EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S Manu	**v**	**DRS Care Homes Limited**

Heard at: Watford **On**: 15 to 18 May 2017

Before: Employment Judge Skehan
Members: Mrs Elkeles
Ms Crighton

Appearances

For the Claimant: Ms I Egan - Barrister
For the Respondent: Mr T Ogg - Barrister

JUDGMENT

1. The claimant's claim for holiday pay succeeds and the respondent is ordered to pay the agreed sum of **£474.26** for 70 hours holiday pay within 14 days from the date of this order.
2. The claimant's claim for unfair dismissal contrary to S98 Employment Rights Act 1996 is successful. The respondent is ordered to pay the agreed total sum of **£6966.47**, comprising of a basic award of £1296 and a compensatory award of £5670.47, within 14 days from the date of this order.
3. Therefore the total amount payable by the respondent to the claimant within 14 days from the date of this order in settlement of paragraph 1 and 2 above is **£7440.73**.
4. The claimant's claim for wrongful dismissal is successful the claimant was entitled to receive notice of termination of his employment. This amount is included within the compensatory award for unfair dismissal above and no further award is made under this heading.
5. The claimant's claim for unlawful detriment and automatic unfair dismissal on the grounds of making a protected disclosure fails and is dismissed.

REASONS

1. At the commencement of the hearing we revisited the list of issues as set out by EJ Bedeau on 20 October 2016. These were:
<u>Unlawful detriment and automatic unfair dismissal on the grounds of making a protected disclosure pursuant to section 43B(1), 47B and 103 A of the Employment Rights Act 1996 (ERA)</u>

   1.1. Did the claimant's letter of 27 March 2016 amount to a protected disclosure? The claimant disclosed to Mr Peat that he had been asked to work at 39 Lansdowne Road alone on 27 January 2016 despite lone working amounting to a breach of the standard operating procedure for care homes, which the claimant states applies when there are three or more service users. The claimant also questions who would have helped if he found himself in a compromising position with a service user if he was working alone. The claimant states that this made him feel unsafe. Counsel for the claimant confirmed that the claimant did not allege that he made a protected disclosure on 27 January 2016. The only alleged disclosure was the letter of 27 March 2016.

   1.2. If so, does the disclosed information in the reasonable belief of the claimant tend to show:

      1.2.1. a person having failed, is failing or being likely to fail to comply with the legal obligation, namely breaching staffing guidelines (S43B(1)(b));

      1.2.2. the health and safety of an individual being endangered or likely to be endangered, namely that the respondent was unable to ensure the health and safety of the claimant and/or service users by failing to provide sufficient numbers of staff (S43B(1)(d)).

   1.3. If so, did the claimant reasonably believe that any disclosure was made in the public interest?

   1.4. Did the claimant raise the disclosure with an appropriate person? The claimant raised the disclosure with Mrs Datoo. The claimant contends that she is an appropriate person as she is a director.

   1.5. If a qualifying disclosure has been made by the claimant, was the claimant subjected to any detriment by any act, or any deliberate failure to act by the respondent on the grounds that the claimant had made a protected disclosure. The claimant relies on the following matters pleaded in paragraph 25 of the ET1 amounting to detriments:

1.5.1. failing to investigate the subject matter of the claimant's protected disclosures as set out in his letter dated 27 March 2016;

1.5.2. commencing disciplinary proceedings against the claimant following an allegation made by a service user who the claimant alleges had a history of making false allegations to the respondent;

1.5.3. failing to carry out any, or any meaningful investigation into the allegation made by the service user;

1.5.4. failing to provide the claimant with any documents or witness evidence obtained during its investigation

1.6. The respondent confirmed during the course of the hearing that it was not taking a limitation point.

1.7. If any qualifying disclosure has been made by the claimant, was the reason or the principal reason for the dismissal related to any protected disclosure pursuant to section 103A ERA.

Unfair dismissal pursuant to section 98 of the ERA

1.8. Did the respondent have a fair reason to dismiss the claimant? The respondent says that it was one related to misconduct which is potentially fair reason for the purposes of section 98(2) ERA.

1.9. Did the respondent follow a fair procedure?

1.10. Did the respondent comply with the ACAS code?

1.11. Was the dismissal within the reasonable range of responses for a reasonable employer and was the dismissal fair in all the circumstances?

1.12. If the dismissal was unfair, did the claimant by his conduct, contribute to the dismissal?

1.13. If a fair process was not followed, what was the percentage chance that the claimant would have been fairly dismissed in any event?

Wrongful dismissal

1.14. It is common ground that the claimant was dismissed without notice. Should the claimant have been dismissed with notice? If so, how much notice pay is the claimant entitled to receive

Unpaid holiday pay.

1.15. The claimant's claim for holiday pay was admitted by the respondent during the course of the hearing and the parties agreed the sum of **£474.26** in respect of 70 hours holiday.

The Law

2. Under section 43B ERA, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

2.1. (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,….

2.2. (d) that the health or safety of any individual has been, is being or is likely to be endangered,

3. A worker does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

4. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act of deliberate failure to act by his employer on the ground that the worker has made a protected disclosure. Section 103A ERA provides that an employee who is dismissed 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.

5. In a claim of 'ordinary' unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. There are five potentially fair reasons for a dismissal under section 98 of the ERA: conduct, capability, redundancy, breach of statutory restriction and "some other substantial reason of a kind as to justify the dismissal" (SOSR). If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.

6. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of Burchell v BHS [1978] IRLR 379. The factors to be taken into account are firstly whether the respondent had reasonable grounds for

its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response. An employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses" (Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588). The non-statutory Acas guide states that the more serious the allegation, the more thorough the level of investigation required. In A v B [2003] IRLR 405, the EAT held that "all the circumstances" for assessing reasonableness (that is, the test under s.98(4) of the ERA 1996) include the gravity of the allegation and the potential effect upon the employee. The Court of Appeal made the same point in Turner v East Midlands Trains Ltd [2013] IRLR 107).

7. A claim for unfair dismissal is a claim to which section 207A applies and the relevant Code of Practice is the ACAS Code of Practice on disciplinary and grievance procedures. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") provides where the employer has failed to provide with that Code in relation to that matter, and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

8. Section 123(6) of the ERA provides that: "Where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding." The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he or he has become involved: Bell v The Governing Body of Grampian Primary School *UKEAT/0142/07*.

9. Wrongful dismissal is a dismissal in breach of contract. Fairness is not an issue: the sole question is whether the terms of the contract, which can be express or implied, have been breached. The employee will have a claim for his notice period if the employer, in dismissing him summarily, breached the contract. In a wrongful dismissal claim, the tribunal is concerned with whether a breach of contract occurred. Another key difference between the two types of claims is that when defending a wrongful dismissal claim, an employer may rely on facts that they found out after the dismissal Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339). However, in an unfair dismissal claim, the only question is whether the dismissal was fair on the basis of what the employer knew at the time.

10. As both parties are represented, the law in relation to remedy and the method of calculation are not in dispute between the parties and the figures in respect

of unfair dismissal and holiday pay set out below have been reached by agreement between the parties, we do not set out the legal framework in respect of remedy within this judgement.

The Facts

11. We heard evidence from Mr Peat, Mr Zinhu, Dr Datoo, and Mrs Datoo on behalf of the respondent. We heard evidence from the claimant on his own behalf. These witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. and the witnesses were cross-examined. We were provided with written witness statements for all of the witnesses together with a bundle of documentation extending to 172 pages. Any page references in this judgement are references to that bundle unless otherwise stated.

12. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

13. We take this opportunity to comment on the claimant's evidence. It appeared to us that the claimant was very nervous giving evidence. We also noted during the hearing that the claimant found it difficult to read English, being his second language, under pressure. Mr Ogg was calm and patient in his cross examination however the claimant appeared confused, and his evidence was confused and contradictory at times. We did not consider this confusion on the claimant's part to be an attempt to mislead the employment tribunal.

14. By claim form received at the Employment Tribunal on 31 August 2016, the claimant claimed unfair dismissal contrary to both section 98 and section 103A ERA, unlawful detriment contrary to section 47B ERA, breach of contract in respect of non payment of notice period and holiday pay. The claim was defended and the respondent lodged their response. During the course of the hearing the claimant's claim in respect of holiday pay was admitted in the sum of £474.26 for 70 hours holiday pay.

15. The respondent operates three registered care homes and eight supported living houses which provide accommodation care and support to adults with mental health and/or learning disabilities. It is registered as a provider with the Care Quality Commission (CQC). The directors of the respondent company are Dr and Mrs Datoo

16. Mrs Datoo confirmed that the respondent has approximately 65 employees. It was agreed between the parties that the claimant commenced his employment with the respondent on 5 January 2012 as a support worker.

We refer to the claimant's contract of employment as contained within the employment tribunal bundle.

17. The claimant's account of incident that happened on 27 January 2016 was that the claimant was working at the care home based at Lansdowne Road. This was the first time that the claimant had worked at this location. The claimant arrived before Mr Peat who is the home manager at Lansdowne Road. When Mr Peat arrived, the claimant asked who he would be working with as no one else had arrived. The claimant was told that he would be working on his own and that he had to clean the rooms and cook dinner for the residents. The claimant said that working on his own is a breach of health and safety. He also said that cleaning all of the rooms was not part of his role as he was responsible for supporting residents with the day-to-day activities, and that he would not be able to carry out the entire cleaning by himself. During cross-examination the claimant was confused and said: 'I told him [Mr Peat] straight out that health and safety regulations do not allow me to work on my own". He said, "I am coming to work on my own in this building… people are mental health people I asked can I work on my own with this people and you said 'yes do all the cleaning and cook for them and do all of their daily reports'….. I can't work on my own". The claimant also said that he did not expressly mention health and safety issues on that occasion however he had complained about staffing levels previously at other care homes.

18. The claimant said that later on 27 January 2016 he was asked to attend a meeting with Mrs Datoo, Mr Zinhu and Mr Peat. The claimant explained to Mrs Datoo that his responsibilities did not include cleaning all of the rooms on his own. The claimant alleged that Mrs Datoo said he should resign if he was unwilling to carry out his duties and Mrs Datoo said that she would find a way to sack the claimant. Mrs Datoo denied this comment. Mr Peat and Mr Zinhu had no recollection of this comment. Mr Peat's evidence was that the claimant did not raise any issue of working alone on 27 January 2016. Mr Peat had reported to Mrs Datoo that the claimant was refusing to work and not supporting clients with daily support needs. Mr Zinhu's evidence, given in relation to his dealing with the claimant subsequent disclosure letter set out below, indicated that the claimant had in fact raised health and safety issues on 27 January 2016.

19. We heard evidence from the claimant that while Mr Peat may be present, he is normally in the office or on the computer and tends to assist only in giving medication. The claimant did not consider that Mr Peat counts when identifying the correct staff to service user ratio. We acknowledge Mr Peat's conflicting evidence that, where required, he assists the support workers.

20. On 7 March 2016 the claimant was working with Mr Zinhu at 45-47 Pembury Road. The claimant was working with a colleague, Mr PP, who was also a support worker. At the start of the shift to the claimant and Mr PP agreed to split the work and each take responsibility for

half of the home. During the day Mrs Datoo went around the home to check that everything was in order and up to standard. One of the rooms that she visited was not up to standard because it had not been cleaned and the bed was not made. Mrs Datoo called the claimant into the room with Mr Zinhu. The claimant said that he explained to Mrs Datoo that the bed had been made earlier in the day but the resident had returned to his room. Mrs Datoo started to make the bed, flicking the crumbs and dirt on the sheet towards the claimant. The claimant told Mrs Datoo that it was unacceptable for her to shout at the claimant and behave in that manner. Mrs Datoo said that she was very assertive but not aggressive during her conversation with the claimant. Everybody had a job to do and everyone had to follow regulation. If the CQC's officer had walked in, the respondent would be penalised. Mrs Datoo denied she was shouting and said that the claimant was shouting into her face and pointing his finger. She denied that she flicked crumbs and dust at the claimant saying that she showed the claimant how to remake the bed and the dust may have fallen on anyone present.

21. Mr Zinhu said that the claimant acted aggressively towards Mrs Datoo and that Mr Zinhu suspended the claimant to allow the claimant time to cool off and also allow Mr Zinhu time to consider the disciplinary process. The claimant confirmed that he was suspended following this incident for three days not three weeks as stated within his witness statement.

22. The claimant received a letter dated 7 March at page 61 of the bundle setting out the reasons for the claimant's suspension. This letter makes reference to an 'official oral warning' given on 27 January 2016. The claimant did not believe that any such warning had been given to him on 27 January 2016. Mr Peat had no recollection of any such warning been given. Mrs Datoo described this warning as 'informal'. Mr Zinhu said "it was an informal warning and the claimant was not told it was a formal verbal warning but it was a warning about his future conduct". Mr Zinhu confirmed that where a formal verbal warning is given to an employee, a letter is normally sent to confirm the same. As this was informal, no letter was sent. Mr Zinhu confirmed that the disciplinary issues raised with the claimant were not investigated nor was any disciplinary matter pursued. Mr Zinhu's evidence was that the suspension itself was considered disciplinary sanction enough.

23. On 27 March the claimant raised an official grievance with the respondent in this document is contained at page 63 to 64 of the bundle. This letter states, inter alia: "… On 27 January 2016 whilst working at 39 Lansdowne Road, Mr Brennan Peat asked me to clean all of the rooms I informed him that was not part of my job description - I am a support worker, I am there to support them carry out their day-to-day activities and also I couldn't carry out the entire cleaning by myself stop I had also initially been asked to work there by myself to which I refused as I felt unsafe working by myself and was also a breach of health and safety procedures. Who could have helped me

should I have been placed in a compromising position by any of the clients? Isn't alone working with three or more clients against the standard operating procedures (SOP) for care homes?....."

24. Mrs Datoo confirmed that Mr Zinhu was tasked with dealing with the claimant's grievance on behalf of the respondent. Mr Zinhu explains in his witness statement: "in particular, [the claimant] said that on 27 January 2016, whilst working at 39 Lansdowne Road, he had been asked to work by himself and that he felt unsafe because it was a breach of health and safety procedures. I looked into that allegation at the time and the claimant was not working alone on 27 January 2016 and so there was no breach of health and safety procedures. There were two support workers on duty that day as well as Mr Peat….. I explained those matters to the claimant in person. Mr Zinhu's statement also states: "…. It is of note that this issue was not raised by the claimant at the time on 27 January 2016 rather it was raised for the first time on 27 March 2016 seemingly in response to separate disciplinary allegations that had been made against him.…".

25. No written response was provided to the claimant's grievance. Mr Zinhu's evidence in relation to what action he took to follow up the claimant's grievance was vague and confused. He said that he had no knowledge of the matter been raised before and also said that he didn't do an investigation as he knew there were sufficient staff on that day. He said that he did not investigate the claimant's grievance following receipt of the grievance letter. When pressed as to how he knew staffing levels were appropriate he said that if staffing levels were inappropriate, the manager would have called him and that didn't happen. Mr Zinhu who went on to say that on 27 January the claimant told him that the home was too big for the claimant to be working alone. Mr Zinhu acknowledged that the rota documentation provided by the respondent in the bundle showed the claimant and Mr Peat to be working on 27 January, however the other support worker was only rostered for four hours and went out in the morning to collect methadone with a service user. Mr Zinhu suggested that another support worker may have been summoned from a different location and there may be an amended rota that was not provided to the employment tribunal but used for payroll purposes.

26. On 28 March 2016 the claimant requested compassionate leave following the death of his father. The claimant wished for that leave to start on 2 May 2016. No response was provided to the claimant. Mr Zinhu's evidence on this matter was vague and confused. He made a reference to approval been given but not communicated to the claimant however the disciplinary hearing notes confirm, although again not communicated to the claimant at the time, that this request had been denied

27. On 13 April 2016 an incident occurred at Lansdowne Road approximately 10:30 AM. It is common ground between the parties that a service user, referred to as "service user A" or "SUA" made a complaint to the respondent that the claimant had punched her. The

claimant's evidence was set out in paragraph 18 and 19 of his witness statement. This states:

> "18. on 13 April 2016 I was working at the care home based at Lansdowne Road from 8 AM to 7 PM. At approximately 10:30 AM I had just finished mopping the front room and was standing by the door waiting for the floor to dry. I noticed a resident, who was not wearing any shoes or slippers, approaching the dining room, which was also wet. I told the resident that the floor was wet and asked her to put her shoes on. The resident did not listen to me. She continued to walk the wet floor. As she walked past me she said "Samuel I am going to report that you punched me". She then went outside to smoke a cigarette. 19. Shortly after this I saw Beatrice, support worker. I explained to her what had happened and what the resident had said. Beatrice said to me that I should be careful. …….Beatrice told me that the resident is known for making false allegations and she told me that once the resident claimed that the cleaner entered her room whilst she was naked.

28. The claimant confirmed during cross examination that the incident referred to above between SUA and the cleaner was relayed to him, not by Beatrice but by a friend while he was on suspension following this incident but prior to the disciplinary hearing. The claimant also said cross examination that he 'did not know' SUA and had no established relationship with her.

29. The claimant said that he was very busy that day he had intended to tell Mr Peat about the threat he received from SUA, however he forgot. Mr Peat's evidence of the incident was that SUA had approached him on 13 April 2016 to ask for an ice lolly. The respondent's freezer is in a locked room. Mr Peat told SUA that the claimant was in the kitchen and suggested she ask him for the lolly. SUA said, "he won't get it for me as we've had an argument". She went on to say, "he punched me in the stomach". Mr Peat asked if SUA was serious. She said, "yes I'm not lying he punched me in the stomach today and it hurt". Mr Peat went to discuss the matter further with SUA. She said that after her appointment where she had been out with Beatrice she had been walking back to the patio doors to go outside to the back smoking area. This is where she saw the claimant. He had just mopped the floor and the floor was wet. The claimant asked her not to walk on the floor however she ignored him and continued to walk towards the patio doors where the claimant was standing. SUA said that the claimant stood in the doorway and she asked him to excuse her in trying to pass, however this is where she alleged that the claimant had punched her in the stomach. She said that when he did this she said that, "you bastard, you've punched me". She proceeded to go outside and have a cigarette. The note at page 98 of the employment tribunal bundle goes on to describe a history between the claimant and SUA where she said that other incidents had happened and she did not like the claimant as he shouts at her when she hands him cigarettes and he [the claimant] grabs them aggressively. SUA said she did not wish to inform the

police she just wanted the claimant to go. Mr Peat's note indicates that another service user ("SUB") witnessed the incident.

30. On 13 April 2016 when the claimant was called in to speak to Mr Zinhu and Mr Peat, he was asked initially if there had been any incidents that day and he replied "no none". Mr Peat said that he had received a complaint about him from a service user and ask the claimant if he could tell Mr Peat about it. The claimant said he had no knowledge of a complaint and that nothing had happened. Mr Peat went on to tell the claimant that a service user had alleged that he had hit them in the stomach. The claimant maintained that he had no knowledge of the allegation. Mr Peat asked if this was the first time the claimant had heard about it and the claimant replied "yes" . Mr Peat went on to ask him if he had discussed the incident with another member of staff and he said no, then he changed his mind and said yes and that SUA had said he had punched her. Mr Peat said that the claimant was very evasive when he was asked about the incident.

31. The claimant initially reported the matter to the police. The claimant was asked to write a report and following consultation with his union, he produced the short letter at page 80. Miss Kaunda conducted the investigation on behalf of the respondent. The claimant was interviewed on 27 April 2016 and the notes of that interview appear at page 74 to 79 of the bundle. Ms Kaunda no longer workws for the respondent and was not at the employment tribunal hearing. We refer to her report at page 109 to 113 of the employment tribunal bundle.

32. The claimant claims that he had not received a copy of the investigation report. The claimant's evidence on this point was confused during cross examination. At one point, he said that he had received the investigation report prior to the disciplinary meeting. However on re-examination the claimant confirmed that he had received a copy of the notes taken during the meeting of 27 April 2016 prior to the disciplinary meeting however he had not received the investigation report.

33. Mr Zinhu conducted the disciplinary process. I refer to the notes of the disciplinary meeting held on 1 June at page. Mr Zinhu's evidence was that he gave the claimant the investigation report at the beginning of the disciplinary meeting. This is not recorded within the minutes of the meeting. The minutes state inter alia:

> "… KZ explained that while SM has been on suspension that a full internal investigation has been completed by (VK) investigating officer and manager at DRS Care Home. Further to the investigation the outcome was that due to the events and allegations made that DRS care Ltd had to institute a disciplinary hearing. At the disciplinary hearing SM was informed that based on the investigation a decision was made to terminate his employment with DRS care Ltd and that he would receive payment owed and any other monies owed such as annual leave pending calculation."

34. The reasons for Mr Zinhu's decision were not recorded in writing prior to the preparation of his witness statement. The claimant was dismissed by letter dated 1 June 2016. The claimant appealed the decision on 5 June 2016 the appeal was dealt with by Dr Datoo. The notes of this appeal meeting are at page 124 of the bundle. They state inter alia "…… Dr Datoo began that with regard to the appeal letter, he had gone through all the investigation documentation with a fine tooth comb and the process stands as it is…. ". Dr Datoo did not address the issues raised within the claimant's grounds of appeal. He considered that the absence of reasons for the dismissal was Mr Zinhu's job and that the claimant should have consulted Mr Zinhu to get all of the information. Dr Datoo said that he thought that Mr Zinhu had done a proper job. Dr Datoo said that he believed that Mr Zinhu had reached his conclusion because SUA had been punched and any employee who punched a service user would be dismissed straightaway. Dr Datoo said that the information was glaring at him. He believed that the incident took place and he made his decision on the information available to him. Dr Datoo denied that he had already made up his mind prior to the appeal hearing.

35. During the hearing Mr Zinhu told us that HR was not his specialised field. However, he did have experience in dealing with HR matters and although he had not received any training with the respondent he had received training with a previous employer. Mrs Datoo gave evidence that HR training was provided to the respondent's staff who were tasked with dealing with HR issues.

Determinations and Findings

36. We first turned to whether the claimant's letter of 27 March 2016 amounts to a protected disclosure. Mr Ogg's position on behalf of the claimant was that, subject to submissions on reasonable belief, it was accepted that the claimant's letter of 27 March was a qualifying disclosure. We have examined the claimant's evidence in relation to the discussions had on 27 January 2016. The rota as relied upon by the respondent show that only the claimant and Mr Peat were present for the entire shift on that day. Beatrice, the other support worker is shown on the rota as present for four hours. Further Mr Peat confirmed that she was absent in the morning. We heard evidence from the claimant that while Mr Peat may be present is normally in the office or on the computer and tends to assist only in giving medication. We accept the claimant's evidence that it was his genuine belief that Mr Peat's presence did not plug required staffing levels. We accept that the claimant had a genuine and reasonable belief that the staffing levels operated by the respondent did not comply with the health and safety requirements.

37. The claimant's evidence as to whether or not he actually complained about health and safety issues on 27 January became confused under cross examination. We note that at one point during the

claimant's cross examination said that he had not specifically referred to 'health and safety' concerns on 27 January however he had raised them on other occasions in respect of other homes. We found the claimant's evidence difficult to decipher at times. We have compared the claimant's evidence to that provided by other witnesses and in particular, Mr Zinhu's evidence that he had looked into that allegation at the time and the claimant was not working alone on the 27 January 2016. During Mr Zinhu's cross examination, his evidence was vague and appeared confused. Looking at the evidence as a whole we find it more likely than not that the claimant raised the issues he claimed on 27 January 2016 and Mr Zinhu examined them to some extent at least at that time.

38. We note the respondent's submissions and distinction between the claimant complaining about his workload and complaints about inadequate staffing levels and failure to comply with health and safety regulations. However, we find this distinction to be artificial and considering the claimant's evidence, it is clear to us that his complaints in respect of his workload were accompanied by and linked to complaints in respect of inappropriate staffing levels. We consider that the claimant had a reasonable belief that these matters were in the public interest both from the viewpoint of the well-being and health and safety of support workers and also from vulnerable users. In light of the above we find that the claimant letter of 27 March 2016 constituted a qualifying disclosure for the purposes of the legislation.

39. We now turn to consider whether the respondent subjected the claimant to any detriment by any act or any deliberate failure to act by the respondent on the ground that the claimant had made a protected disclosure and we look at each detriment claim in turn:

    39.1. The first allegation is in relation to the respondent's failing to investigate the subject matter of the claimant's protected disclosure is set out in his letter of 27 March 2016. Mr Zinhu confirmed that he made no attempt to investigate the subject matter of the claimant's letter dated 27 March. Mr Zinhu failed to identify the letter as a protected disclosure and failed to comply with the respondent's whistleblowing policy. Mr Zinhu failed to take basic steps of dealing with the claimant's grievance in accordance with the respondent's grievance policy. We consider that Mr Zinhu did not deal properly with the claimant's letter of the 27 March 2016, however we do not consider that this omission was on the ground that the claimant had made a protected disclosure. Any detriment caused by the employer failing to address the concerns would only be actionable, if the reason why the employer failed to address the concerns was because those concerns were raised in the first place. We find that such a scenario in this case is unlikely. We find it more likely that the respondent's

failure to deal with the letter of 27 March 2016 was symptomatic of its failure to adhere to or comply with basic HR policy and statutory code of conduct on disciplinary and grievance matters.

39.2. The second detriment complained of relates to commencing disciplinary proceedings against the claimant following the allegation made by SUA. We refer to our comments in respect of the investigation into the allegations as made by SUA and in particular the inadequacies of that investigation as set out below. However, the allegation made by SUA is an extremely serious one. The respondent undertook an investigation, albeit flawed, and thereafter decided to commence disciplinary proceedings against the claimant. We have seen no evidence that would support the claimant's allegation that these disciplinary proceedings were commenced on the grounds of anything other than the allegations made by SUA.

39.3. The next allegation of detriment is that the respondent has failed to carry out any meaningful investigation into the allegation made by SUA. We consider the investigation as carried out by the respondent to be inadequate for the reasons set out below. However, we have seen no evidence that would lead us to conclude that the inadequacies of the investigation as carried out by the respondent are in any way linked to the claimant's letter of 27 March 2016.

39.4. The fourth and final allegation in relation to detriment is a failure on the part of the respondent to provide the claimant with documents and witness evidence obtained during the investigation. Our consideration of the evidence in respect of this point is set out below and we accept that the claimant was not provided with relevant documents or witness evidence obtained during the investigation prior to the disciplinary hearing. We consider this to be a flaw within the disciplinary process. However again, we have not identified any evidence that would lead us to conclude that this flaw is connected in any way to the claimant's protected disclosure of 27 March 2016.

40. Next, we turn to the claimant's allegation that the reason for his dismissal was related to the protected disclosure made on 27 March 2016. It is common ground between the parties that SUA made the allegation. This is an extremely serious allegation. We acknowledge the respondent's duty of care to vulnerable service users and notwithstanding the flaws we have identified below, we consider that the claimant was dismissed by reason of misconduct. We have seen no evidence that would support any conclusion that the claimant's dismissal was in any way linked to his protected disclosure of 27 March 2016. We note that on the claimant's claim appeared to be that Mrs

Datoo alleged comments on 7 March that she would find a way to sack the claimant had eventually resulted in his dismissal. We found no evidence to support this allegation. However even if we had, this discussion predates the alleged protected disclosure and would not render the dismissal automatically unfair.

41. We now turn to consider the claimant dismissal under the ***Burchell*** test What was the reason for dismissal? It is accepted that SUA made a serious complaint that the claimant had punched her. SUA was a vulnerable resident and we find that the reason for the claimant's dismissal related to his conduct. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which he was dismissed? Having carefully considered the evidence in the round, we conclude that Mr Zinhu had a genuine belief that the claimant was guilty of punching SUA.

42. Did the respondent have in his mind reasonable grounds upon which to sustain that belief and was that belief formed after a fair and adequate investigation? We do not consider that Mr Zinhu had reasonable grounds upon which to sustain that belief due to our finding that his belief was formed following an unfair and inadequate investigation. We do not expect the respondent to have carried out an exhaustive investigation. We appreciate that holes may be picked in any investigation with the benefit of hindsight. The legal test is that an employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses" are set out in Sainsbury's Supermarkets Ltd v Hitt. While it is difficult to give hard and fast guidelines as to what this means in practice, an employer will need to investigate sufficiently to ensure that the substance of the allegations are clear, in order that these can be put to the employee in sufficient detail to enable a meaningful response. The non-statutory Acas guide states that the more serious the allegation, the more thorough the level of investigation required. In A v B, the EAT held that "all the circumstances" for assessing reasonableness (that is, the test under s.98(4) of the ERA 1996) include the gravity of the allegation and the potential effect upon the employee. The Court of Appeal made the same point in Turner v East Midlands Trains Ltd. So, if an employee's professional reputation or ability to work in a chosen career is at stake, it is even more important that the investigation is fair and even-handed. Where the allegations against the employee amount to criminal behaviour, they must always be the subject of the most careful investigation. This is because the employee's reputation will be seriously affected, and their ability to work in their chosen field could be irreparably compromised, if they are dismissed because of misconduct which amounts to a criminal offence.

43. The allegations in this particular case are extremely serious. The respondent clearly and rightly identified its obligations to its vulnerable resident. However, in our opinion the respondent appears

to have overlooked its obligations to its employee. We have identified the following flaws within the investigation:

43.1. No statement appears to have been taken from SUA following her initial complaint on 13 April. We have no explanation why SUA did not report the incident immediately. We have no explanation as to why the incident was reported as being secondary to receiving an ice lolly. There is no questioning of any reaction or any lack of reaction on SUA's part. Did she scream? Did she shout? Who did she tell and what did she tell them?

43.2. We have no further information as to why SUA said she did not like the claimant nor do we have details of any previous incidents between SUA and the claimant. The claimant's evidence was that he hardly knew the SUA.

43.3. The investigation does not address why SUA did not wish to inform the police.

43.4. Despite SUA complaining that she was punched and the respondent's documentation noting physical pain, the respondent had no evidence that SUA was referred to a doctor (other than her psychiatrist) either on the day or shortly after. We find it most unusual that there was no record of an absence or presence of any bruising or discomfort. We noted a reference to emotional upset at page 66 of the bundle, however SUA was not asked about this.

43.5. No evidence was taken from SUB, who was identified at an early stage as a possible witness to the incident.

43.6. While the investigation report states that Mr Peat and Beatrice were both interviewed, We have only seen the full record of the claimant's interview. Beatrice's interview in particular is condensed to one short paragraph within the investigation report and we consider this inadequate. Sake of completeness we note that Mr Peat did interview Beatrice prior to the formal investigation.

43.7. There has been no consideration of SUA's illness information provided in respect of SUA's illness and whether or not this would have any impact on the allegations made by her against the claimant. We note references to 'capacity' within the employment tribunal bundle refers to legal capacity in relation to an ability to make decisions rather than any potentially relevant considerations arising from SUA's illness. For the sake of completeness we consider the references to 'SUA' being mentally stable, without further comment to be inadequate.

43.8. We note that the investigation report within its conclusions states that [SUA] has been a customer in this organisation for a year and has made similar allegations before. This was explained by Mr Zinhu as a typo. It is curious that the claimant makes reference to previous complaints made by SUA. As the main body of the investigation report fails to indicate what investigation has been carried out to check whether previous allegations have been made, the conclusion that the reference to previous complaints must be a typo is unsupported.

43.9. We also have noted on reviewing this matter that the investigation report page 112 indicates that it was supplied in draft form to the operations manager, Mr Zinhu. We have had no explanation as to why Mr Zinhu, who was tasked with dealing with the disciplinary aspects, had any dealings with the investigation.

44. In reaching the decision to dismiss, did the respondent follow a fair procedure? We consider the respondent' procedure to be lacking for the below reasons:

44.1. In considering the claimant's evidence we note that he gave conflicting evidence as to whether or not he received the investigation report. Considering his evidence as a whole we consider it more likely than not that the claimant became confused during cross examination and that he had not received the investigation report as confirmed during re-examination. The respondent's case was that Mr Zinhu provided the investigation report to the claimant at the disciplinary hearing. This is not recorded in the notes. We find it more likely than not that this did not happen. Even, in the event that the claimant had been provided with the notes at the commencement of the disciplinary hearing, the claimant had not had sufficient time to properly absorb this information. For all of these reasons we conclude that the claimant was unable to participate within the disciplinary hearing.

44.2. Turning to the disciplinary hearing itself we note that at the commencement of the disciplinary hearing the claimant appeared concerned with issues the respondent deemed irrelevant such as the claimant's compassionate leave. The respondent had failed to respond to the claimant in respect of his compassionate leave however Mr Zinhu advised that as the claimant had been suspended and was currently under investigation, his leave had not been authorised. Mr Zinhu was aware that the claimant had not had sufficient notification of the hearing to arrange to be accompanied by his union representative.

44.3. Mr Zinhu is informed the claimant that based on the investigation, a decision was made to terminate his employment with the respondent. We consider that there was no meaningful discussion with the claimant about the allegation prior to this decision being announced. No time was taken by Mr Zinhu to consider the position. It appears from the notes, and on balance we conclude that Mr Zinhu had taken his decision prior to the disciplinary hearing.

45. Was the dismissal within the band of reasonable responses open to an employer in the circumstances? Taking all of the above matters into account by considering the evidence in the round, we conclude that the deficiencies in the investigation viewed alongside the deficiencies within the respondent's procedures result in the dismissal of the claimant in the circumstances falling outside the band of reasonable responses open to an employer. We therefore find that the claimant has been unfairly dismissed. We note that the claimant was informed of his right of appeal and his appeal letter is contained at page 121. It is possible for an appeal to remedy an unfair dismissal. We refer to the appeal notes and these reflect how the appeal was handled. It is clear from Dr Datoo's opening comments that he has been through the investigation documentation with a fine tooth comb and the process still stands, that the appeal was not approached with an open mind. We conclude that the claimant was denied any real right of appeal.

46. Did the parties comply with the statutory ACAS code? The respondent failed to comply with the ACAS code in that it failed to carry out necessary investigations in respect of the alleged disciplinary matter and failed to provide sufficient information about the alleged misconduct to allow the claimant to prepare to answer the case at a disciplinary meeting. The appeal carried out by Dr Datoo was in our opinion insufficient to the extent that no real appeal opportunity was provided. We note that the respondent's failure to comply with the ACAS code appears to be consistent with the respondent's repeated actions in failing to follow either the ACAS code or its own internal disciplinary or grievance processes. We referred the incident of 27 January and confusion over the issuing of a verbal warning, the claimant suspension and subsequent confusion in respect of the disciplinary process, the respondent's failure to deal with the claimant's grievance.

47. We have considered whether or not there should be any adjustment of the compensatory award. For the sake of completeness, we note that we heard additional submissions from counsel for both parties prior to determining the appropriate adjustment of the compensatory award. We have taken into account the respondent's submissions that while we have identified a number of failings within the process the process was not ignored: there was an attempt at an investigation, disciplinary and appeal process. Where flaws have

been identified these were not deliberate but inadvertent failures. In mitigation, Mr Ogg submitted that the respondent was a small employer with no dedicated hedge of function. They have no reference to HR professional the witnesses do the best they could in the circumstances but fell short. While we accepted that some effort had been made by the respondent, and we could see the basic outline of a fair process had been followed, however while the respondent was the small employer it did employ approximately 65 people, it was not a one-man band. Mrs Datoo claims to have provided HR training. There was confusion in relation to whether or not such training was actually provided and in any event, from the flaws outlined above, it was unlikely that such training was sufficient. On consideration of the evidence as a whole we concluded that the appropriate increase failure to follow the ACAS code was 20%.

48. Did the claimant cause or contribute to the dismissal and if so by how much should the basic and compensatory award be reduced? The respondent has referred to a number of inconsistencies within the claimant's witness statement highlighted during cross examination as set out above. We accept that these inconsistencies are more than minor errors such as dates. However, when viewing the evidence as a whole, we find it more likely than not that these inconsistencies have arisen through a combination of genuine error and English not being the claimant's first language. The respondent has submitted that the claimant's failure to report the incident with SUA to the respondent initially amounts to blameworthy conduct. We have considered this aspect carefully. The claimant admits within his witness statement that he should have reported that the threat that he had received from SUA to Mr Peat. We find it unusual that the claimant failed to report this threat to Mr Peat however we note that the timescale involved is relatively short. We consider the claimant's initial failure to report the incident and subsequent failure to volunteer the information or mention the threat that he had received from SUA at the commencement of the meeting in an open and forthright manner, may well have contributed to setting the respondent's investigation and process off on the wrong foot. For the sake of completeness I note that we requested that counsel for both parties make additional submissions in relation to this particular point prior to determining the appropriate level of contribution. The respondent relied upon the case of Hollier V Plysu *[1983] ILR 260* setting out the general categories for blameworthy conduct being where the claimant was wholly to blame: the contribution should be 100%, largely to blame: 75%, equally to blame: 50% and slightly to blame: 25%. In considering the contributory conduct on the part of the claimant, we were of the opinion that his conduct played a very slight part in the process. The claimant's position and the detail of the threat that he said he received from SUA was clarified in the first meeting, prior to the commencement of any investigation or disciplinary procedure albeit not immediately during that first meeting. We do not consider that the claimant's conduct in this regard any substantial effect on the

subsequent investigation disciplinary process. In light of the evidence in the circumstances as a whole, we consider that the appropriate contributory fault reduction is 15%.

49. For the sake of completeness we note that we have seen no evidence to support and do not accept the claimant's attributed motive that he attempted to cover up punching SUA. We find that the existence of such a motive is inconsistent with the claimant's early and immediate comments to Beatrice and his initial contact with the police. We also considered the respondent allegation that the claimant. failed to provide a statement. The claimant was faced with a very serious allegation. We consider it reasonable for the claimant to wish to discuss this matter with his trade union. It is clear from the wording of the letter provided by the claimant that this was drafted with assistance from a third party. The claimant considered that this was what the respondent wanted. We acknowledge that the statement is inadequate however there is no evidence to suggest that they claimant's conduct in producing this statement is blameworthy conduct that could reasonably constitute contribution on his part.

50. In the event that the dismissal was unfair due to the respondent following an unfair procedure should the compensatory award be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome? This is commonly referred to as a Polkey deduction (or reduction). We have considered whether a pokey reduction is appropriate in this case. We acknowledge that the allegation against the claimant is extremely serious. However, in our view the allegation alone does not make the termination of the claimant's employment inevitable. In these particular circumstances the investigation was deficient to such an extent that the dismissal was substantively as well as procedurally unfair. Therefore should the procedure in this case be remedied it is not possible for us to reasonably identify any chance that the claimant would have been dismissed in any event. It is not the case in this matter the procedural errors made no difference to the outcome. Had the claimant been allowed the opportunity to properly examine the information obtained with in the investigation report prior to the disciplinary matter he may well have been able to highlight deficiencies within the investigation. The respondent may well have been able to address these deficiencies by way of further investigation and it is not possible to conclude that this would have made no difference to the outcome. In the circumstances, we find that no pokey reduction is appropriate.

51. The next matter to consider is whether the claimant has been wrongfully dismissed. For all of the reasons as outlined above we are unable, from the investigation carried out by the respondent, to conclude that the claimant punched SUA as alleged. In light of all the available evidence we conclude that it is more likely than not that the

claimant did not punch SUA. Therefore, we find that the claimant's claim for wrongful dismissal is successful and he is entitled to his notice period.

52. We note that the claimant's claim in respect of holiday pay is admitted and he is entitled to some of 474.26 net in respect of 70 hours worth of holiday pay. Once judgment in respect of liability on this matter was given to the parties, counsel for both parties liaised to confirm the following agreed figures:

    52.1. Unfair dismissal basic award of £1296.

    52.2. Unfair dismissal compensatory award: losses calculated up to 1 January 2017. when the claimant began new full-time position, of £6292.88. We note that this calculation includes the period for the claimant's four-week notice period.

    52.3. Sums earned by the claimant prior to starting his new position amount to £1133.60.

    52.4. Loss of statutory rights is £400.

    52.5. This gives a total compensatory award of £5559.28, prior to any adjustments.

    52.6. When this figure is adjusted for a 20% uplift due to a failure to follow the statutory ACAS code, it amounts to £6671.14.

    52.7. When this is adjusted for a 15% reduction in respect of contributory fault, it amounts to £5670.47.

53. Therefore, the claimant is awarded unfair dismissal compensation by way of a basic award of £1296, a compensatory award in the sum of £5670.47 and agreed holiday pay in the sum of £474.26. The total amount payable by the respondent to the claimant within 14 days of this order is £7440.73.

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Employment Judge Skehan

Date: ……8 July 2017..

Sent to the parties on: .....

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For the Tribunal Office