



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Chadwick

**Respondent:** Sue Ryder

**HELD AT:** Manchester

**ON:** 10, 11 & 12 July  
2017

**BEFORE:** Employment Judge Ross  
Ms L Atkinson  
Mr A J Gill

## REPRESENTATION:

**Claimant:** In person  
**Respondent:** Mr S Flynn, Counsel

## RESERVED JUDGMENT

1. The claimant's claim that he was subjected to a detriment by the respondent when his engagement with them as an agency worker was terminated and that this was done on the ground that he made a protected disclosure is not well founded and fails.
2. The claimant's claim that he was victimised by the respondent pursuant to Section 27 of the Equality Act 2010 is not well founded and fails.

## REASONS

1. The claimant was employed by Adecco as an agency worker. He was supplied to the respondent to work as a cleaner from 19th September 2016 on a weekly rolling basis. It was anticipated the length of the assignment would be approximately three months.
2. The respondent is a registered national charity, which provides specialist neurological and palliative care. As part of its charitable activities the respondent

operates a neurological care centre at Cuerden Hall in Preston where residential and day care is provided to people with a variety of neurological conditions. During the time the claimant worked at Cuerden Hall he alleged to the respondent that he had been sexually assaulted by a care worker, ZZ. He also made three other allegations to the respondent concerning ZZ. His placement with the respondent ended on 25th October 2016. The claimant alleged the termination of his engagement was a detriment to which he had been subjected by the respondent on the ground of making protected disclosures.

3. He also alleged that the allegation he made of sexual assault amounted to a protected act within the meaning of the Equality Act and the termination of his placement amounted to a detriment and that he had therefore been victimised pursuant to Section 27 of the Equality Act 2010.

4. Both claims were denied by the respondent. The respondent said that the reason the claimant's placement had ended was because of the poor quality of his work and the fact he had lied to his supervisor.

5. We heard from the claimant. For the respondent we heard from Mrs G Bayliss the respondent's specialist Employee Relations Adviser, Ms Nicola Murray Head of Support Services at Cuerden Hall, Mr Terry Mears, Care Centre Director at Cuerden Hall and Ms Janet Abbott, Senior Domestic at Cuerden Hall.

6. The claimant's claims were for public interest disclosure detriment pursuant to Section 47B Employment Rights Act 1996 and victimisation pursuant to Section 27 of the Equality Act 2010. It was agreed at the outset of the case that the issues for the Tribunal were as follows:

**7. Public Interest Disclosure detriment claim.**

(1) Was the allegation of sexual assault made by the claimant to the respondent and the three allegations about ZZ protected disclosures within the meaning of Section 43B ERA 1996. In particular

(i) was there a disclosure of information?

(ii) was the disclosure of information in the reasonable belief of the claimant and made in the public interest?

(iii) did it tend to show one or more of the following at 43B(a) - (f) ERA 1996.

(2) Was it made to the employer or other responsible person?

(3) Was there a detriment? The claimant relied on the termination of his assignment.

(4) If the claimant established that there was a protected disclosure and a detriment, having regard to the reverse burden of proof in Section 48(2) ERA

1996, the respondent is to show the ground on which the termination of the claimant's engagement was done.

**Victimisation claim pursuant to s27 Equality Act 2010 where:**

- (i) Was the allegation of sexual assault made on the 12th October 2016 a protected act within the meaning of Section 27 of the Equality Act 2010 (this was undisputed by the respondent).
- (ii) Was the allegation made in bad faith within the meaning of Section 27(3) of the Equality Act 2010;
- (iii) Was there a detriment when the claimant's assignment with the respondent was terminated?
- (iv) Had the claimant adduced facts which could suggest the reason for ending his assignment with the respondent was his protected act on 12th October 2016? If so, could the respondents show a non-discriminatory explanation for the ending of the claimant's assignment.

**Facts**

8. We found the following facts. We find that Cuerden Hall is a Grade 2 listed building and is difficult to keep clean. We find that in September 2016 the Local Authority carried out an informal inspection of all the respondent's infection prevention and control practices. We find the Local Authority made a number of recommendations as how the respondent could improve their infection prevention measures. We find that the respondent introduced a number of measures. Firstly they introduced a new role of Senior Domestic. Ms Janet Abbott was appointed to that role in September 2016. Secondly they sought an extra cleaner and approached the Adecco agency to provide them with an experienced temporary cleaner on a rolling basis (weekly for a period of up to three months). The claimant was the cleaner provided. Thirdly they introduced an audit system for all cleaners when they thoroughly cleaned a room on a "deep clean". The cleaners were required to complete a tick list of completed tasks. On an ad hoc basis the Senior Domestic checked the work of the cleaners making notes if she found the cleaning to be inadequate. . We find the new system of audits was introduced in early October 2016.

9. There was no dispute that in the first couple of weeks when the claimant started working at Cuerden Hall on 19th September 2016 his work was satisfactory. We accept the evidence of Ms Abbott that during this period the claimant was cleaning public rooms only. She found when he became responsible of cleaning residents' bedrooms his work deteriorated.

10. We find that when the claimant began working for the respondent Ms Abbott arranged for him to be trained in how to clean the various floors and other rooms by

one of the other cleaners. We find the claimant shadowed that other cleaner for around four days.

11. We find each cleaner on completion of a weekly deep clean of each room was to complete a schedule. An example is at page 97 of the bundle. It is the weekly deeply clean schedule for the claimant dated 24th October 2016 for Room 19. We find that page 98 is an example of an audit completed by Ms Abbott on the same day, 24th October 2016, where she has marked what has and hasn't been done and has commented in the notes section where she finds matters to be unsatisfactory "Still dust on bed. Door frame had marks on. Standard not generally very good". We find she then used the "office use only" formal section of the form at p97 to note the audit had been completed, dated and signed it. We find that document at p 61 shows in the column marked "weekly" adjacent to "Room 19" that the claimant has initialled to say that he has done a deep clean of that room where the day is shown as Monday, which was 24 October.

12. On 10th October 2016 an anonymous letter dated 9th October 2016 and addressed to the management at Cuerden Hall was received. The letter is directed at a care worker at Cuerden Hall whom the Tribunal by way of anonymity order refers to as ZZ. It states "Stop it. Sexual innuendos or pervert acts in public or elsewhere will lead to your employer and the Police getting involved. It is your choice. Trouble is what you will get if you continue. Excuses are the patches which mend the garment of failure. So! Don't excuse yourself or face the consequences of your actions. From a notable citizen of the authority to make a citizen's arrest if needed". Ms Murray said this letter was brought to her attention on or around the 10th October 2016.

13. There is no dispute that on 12th October 2016 the claimant reported to Mr Mears the Centre Director that he had been sexually assaulted. The claimant alleged that the incident had occurred when care worker ZZ struck him from behind when the claimant was in a corridor with his domestic colleague VA and a contractor Pete. They were discussing the loan of a hover. See claimant's statement paragraph 3.

14. The claimant also reported to Mr Mears that on another occasion ZZ and the claimant were outside a resident's room. The claimant alleged ZZ was kneeling down in front of a resident in a wheelchair and appeared to be adjusting the buckle but the claimant said he considered ZZ's head was too close to the resident's lap. He also alleged that on another occasion when the claimant was talking to a female admin worker, ZZ gave a pelvic thrust towards the admin worker in an inappropriate fashion. He said ZZ was standing behind the admin worker when he did this.

15. We find Mr Mears was sympathetic when he reported the sexual assault. The claimant in his own statement says Mr Mears says "Oh I'm so sorry Mark it sounds like you have been assaulted". He asked the claimant if he was able to carry on working.

16. We find Mr Mears arranged for Nicola Murray to take a detailed statement from the claimant that same day. We find he arranged a telephone conference call with

senior person in human resources and the Head Nurse and arranged for ZZ to be suspended which we find took place that same day. We accept Mr Mears evidence that he ensured that until ZZ was suspended, he worked under supervision.

17. We find Mr Mears arranged for the incident to be reported to the Care Quality Commission ("CQC") and for an investigation to be commenced.

18. We find the respondent arranged for Gina Bayliss an employee of the respondent who works in the Charity's Retail Fundraising and Business Support Department and does not normally work within the healthcare directorate to conduct an investigation. We find she was chosen because she was entirely independent not just of Cuerden Hall but of the respondents healthcare sector. We find these steps show the respondent treated the claimant's complaint very seriously by acting appropriately to ensure that its procedures were triggered.

19. We rely on the notes at page 67 of the conversation between Nicola Murray Head of Support Services and the claimant.

20. At the Tribunal the claimant was critical of the respondent's notes of this and other meetings. He suggested that the transcripts were inaccurate and said that he had asked for the original recordings.

21. When cross examined he agreed that he had been sent the original recordings but had failed to listen to them until shortly before the hearing and that there was nothing but "white noise" on the tapes. When asked what action he had taken about this he said he had not taken any action.

22. The Tribunal relies on the evidence of Nicola Murray and Gina Bayliss whom it found to be clear and reliable witnesses that the transcripts supplied by the respondent of the interviews with witnesses including Mr Chadwick are accurate.

23. We find that the claimant repeated his disclosure to Ms Murray that he had been sexually assaulted by ZZ when he walked into him when the claimant was talking to a contractor and another domestic in a corridor outside the cleaning cupboard downstairs next to the dining room. The claimant told Miss Murray on the 12th October that the incident had happened "about two weeks ago". He said that the incident which occurred when ZZ was leaning over the resident and was "very uncomfortably close to her lap" was "on Friday" and we find that was Friday 7th October. He made a further allegation namely that ZZ on Friday (7th October) had followed him into the changing rooms. He alleged that it was on the same day when he was talking with a member of admin staff ZZ came walking behind her and "thrust his hips towards her buttocks whilst looking at the claimant".

24. We find Ms Murray treated the claimant sympathetically. We find she mentioned the Employee Assistance Helpline and also asked whether the claimant wanted her to notify the agency.

25. We find that on the following day 13th October 2016 the claimant gave a report to C. Hereford of Adecco Agency, his employer. He signed that account. In that account he says the sexual assault occurred "on approximately second day of

working at Sue Ryder (estimated 21st September)". This is a different date to the date he had suggested to Ms Murray the day before. On that occasion he had suggested the incident had occurred two weeks earlier than the 12th October which would have been on or around 28th September. In this account he says the incident with the resident and the buckle where the claimant believes ZZ's head was too close to resident's lap was on 22nd September. He says the date of being followed into the changing room and the date when ZZ thrust his hips at the admin worker in an inappropriate gesture were both on 7th October.

26. We find on 21st October Mrs Bayliss interviewed the claimant see page 74 to 79. On this occasion the claimant believed the assault was "towards the end of September". We find Mrs Bayliss also interviewed the admin worker -see page 72 to 73 and the domestic who was present at the time of the alleged sexual assault see page 70 to 71 on 21 October. We find on 24th October she interviewed ZZ -see page 80 to 84. On 24th October she also contacted the contractor "Pete". See page 85.

27. Meanwhile the claimant's supervisor Janet Abbott who had introduced the new audit for checking rooms was developing concerns about the claimants work. We find Janet Abbott to be a clear, convincing and honest witness. Where there were errors in dates she made concessions that could have been mistaken. For example she completed handwritten notes contemporaneously at pages 102 and 103 of the bundle. She admitted that where at page 102 she refers to "on Thursday" it is likely she meant Wednesday because in her note she refers to an audit of room 27 where the bed has not been done and the back of the doors are still full of rubbish. We find this is consistent with the audit document at page 90 for room 27 on Weds 19 October which states "socks and paper work behind chest of drawers near door, fan not dusted, under beds not good, dust on carpet".

28. Ms Abbott told us that the daily clean required the cleaner to empty the bins, check the soap and the surfaces, clean the sink, and mop or Hoover. A weekly clean was a deep clean starting at the top of the room at the top of the wardrobe moving any ornaments and polishing them and moving down through the room and cleaning all surfaces and disinfecting, moving any furniture would could be moved and cleaning under it and behind it. Document 56 identifies that room 27 has the initials MC next to a weekly clean on Wednesday which is 19th October 2016 as the schedule is for week commencing Sun 16 October.

29. We rely on the evidence of Ms Abbott that on Wednesday 19th October the claimant's cleaning trolley had not been stocked up properly and on following his work she "could not believe what a mess the rooms were in". We find later that day she spent an hour with the claimant showing him how to deep clean a room. She accepted that the comment in her statement that she spent a day with him was not accurate. The claimant disputed that he was shown how to clean a room again by Ms Abbott at all.

30. We find on Friday 21st October 2016 the claimant had completed a bedroom weekly clean deep schedule for room 28, see page 94. We find that Ms Abbott had completed an audit and found "windows did not look clean, bedside cabinet not very

clean and sink not done", see page 95. In cross examination the claimant although he did not dispute that he had completed the weekly deep clean document at page 94 took issue with the fact that the rota at page 96 does not show that he placed initials next to the column for weekly clean. We find this is something of a red herring. Ms Abbott was concerned about the standard of the claimant's cleaning. We entirely accept her evidence that even on a daily clean the sink should be cleaned. The claimant had filled in a form to say he had done a weekly deep clean and yet he had not even cleaned the sink. We find this is contemporaneous evidence that his work was not of a suitable standard. We find the fact that the claimant has failed to complete a section of the form by placing his initials next to "weekly clean" on page 56 is not relevant to that finding.

31. We rely on the evidence of Ms Abbott that on occasion the claimant's check list was missing from his cleaning trolley. When she asked him where it was he said he would fetch it. We find she followed him and at that stage he admitted to her "you've got me". He had not completed the check list at all. We find this is likely to have occurred on Friday 21st October (see page 102 and 103).

32. We find on Monday 24th October the claimant completed a weekly deep clean for room 19 see general rota see page 61 and the claimant's form at page 97. We find the claimant was audited by Janet Abbott and she inspected room 19 on the 24th October see page 98. She found "still dust on bed. Door frame had marks on. Standard not generally very good".

33. We accept Ms Abbott's evidence that the cleaning staff responsible for refilling their trolleys with supplies. We accept her evidence that on a number of occasions the claimant left his trolley empty at the end of a shift and when she reminded him of the need to replenish stocks he turned round and said "you do it".

34. We find that on Monday 24th October 2016 Ms Abbott was spot checking rooms. She asked the claimant if he had missed room 21 out thinking perhaps he had made a mistake. We find she asked did he need to go back to it, he specifically told her no he had done it. She then went back with him to show that he had not done it and had not emptied the bin or hoovered the carpet. We find Ms Abbott reported her concerns to her manager Ms Murray.

35. We find on Tuesday 25th October 2016 Ms Abbott told the claimant he had left a cleaning product out on the corridor windowsill and he said "how did she know it was him". See her notes at page 103. The claimant in his statement agrees that Ms Abbott accused him of leaving the cleaning product out and that he said "how did you know it was me".

36. In cross examination the claimant said that Ms Abbott never raised any issues about unsatisfactory work with him. This is contradicted by his own statement where he accuses Ms Abbott of "nit picking".

37. Where there was a dispute between the evidence of the claimant and the evidence of Ms Abbott we preferred the evidence of Ms Abbott. We prefer Ms Abbott's evidence because there are contemporaneous documents supporting her

contention that the claimant's cleaning was poor and we find her to be a credible witness.

38. We also rely on the evidence of Ms Murray at paragraph 15 of her statement, which was unchallenged in cross examination, that Janet Abbott raised concerns with her about the quality of the claimant's work and told her the claimant had lied about completing the cleaning forms which are filled in as each room is cleaned and that Ms Murray had then informed the agency of these concerns and informed them that they may need to rethink their use of the claimant.

39. We found the claimant to be a poor witness. There were a number of occasions in the evidence where we found his account to be entirely implausible. He said to his employer Adecco on 13th October and to Ms Murray the previous day that the incident with the admin worker and ZZ and the incident where he believed he was being followed by ZZ both occurred on 7th October. He signed the record of his account to his employer.P69. In the investigation report Mrs Bayliss reviewed staff records which showed that ZZ was not on duty on 7 October.

40. In his statement to the Tribunal the claimant said these incidents occurred on 6th October. When cross examined about the change in date from 7<sup>th</sup> to 6<sup>th</sup> October the claimant gave a completely implausible explanation which involved reference to a mobile phone. He said "I decided to keep a diary. It was on a mobile phone in the calendar. That's why I know it was on the 6th October. The phone had a cracked screen". He was then asked when he stopped using the phone "soon after the 6th I got a new phone". He was asked if he had the phone on the 12th October when he reported these incidents "no I stopped using it. Also I lost it some time ago around Christmas 2016". The claimant said he had taken photographs but he had lost them. . When questioned further he said "I didn't reactivate the phone for quite some time until Christmas and then I saw the entry for 6th October". When asked if he had made the entry on his phone on 6th October why could he not have referred to it when reporting the allegations on 12th October he said he couldn't because he was "in shock".

41. Although the Tribunal accepts witnesses often struggle with precise dates we found it implausible that the claimant told his employer Adecco on 13th October that the sexual assault occurred on approximately the second day of working at Sue Ryder which he specifically said he estimated to be the 21st September and yet to Ms Murray the previous day and later to Mrs Bayliss he suggested it had occurred a "couple of weeks earlier" ie around the end of September.. The Tribunal considers that the date of incident which occurs on the first or second day on a new placement is likely to be clear in an individuals' mind.

42. We find the claimant also gave implausible evidence as to why he finally reported the sexual assault on 12th October. In his statement to Tribunal he said he reported it because "ZZ saw me then he winked at me whilst he was flicking his tongue out which made me feel physically sick". Despite the graphic description of this incident the claimant did not mentioned this to Mr Mears, to Ms Murray, to Mrs Bayliss, to his employer nor in the Employment Tribunal claim form.



43. Likewise in terms of inconsistency the claimant never raised the incident of ZZ and a female carer companion called Missy, paragraph 6 of his statement with anyone when he was engaged by the respondent either at his meeting with Ms Murray or Mrs Bayliss or to his employer or in his Tribunal claim form. If this incident occurred it is a serious safeguarding matter and the claimant said when cross examined that he knew safeguarding matters should be raised. The claimant was given an opportunity to raise any concerns he had. We find he was treated seriously and sympathetically by the respondent and find it implausible that he would not raise safeguarding concern in relation to a patient, ZZ and/or female carer companion.

44. We find on 25th October 2016 Ms Abbott raised the issue of a staircase with the claimant. We find he had missed cleaning an entire staircase which he should have cleaned. We find that when she asked him to do it he said "stop I'm not having this". We find he went on to say that he needed to speak to Nicola Murray immediately. We accept Ms Abbott's evidence that the claimant went looking for Nicola Murray. We find that later that day there was a meeting with the claimant, Nicola Murray and Ms Abbott.

45. We accept the evidence of Ms Murray and Ms Abbott that the claimant behaved in an angry way in this room and they found him intimidating. We accept Ms Abbott's evidence that the claimant told her she should have been more lenient with him and "let things go because of what had happened". It is undisputed that Ms Abbott had no idea of what he was talking about. The claimant accepted that when he then told Ms Abbott about his allegation of sexual assault concerning ZZ she was shocked and had been completely unaware of it. The claimant accepted that this was correct.

46. We find that on 24th October 2016 Mr Mears had taken the decision to request a new worker from Adecco. We find that Ms Murray had raised with him the concerns Ms Abbott was having about the claimant's poor cleaning and that he had lied to his supervisor. We find he did not require the claimant to be removed immediately and that he should work the end of the week and that the new cleaner could start the following week.

47. We find in the meeting of 25th October because Janet Abbott became increasingly intimidated by the aggressive behaviour of the claimant who had raised his voice and challenged her authority to manage him, she left the meeting. We find that Nicola Murray said to the claimant that the claimant had been good for the residents. We find the claimant, on the use of the past tense by Ms Murray became increasingly angry. We find Nicola Murray brought Mr Mears the Centre Director into the meeting. We find Mr Mears raised the concerns about the quality of the claimant's cleaning and also that the claimant had lied to Ms Abbott about filling in the cleaning schedules. We accept the claimant's evidence and Mr Mears evidence to find that Mr Mears said "look I believed you when you made your complaint now I am believing my supervisor".

48. We find that the claimant became increasingly angry and heated and threatened to go to the Press. We find Mr Mears suggested to the claimant that he should calm down and leave the premises while he calmed down. We find the

claimant interpreted this to believe his engagement was being terminated immediately. We find the claimant was raising his voice and his behaviour was agitated. We find that Mr Mears escorted the claimant off the premises. We find the claimant behaved in a highly inappropriate manner for any cleaner in a workplace but particularly for a cleaner working in an environment where there were vulnerable residents.

49. We find Mr Mears followed the claimant down the stairs. We find he was some steps behind him and yet despite this the claimant turned and shouted at him and told him to "back off". The claimant says in his statement he felt threatened. We find this illustrates the claimant's mindset at this stage. We find his behaviour was not rational. We find that when the claimant reached the keypad he started hitting and banging the keypad beside the door. We find the claimant then collected his belongings from his locker and went outside. We find the claimant then came round to the front of the building and was banging on the office window at the front of the hall demanding to speak to a particular member of the admin staff. We accept the evidence of Mr Mears and Ms Murray that the claimant seemed fixated on the member of the admin staff who was the person he alleged ZZ had conducted a pelvic thrust towards on a previous occasion. The claimant does not dispute that he went round the front of the building to try to get to the attention of that member of staff despite the fact he had been told to leave the premises.

50. We find and it is not disputed at this stage that Mr Mears told the claimant that if he did not leave he would call the Police.

51. The respondent's premises are set in seven acres of land and there is a long drive down to the main road.

52. We accept the evidence of Ms Murray and Mr Mears that the member of admin staff on reception was so upset that she did not want to leave the premises alone and accordingly they accompanied her in her car down the drive. We accept the evidence of Mr Mears that the claimant was waiting on his bike at the end of the drive. We accept his evidence that in these circumstances they turned left, rather than right so that they would not go past him.

53. The following day, 26th October, the claimant wrote to Nicola Murray, see page 106. He stated "I am grateful for your initial help in trying to resolve the matter. I initially approached you on or about 27th September but unfortunately this problem has escalated as you are aware and I feel it needs to be raised in a more formal way to resolve it". He stated that he had been dismissed for his standard and quality of work but he didn't believe the concerns and said it only became an issue after he reported the sexual harassment incident which took place on (or around) 27th September 2016.

54. The Tribunal finds this another example of the claimant's inconsistency. In this letter of 26th October he suggests that he reported the assault to Nicola Murray on 27th September. The Tribunal heard no evidence whatsoever to suggest that occurred. Nicola Murray did not suggest that he was ever raised with her before 12th October 2016 and neither did the claimant suggest it was raised with Nicola Murray prior to 12<sup>th</sup> October in his statement or when giving evidence to the Tribunal

55. . On 28th October 2016 Mrs Bayliss issued her report and sent a copy to the claimant with a letter at page 107 and also sent it to Mr Mears. She found no case to answer against ZZ. She informed the claimant no further action would be taken

56. The respondents sent a letter to the claimant in reply dated 2nd November confirming the reasons why his assignment was terminated, see page 113 to 114.

57. Tribunal took into account the evidence of Nicola Murray that she spoke regularly to the claimant after he made the allegation of assault to her on the 12th October to check he was alright. We find that in one of those conversations she asked the claimant if he had discussed his allegations with anyone, he replied "why have you had a letter". We accept Ms Murray's evidence that she had not told the claimant that the respondent had received an anonymous letter and we accept her evidence that this caused her to believe that the claimant was responsible for the anonymous letter at 111C of the bundle .

## **The Law**

### Public Interest Disclosure Detriment

58. The relevant law is found at S 47B ERA 1996 "a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure". S47B[ (1A) ] is also relevant: "the worker has the right not to be subjected to any detriment by any act or any deliberate failure to act done .... (b) by an agent of W's employer with the employers authority".

59. S43B (1)(a) to (f) ERA 1996 are relevant, as is 48(5)(b) ERA 1996 and 48(2) ERA 1996 ( the burden of proof). We had regard to Feckitt and Others -v- NHS Manchester (Public Concern at Work Intervening) 2012 ICR 372 CA and Babula v Waltham Forest 2007 IRLR 346

### **Applying the law to the facts.**

60. We turned to consider the first issue, was the allegation of sexual assault made by the claimant to Mr Mears and Ms Murray on the 12th October 2016 a disclosure of information ?There was no dispute that it was. It clearly contained facts.

61. The next question is- was the disclosure in the reasonable belief of the worker making it and in the public interest?

62. We remind ourselves that is the reasonable belief of this worker namely the claimant making the disclosure that is relevant.

63. The claimant was a poor witness. There were inconsistencies in his evidence, in the nature of the description of what occurred and the dates. It is not unusual for there to be some inconsistencies in recollection. However the Tribunal does find it puzzling that the claimant appears to have been so inconsistent about the date of the incident occurring in the first couple of days in his engagement with the respondent

or some time later. The respondent suggested that the claimant had made up the allegations. The claimant denied that he had. In determining this issue we must take into account the worker's personality and the individual circumstances in judging whether he had a reasonable belief in the information he disclosed. We find this is relevant.

64. Later, when the claimant was being escorted from the building he appeared to believe that Mr Mears was too close to him and told us he felt threatened and yet we find Mr Mears was not close to him at all. The claimant did not appear to be an individual who was prepared to accept that there were other explanations. He was adamant in cross examination and in the investigation that he had been assaulted by ZZ pressing an erect penis against his hand despite the fact that two witnesses who were present had seen nothing and that he said ZZ had been walking down the corridor from behind him and so it was unexpected when ZZ bumped into him. We cannot go so far as to find that the claimant was lying. We find this claimant did believe that when ZZ bumped into him that day, ZZ pressed his penis, within his clothing, against the claimant's hand. We find that believing these facts, the claimant believed a criminal offence of sexual assault was likely to have been committed. This is reflected by the fact that the claimant reported the incident to the police as well as his employer.

65. We find that the claimant, believing there had been a sexual assault, believed that it was a matter of public interest.

66. The next issue is was whether the disclosure was made to his employer or other responsible person within the meaning of 43C(1)(b). It was not disputed by the respondent that in reporting the matter to Mr Mears and Ms Murray this requirement was met.

67. We turned to the next issue which was detriment. The detriment relied upon was the termination of the claimant's assignment. There was no dispute by the respondent that this was capable of amounting to detriment.

68. We therefore turned to the causal connection between the termination of the claimant's assignment and his protected disclosure having regard to the reverse burden of proof at Section 48(2). It is for the respondent to show the ground on which any act was done. We are satisfied that the respondent has shown that the ground on which the claimant's assignment with them was terminated was in no sense whatsoever related to his protected disclosure of sexual assault.

69. Janet Abbott, whom we found to be an honest and convincing witness, knew nothing of the allegations made by the claimant until 25 October 2016, which was after she had developed serious concerns about the standard of the claimant's cleaning and after he had lied to her about completing the cleaning forms. We find that as supported by her evidence and the contemporaneous documents to which we have referred in our findings of fact there was clear evidence that the claimant was not up to the standard required in terms of his cleaning. In addition he had lied to Ms Abbott saying he had completed work sheets when he had not.

70. We find that Mr Mears and Ms Murray treated the claimant with sympathy and respect when he made his complaints about ZZ to them. We find that they acted appropriately in Ms Murray taking a detailed account of what had occurred from him and by Mr Mears arranging for the alleged perpetrator to be suspended that same day and arranging for a person independent of Cuerden Hall and the residential care part of the respondent's organisation to come in and conduct the investigation. We find that investigation was conducted promptly and thoroughly with a number of people interviewed. We find the claimant was interviewed sympathetically by Mrs Bayliss and given the opportunity to set out his concerns. We find that the fact there was a prompt, fair, thorough and independent investigation into the claimant's allegations is not consistent with the allegation that the respondent terminated the claimant's assignment because he had made a complaint of sexual assault.

71. We found Mr Mears to be a convincing witness. We find he made the decision to terminate the claimant's assignment. We find he made and communicated his decision to the agency on 24 October 2017. We rely on his evidence that it was not unusual for agency workers assignments to be ended for all sorts of reasons and that the assignments operated on a week to week basis. We accept his evidence that he believed Janet Abbott's allegation that the claimant had lied to her (just as he had believed the claimant's allegation of assault). We accept his evidence that a person who lies to their supervisor destroys trust, and we find he ended the assignment because the claimant had lied to Ms Abbott and because his cleaning was not up to standard. We find the ending of the assignment was in no sense whatsoever on the ground of the protected disclosure. The only potential link between the two matters is that the claimant made the disclosure close in time to when his assignment was terminated but we are satisfied that the real reason for the assignment ending was unrelated to the disclosure.

72. Accordingly the claim fails.

73. The claimant is a litigant in person. Although at the case management hearing and in his claim form he suggested that the protected disclosure was the allegation of sexual assault on him by ZZ, during the proceedings he seemed to suggest that there were three other disclosures of information which he relied upon as being part of the reason his assignment was terminated. These were all matters which also concerned ZZ. There was an allegation that ZZ had placed his face too close to a resident's lap when the resident was in a wheelchair, an allegation that ZZ had followed the claimant to a changing room and an allegation that (although unseen by the individual) ZZ had made a pelvic thrusting movement towards her.

74. We turn first to the alleged incident with the resident in the wheelchair which is set out in our finding of fact. We find that in the claimant appears to have attached a negative inference to any action of ZZ. We find that when he saw ZZ's face in close proximity to the resident in the wheelchair he believed that tended to show either that a criminal offence was likely to be committed or that there was some breach of legal obligation. The claimant did not specifically identify a breach of a legal obligation. We rely on our findings that we made about the claimant. We remind ourselves that is a low test as to whether a disclosure of information in his reasonable belief amounted to a breach of the legal obligation or a criminal offence. Given the mindset of the claimant that he believed ZZ had assaulted him, we are satisfied that

he did believe there was a breach of a legal obligation( safeguarding) I relation to the resident. We find that any potential criminal act or safeguarding issue is a matter in the public interest and accordingly we find the disclosure qualifies for protection.

75. Likewise, the allegation ZZ followed the claimant to the changing room. On an entirely objective basis simply following a person to a changing room is not a reasonable belief that a criminal or other offence has been committed. However in the claimant's mind he believed he had already been assaulted by ZZ and so he attached significance to ZZ being behind him in the corridor. We are satisfied that given the mindset of this claimant , in his reasonable belief he made the disclosure which tended to show that either a criminal offence could be committed or there was a breach of a legal obligation. We find that he believed such a matter was in the public interest.

76. Finally the alleged pelvic thrust by ZZ at GA (unseen by her). We find this is a further example of something which the claimant believed had happened. We find his perception is consistent with the fact that on 25 October he was banging on the front window at Cuerden Hall to attract her attention. He said he did this because he thought the admin worker was unaware of the incident with ZZ and he wanted to warn her. (In fact we find that the admin worker was aware of the allegation because she had been interviewed by Mrs Bayliss about it and was intimidated by the claimant's behaviour towards her on 25 October.) However we remind ourselves it is not a purely objective test. Taking this claimant in the way he perceived matters, we find he believed that this incident had occurred and therefore we find it was in his reasonable belief when he made the disclosure to the respondent that it was in the public interest because he believed it was a matter of sexual harassment, that it was a potential criminal offence or breach of a legal obligation. Accordingly we find these 3 disclosures amount to protected disclosures.

77. There is no dispute that all these three further alleged disclosures were made to the respondent within the meaning of Section 43C(1)(b) ERA 1996

78. The next issue therefore is causation. We find that the respondent has shown us that the claimant's engagement with the respondent was terminated on the ground that he lied to his supervisor and that his cleaning was inadequate. It was in no sense whatsoever related to the disclosures he made about matters which he believed had happened (which were found not to have occurred).

### **Victimisation**

79. The relevant law is Section 27 of the Equality Act 2010. We also had regard to the burden of proof provisions. See section 136 of the Equality Act 2010

80. The issues:-

(1) Was the allegation of assault made on the 12th October 2016 a protected act within the meaning of Section 27(2) of the Equality Act 2010.

(2) Did the claimant act in bad faith, Section 27(3) of the Equality Act 2010.

(3) Was there a detriment when the claimant's assignment with the respondent was terminated?

(4) Has the claimant adduced facts to suggest that the reason his engagement was terminated was because he made a protected act? If so can the respondent satisfy the Tribunal there was a non-discriminatory explanation for the treatment.

81. It is not disputed that the claimant's allegation of assault amounts to a protected act. The Tribunal finds that if the claimant was also relying on the three other matters referred to above then they too are capable of amounting to protected acts because they are suggestive of acts of sexual harassment.

82. We turn to the next issue. Was there a detriment when the claimant's assignment with the respondent was terminated? The answer to the question is yes and there was no dispute about that by the respondent.

83. We turn to the next issue. The respondent alleges the claimant acted in bad faith pursuant to s27(3) Equality Act 2010. It alleges the claimant made up the allegations of sexual assault/harassment by ZZ.

84. It is certainly true that the respondent found there was no case to answer in relation to any of the allegations reported to it after a thorough investigation. However as an industrial jury the Tribunal is reluctant to find that an allegation of sexual assault is made in bad faith without cogent evidence that the claimant knew the allegations were false.

85. We are not convinced we can go so far as to say that the claimant told lies about the allegations against ZZ. We find it more likely the claimant believed the allegations but his belief was reflective of his perception of reality.

86. In reaching this conclusion we rely on our finding that the claimant thought he was being threatened by Mr Mears when he followed the claimant downstairs, some steps behind, when escorting him from the building. We find Mr Mears behaviour was reasonable and appropriate and he was not threatening the claimant. We find this is an example where the claimant's perception of reality is incorrect.

87. We find the claimant behaved entirely inappropriately in the way he intimidated the member of admin staff by banging on the window of the premises and later standing at the end of the drive on 25<sup>th</sup> October. We find these actions illustrate the claimant's perception that his actions were justified and appropriate (he said he wanted to warn the admin worker about the allegation concerning ZZ). However we find the reality was that his actions were highly inappropriate for someone who had been asked to leave the premises and in fact upset and intimidated the admin worker to the extent she was unwilling to leave work unaccompanied.

88. Accordingly, although we entirely accept the evidence of the respondent that there was no factual basis for the allegations the claimant made to them about ZZ, we are not satisfied there is sufficient evidence for us to find that the claimant deliberately and intentionally told untruths when making those allegations. Accordingly we do not make a finding of bad faith.

89. We turn to the next issue. Was there a casual connection between the protected acts and the ending of the claimant's assignment? We have regard to the reverse burden of proof.

90. We have reminded ourselves that in discrimination cases there is rarely direct evidence of discrimination. We remind ourselves that we must consider whether there is any evidence to cause us to infer that victimisation could have occurred. We remind ourselves that bias may be unconscious. See *Nagarajan v London Regional Transport* 199 ICR877.

91. In this case we find the only possible evidence which could shift the burden of proof is the close link in the time when the protected act occurred on 12th October 2016 and when the assignment ended which took place on 25th October 2016.

92. Accordingly we rely on the close link in time between the protected act and the detriment to find the burden of proof has shifted.

93. We turn to the respondent's explanation for the treatment. We rely on our findings above that the respondent has shown the real reason the claimant's assignment was terminated was because of the inadequacy of his cleaning and that he lied to his supervisor. We find this is supported by the cogent evidence of Ms Abbott, Ms Murray and Mr Mears and by the contemporaneous records which show the claimant's cleaning was not up to the standard required.

Employment Judge Ross

17 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2017

FOR THE SECRETARY OF THE TRIBUNALS

[JE]