *Generally, when the claimant called Ms Wesley in relation to her work, Ms Wesley would speak to her in an inappropriate tone, would be short and sharp, and would make the claimant feel that what she was doing herself was wrong. For example, when the claimant raised issues in relation to the MAR charts, Ms Wesley would raise issues with the claimant not having signed them herself. Ms Wesley would focus complaints made by the claimant back onto the claimant in a passive aggressive manner.*

73. This is denied by Mrs Wesley. The only specific allegations in the witness statement about Mrs Wesley's tone concerns the complaints about Emma and the thefts, not a response to raising the issue of the MAR chart.

74. We find that Mrs Wesley acted responsibly with respect to the complaint about the MAR chart. She followed it up with a discussion with Miranda, required her to undergo training and sent a written communication to all staff to remind them of the need for care in signing for medicines taken. It is highly unlikely, in these circumstances, that she would have turned the accusation back on to the claimant, as alleged. There was a complaint made by Emma against the claimant, on 29 December 2020, which included an issue relating to medication. It may be this was what the claimant recalled, but it was some three weeks later.

75. We reject the allegation which, save for the issue about MAR charts, is in broad and general terms.

2. *On a date in December 2020 Ms Wesley put the claimant on a double-up call to train a new carer when the claimant herself did not know the call. Ms Wesley knew this and that consequently the claimant would be unable to carry out the necessary training.*

76. The claimant could not provide the date or the name of the carer she says she was to train. Mrs Wesley recalled an occasion when she sent a co-worker to share a shift with the claimant who was new to the respondent but had experience in care work from previous employment. We are not satisfied the claimant was required to train this co-worker.

3. *On the same date, when the claimant told Mrs Wesley that she was struggling to deal with the double-up call and needed help, instead of sending her someone to help Mrs Wesley sent a third carer who announced that she was there to "watch" and not to provide help*

77. Mrs Wesley recalled asking Mr Gibbons if he would authorise a third carer to attend when the claimant called, which was authorised to the extent that third worker would observe and assess whether extra support was needed. Kelsey was sent.

4. *On the same date, the claimant noticed faulty wiring connected to the chair of the service user which posed a health and safety hazard. The claimant switched it off and unplugged it but the third carer shouted at the claimant and went to plug the chair back in.*

78. We have no account other than that of the claimant of this event and therefore accept it. The state of the wire was reported to Mrs Wesley by the claimant. Mrs Wesley contacted the service user's son. He was an electrician. He attended and applied masking tape to the wire.

5. *Other carers did not want to work with claimant, in particular Miranda who was the main carer for SM and CM. Miranda would ask other carers to swap calls with her, so she did not have to work with the claimant. The claimant believes Miranda did this because Ms Wesley had told her about some or all of the disclosures (as set out above) which the claimant had made.*

79. A number of the claimant's colleagues expressed concern about her. For example on 29 December 2020 Emma had described the claimant to Mrs Wesley as intimidating and overbearing and failing to follow the procedures.

80. Mrs Wesley denied that she had discussed the concerns the claimant had raised with carers generally. She said she had discussed the allegation of theft with Emma and had spoken to Miranda about MAR charts. It is reasonable to infer Miranda would have known it was the claimant who had raised concerns. Mrs Wesley only raised the concerns the claimant made with those to whom they related.

6. *Other carers would give the claimant the cold shoulder. For example, on one occasion when the claimant was doing a double call for SM and CM, the other carer, Nikita Wells, went into the house and shut the door in the claimant's face, and then gave the claimant "the silent treatment" throughout the call. The claimant believes this was because Ms Wesley had told other carers about some or all of the disclosures (as set out above) which the claimant had made.*

81. There is no evidence in the statement of the claimant about the incident concerning Nikita, but she is mentioned as one of three others who did not want to work with the claimant, at paragraph 43 of the statement of Mr Gibbons and he understood this was because they found the claimant to be intimidating, abrupt and overbearing. They said the claimant would try to take over the care of the clients. There is no evidence Mrs Wesley discussed the concerns the claimant had raised with Nikita and we reject that allegation.

82. The evidence suggests the claimant was not popular with four carers, but the precise reason for this is unclear and based on hearsay or the claimant's assumption. We are unable to make findings upon the reason they held these views.

7. *Other carers excluded the claimant from a WhatsApp group. The claimant believes this was because Ms Wesley had told other carers about some or all of the disclosures (as set out above) which the claimant had made.*

83. It was not disputed that the claimant was excluded from the WhatsApp group. There was no evidence of how many were in the group or that whoever was in the group excluded the claimant because of anything she had said to Mrs Wesley. That part of the allegation is not established.

8. *Other carers made the claimant feel that she could not do her job properly. In particular, Miranda made her feel that she could not do her job properly by saying that she "did not know what she was doing" and that excess medication could be thrown away, when the claimant pointed out that this was contrary to the online training she had just received.*

84. We accept this allegation in respect of Miranda, on balance, because she was one of the four worker who Mr Gibbons said had expressed a desire not to work with the claimant. It is not clear which other workers the claimant is referring to and we make no findings on that.

9. *Ms Wesley removed the claimant from the call to SM and CM on 31 December 2020 after the claimant had reported a theft from that service provider by Emma (rather than removing Emma).*

85. It was agreed that this, in fact, related to 29 December 2020. Mrs Wesley removed the claimant from the visit to SM and CM because the claimant expressed her concern at having to work with Emma. The decision to allow Emma to do the shift must be seen in the context of the fact that a call was made by Mrs Wesley to SM who said nothing had been taken. There was no evidence of theft, only the claimant's suspicion. This would not justify removing Emma from this call.

*10. Ms Wesley told other carers about the disclosures (as set out above) which the claimant had made.*

86. We address this in paragraph 80 in respect of allegation 5.

*11. Ms Wesley allocated her to a singles job on 31 December 2020 requiring her to change a stoma bag when she had not received appropriate training for this task.*

87. The date of this allegation is incorrect. The claimant resigned two days before. It probably relates to 29 December 2020. Mrs Wesley stated that the claimant would be aware she would not have to deal with a stoma bag, because that was dealt with by the service user's wife. It is not raised in the statement of the claimant. We do not accept the allegation.

#### Constructive dismissal

Did any of the above alleged events, 1 to 11, amount to conduct of the respondent which was, without reasonable and proper cause, likely to destroy or seriously undermine trust and confidence

88. We have not accepted allegations 1, 2 and 11.

89. With respect to allegation 3, the provision of an additional carer to observe was not an act which would, objectively, destroy trust and confidence. An assessment of the visit was perfectly reasonable having regard to the costings and charging mechanism available to fund each client. Mr Gibbons' authorisation to provide the extra worker to observe could not reasonably have been taken as one which was calculated or likely to destroy trust and confidence and was, in any event, based upon reasonable and proper cause; to evaluate the needs of the client.

90. With respect to allegation 4, we accept Kelsey reacted as alleged, but this was not the conduct of the claimant's employer, but a co-worker. It is the trust in the employer which forms the basis for this implied term, not a worker's colleagues. The action of Mrs Wesley also to have the wire checked, demonstrated a responsible and appropriate response to the concern which the claimant raised.

91. In respect of allegations 5, 6, 7 and 8 the actions of the co-workers cannot be attributed to the employer. For the reasons we set out, it is trust and confidence in the employer as a result of its actions which is material. That is fatal to the allegation that these matters constituted a breach of the implied term.

92. We reject the claimant's belief that Mrs Wesley had spoken about the concerns she had raised about others, save for when they directly concerned them. This would not objectively destroy or seriously undermine trust and confidence. A worker would expect deficiencies in care they had raised to be taken up with those

responsible and for the employer to do so would be for reasonable and proper cause. There is no evidence the management of the respondent encouraged or condoned the conduct of the claimant's colleagues in the views they expressed of or to her. The claimant did not raise these allegations about her colleagues with her manager.

93. Furthermore there may have been a number of reasons her colleagues acted in the ways which caused the claimant concern and we are not able to draw an inference as to why they conducted themselves in this way.

94. In respect of allegation 9, the removal of the claimant from the clients SM and CM was for reasonable and proper cause. The claimant would not attend with Emma. Her allegation had been investigated and was not substantiated. S had been spoken to and said nothing had been taken from her bag. The claimant had not seen Emma with her hands in SM's bag, as she initially and later stated, but only in the near vicinity of it. SM said nothing had been taken. Mr Gibbons had made enquiries of the CQC and police helplines who had told him there was no case of theft to take forward. In the light of that advice, Mr Gibbons and Mrs Wesley would face other difficulties if they were to remove her from visits. They would run the risk of breaching the implied term of trust and confidence with respect to Emma.

95. Allegation 11 has been addressed in paragraph 87.

96. The claimant said she was driven to resign in her telephone conversation with Mr Gibbons on 29 December 2020 because her employers had not taken the appropriate action she expected in response to her complaint about Emma. The respondent had prepared its case with respect to the issue identified in the case management order and to add this aspect as a breach would technically require an amendment. However, the evidence was such that we could address it.

97. We are satisfied Mr Gibbons made the appropriate enquiries when the claimant's allegation was brought to his attention. He ensured SM was spoken to and then he made enquiries of the appropriate authorities, the CQC and the police. Criticism could be made of the failures to ensure written records were made of the ring and bag incidents and the enquiries made. That was recognised by Mr Gibbons and Mrs Wesley; but the absence of written records was not why the claimant resigned. Even had a record been taken, the claimant's account of both alleged thefts was short of what was necessary to take action against Emma that the matter could not be pursued as the claimant would have wished or to move Emma instead of moving her to other clients. Therefore the respondent did not act in a way which was calculated or likely, objectively, to destroy trust and confidence.

98. Her case is not assisted by the content of her resignation letter the next day which speaks in favourable terms of her short period of employment and some of her colleagues. There is no mention of the upset and trauma she felt or disappointment in her colleagues although it is clear from the evidence that she was very upset when she spoke to Mr Gibbons on the telephone and tendered her verbal resignation. Her strong views seem to have crystallised having spoken with others, relatives and friends, after which she then made a referral to the CQC. We note that what she said to others was in terms she had witnessed stealing, which was not in fact the

case. We did not find the subsequent enquiries by the CQC to be particularly instructive in our findings, those being after the event.

99. There was no breach of the implied term of trust and confidence. The claimant was therefore not dismissed as defined in section 95 of the ERA and her unfair dismissal claim cannot succeed.

Disability discrimination  
Disability and knowledge  
Mental health

100. It is accepted that the claimant has the disabilities of PTSD, anxiety and depression and social phobia.

101. The respondent defends the claims in respect of those matters on the ground it had no knowledge of them, nor could reasonably have known of them.

102. In one part of her application form for the job the claimant declared that she did not have, nor ever had had any significant health problem, impairment /disability (physical or mental) that might affect her ability to undertake tasks set out in the job description other than dyslexia. At the end of the form she stated that she had dyslexia but it did not stop her being able to do her job. In an earlier part of the form she stated she was disabled but stated that was dyslexia.

103. The claimant said she did not reveal her true history of mental health because she believed it would have meant she would have been refused the job. She said she had a full discussion with Mrs Wesley when she attended the induction day and handed over the handwritten note with her DBS certificate. Mrs Wesley denied having been informed about her mental health and we find the claimant had not told the respondent about it. There was no reason for the respondent not to suppose her written health declaration were not correct.

104. It follows that her complaint about direct disability discrimination with respect to her mental health conditions cannot succeed. The reason for the alleged detriments could not have been one of which the respondent's managers were unaware.

Dyslexia

105. A report in respect of the claimant states dyslexia, dated 16 May 2009, was submitted. It refers to a discrepancy between the claimant's general ability and literary skills, a weakness in her subskills and difficulty in processing information. This disadvantaged the claimant with respect to academic work. The report made specific recommendations with respect to adjustments in examinations, skill development and study.

106. In her impact statement the claimant states that she requires bigger font and has to reread documents a few times. She says she cannot process too much information at once and her spelling can be bad if rushed. She becomes tired and this can mean everyday activities take longer. She can suffer from headaches and migraines when using computers or laptops or when writing for too long.

107. There was no challenge to this evidence. The report confirms that the claimant has an impairment and that it is long-standing, lasting more than a year. We accept the evidence of the claimant, that is that the impact on her normal day-to-day activities is more than trivial or minor (that is substantial). We find the dyslexia was a disability.

#### Reasonable adjustments

108. The claimant has identified three provisions, criteria or practices (PCPs).

109. The first is that new employees were expected or required to complete the online training within a fixed period of time. The evidence of Mr Gibbons was that there was no requirement to complete the online training within a timeframe but it was to be reviewed at the probationary assessment after six weeks of employment. The claimant did not give evidence to the contrary. We find there was an expectation, not a requirement, in respect of this PCP.

110. The second is an expectation or requirement for new employees to complete part of the online training in a format which did not enable text to speech. There was little evidence on this. The claimant was able to complete a number of the programs without difficulty and no such PCP is explained in the claimant's witness statement. In the circumstances we were unable to find there was such a PCP.

111. The third is an expectation or requirement that employees would complete pharmacy medication charts for service users. The evidence of Mrs Wesley was that the respondent only required their carers to compile the MAR chart provided by the respondent, not the charts supplied to the clients by their pharmacy. Carers, including the claimant, were trained on completing the respondent's MAR charts on induction.

112. At the home of SM and CM, the claimant was asked by Miranda to fill in a pharmacy medication chart which had smaller font and required more detail. The claimant found this difficult. Mrs Wesley would not have required her to use this chart had she known about it but would have advised using one of the respondent's MAR charts. The request of Miranda was unknown to the respondent and was not one they would have endorsed. In circumstances were not satisfied this was a PCP of the respondent.

113. We accept that all PCPs would have placed the claimant at a substantial disadvantage because of her dyslexia. However, we are not satisfied that the respondent had known of, nor reasonably could have been expected to know of, these disadvantages.

114. The claimant stated in her application form that the dyslexia would not stop her being able to do her job. At the induction there was discussion about dyslexia and Mr Gibbons said, "*join the club*" because he also has the condition. He showed the claimant how to use the online training system on the computer. We are not satisfied the claimant said anything at this time to indicate she would have a problem with the training or any aspect of her job. Ms Brownjohn told all new recruits they should let her know if they had any problem completing the paperwork, such as their

mileage claims. The claimant never raised any problem. Her written communications were legible and cogent.

115. On 25 November 2020 the claimant received a certificate of completion for Atlas, the system she was to use for the online training. This had required her to complete an online module. She received further certificates of completion for medications level 2, on 4 December 2020, modules of moving and assisting people level 2, on 7 December 2020 and CPR/basic life support for healthcare professionals level 2, on 7 December 2020.

116. On 4 December 2020 the claimant requested by email an advanced payment to assist with her costs. Mr Gibbons agreed by return. He asked her in the same email how the training was going. She replied, *"It's going good. Got onto meds yesterday. Finishing off tonight, only 20 minutes each left then starting on some of the others. Got weekend so should have lots done by Monday"*.

117. The claimant said in evidence that she had suffered a migraine the day after on-line training and that this was recorded on her rota. We note that she has written migraine on the rota for 18 December 2020. There is no reference to the reason for this and no evidence that she had informed Ms Wesley or Mr Gibbons of the connection between her headache and the training.

118. We find that the claimant had not informed the respondent of any difficulty she anticipated with the online training at the induction day, nor that she was having any difficulties when she undertook it. The email chain of 4 and 7 December 2020 with Mr Gibbons suggests the opposite – *"It's going good"*. Nor is there any evidence that the claimant ever mentioned the difficulty with filling in a pharmacy medication chart or that the absence of a text to speech function for the online training created a difficulty.

119. The claimant suggested that the respondent ought to have undertaken a risk assessment because it was known she had dyslexia. She stated that dyslexia is always a disability because that is suggested on the website of the Dyslexia Association and supported by the authority of *Paterson v Metropolitan Police Commissioner [2007] IRLR 763*.

120. Dyslexia takes many forms and is not a deemed disability unlike some conditions such as cancer and HIV. It must meet the definition in section 6 of the EQA. Whilst it is a long-term condition, the critical question will be whether it has a substantial adverse effect on a person's ability to undertake normal day-to-day activities. It will very much depend on where it falls on a spectrum and the way in which it creates difficulties for the individual. That is clear from *Paterson*. We do not accept the claimant's proposition that it will always amount to a disability and to the extent the Dyslexia Association says to the contrary, it is incorrect.

121. The discussions the claimant had with Mr Gibbons and Mrs Wesley, her application form and emails gave every impression that the training she would have to undergo would not present a problem. Nothing was said by the claimant to suggest she would have problems completing medication charts. She stated in the application form for the job that her dyslexia would not cause a problem in her work and when asked about the training she replied, in writing, that it was good. The

respondent was entitled to take her at her word. We do not find it ought to have challenged this and doubted the presentation she had given of her abilities. Employers must not make stereotypical assumptions about what employees can and cannot do and run the risk of patronising a disabled employee if they jump to conclusions that the employee cannot achieve what they have stated they can.

122. The complaint of a breach of the duty to make adjustments cannot succeed because in addition to the fact that we have found only one PCP applied, in any event the respondent did not know and could not reasonably have been expected to know of any particular disadvantages.

#### Direct discrimination

123. This can relate only to the claimant's dyslexia. For the reasons set out above, the respondent had no knowledge of her mental health conditions and so could not have treated the claimant less favourably because of them.

124. The claimant said that 11 alleged detriments were part of a campaign to force her to leave and this was because of her disabilities.

125. The respondent had no knowledge that the dyslexia would constitute a difficulty with her work for the reasons set out above. She had completed a number of the modules successfully and was not criticised for the pace at which she was undertaking the training.

126. In respect of the acts which we have found occurred as alleged, under paragraphs 2.1.1. of the list of issues, which we address at paragraphs 73 to 87 above, they have nothing whatsoever to do with the claimant's dyslexia. There was no evidence her co-workers knew of this condition. There was no sensible reason Mrs Wesley should have made the decisions which the claimant complains of, consciously or subconsciously, because of her dyslexia and the claimant did not provide an explanation as to why she believed it influenced Mrs Wesley in any way. The direct discrimination claim is not well founded.

#### Outstanding wages and holiday pay

127. Following examination of the documentation and cross examination of Mr Gibbons, the claimant withdrew these claims.

Employment Judge D N Jones

Date: 10 March 2022