EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Shaw**

Respondent: **BUPA Care Homes (BNH) Ltd**

Heard at: **Ashford, Kent** **On: 26, 27, 28, 29 and 30 June 2017 and 3 July 2017**

Before: **Employment Judge Wallis**
Members: Ms M Foster Norman
Mr C Wilby

Representation
Claimant: **In Person, assisted by Mr P Jones (Solicitor volunteer at CAB)**
Respondent: **Mr T Brown (Counsel)**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant made various protected disclosures;

2. The Respondent subjected the Claimant to a detriment on the ground that she had made protected disclosures;

3. That claim is accordingly successful to the extent set out below;

4. The Respondent is ordered to pay the Claimant a sum equivalent to four weeks pay having regard to the failure to provide her with written particulars of employment;

5. The claim for unpaid wages is unsuccessful and it is dismissed;

6. The Claimant and the Respondent are to follow the directions set out below in respect of the stayed claims;

7. If the parties are unable to agree a settlement, a remedy hearing will take place on 22 September 2017.

REASONS

Oral reasons were announced at the end of the hearing. Both parties requested written reasons. These have been prepared from the recording of the reasons given orally.

Issues

1. The Claimant presented two claim forms, one on 12 July 2016 and one on 6 December 2016 which largely reiterated the first claim. She made claims of suffering detriments on the grounds that she had made protected disclosures.

2. In the response form the Respondent conceded that there had been a protected disclosure on or about 14 July 2014, but disputed the remaining claims.

3. There were case management discussions on 28 September 2016, 14 December 2016 and 27 March 2017.

4. As a result, the Claimant produced a schedule setting out the disclosures upon which she relied and a second schedule setting out the detriments that she claimed flowed from the disclosures.

5. The parties had agreed a list of issues which asked the Tribunal to consider:

    (a) Whether the Claimant had made the protected disclosures set out in her schedule;

    (b) Whether the Respondent had subjected the Claimant to the detriments detailed in her second schedule;

    (c) Whether each such detriment was on the ground of ie materially influenced by (in the sense of being more than a trivial influence) the fact that the Claimant had made a protected disclosure;

    (d) In particular, can the Respondent prove the reason for such detriment and that the detriment was therefore not on the ground that the Claimant had made protected disclosures;

    (e) If the Claimant was subjected to one or more of the detriments, does the Tribunal have jurisdiction to hear the complaint, having regard to the time limit.

6. The list of issues went on to deal with compensation and then referred to the Claimant's claim in respect of unauthorised deductions from wages. It was the Claimant's case that she had not been paid since the end of November 2014 although she had been fit for work since the 1 December 2015 (with adjustments) and from 28 March 2016 without adjustments.

7. There was no dispute that the Respondent had not provided the Claimant with written particulars of employment when she became full-time in her post as a carer at one of the Respondent's care homes. If the Claimant was successful in either of her claims, the question arose as to whether compensation should be at the minimum rate of two weeks pay or the maximum rate of four weeks pay.

Documents and Evidence

8. There was an agreed bundle of documents and a further few documents were added to that bundle with the agreement of the parties during the course of the hearing.

9. We had written statements from each of the witnesses who gave evidence. We had a statement from Mrs Gill Bruton who was to have attended the hearing, but on the third day of the hearing the Respondent heard that she would not be attending. The Claimant decided to proceed in the absence of Ms Bruton.

10. The witness statement prepared by the Claimant ran to some 109 pages and 372 paragraphs.

11. The Tribunal heard from the Claimant herself, Mrs Lorraine Shaw and from the Respondent's witnesses Mrs Rositsa Manolova (assisted by an interpreter in the Bulgarian language, provided by the Respondent); Mrs Julie Taylor, a Home Manager; Mrs Chloe Osborne, Consultant, Manager Advisory Service (HR); and Mrs Lesley Andrew, Regional Director.

12. We also heard written closing submissions from both parties.

Recusal Application

13. At the start of the hearing Mr Brown made an application for one of the Tribunal members, Ms Foster Norman, to recuse herself. He explained that some years previously he had been instructed by British Transport Police in a claim made by Ms Foster Norman's husband Mr Norman. Ms Foster Norman had represented her husband at a preliminary hearing. After that, the matter was handed over to other solicitors.

14. Mr Brown suggested that, following the test in the case of Porter v Magill [2002] 2AC 357 a fair-minded observer might consider that there was a real possibility of a risk of bias.

15. On behalf of Mrs Shaw, Mr Jones explained that he was present on a pro bono basis from the Law Centre, that Mrs Shaw would be undertaking her

own cross-examination of the Respondent's witnesses, but having discussed with her briefly the application made by Mr Brown she would leave the matter for the Tribunal to consider but noted that if there was a need to vacate the hearing this would cause serious prejudice to her as she was still employed by the Respondent and on zero pay.

16. We adjourned to consider the application. The Tribunal noted that as far as Ms Foster Norman could recall, the case involving her husband happened around six years ago. She had no memory of seeing Mr Brown at that hearing. She has sat as a Tribunal member for some twenty-two years and has been a qualified lawyer since 2001. In addition, the Tribunal noted that Mr Wilby has some eight years experience as a Tribunal member and the Judge some twenty four years experience in chairing Tribunal hearings. A part of the Judge's remit is to ensure a fair hearing for all parties. In weighing up all of those matters the Tribunal decided that there were no grounds for recusal and that a fair-minded observer, knowing those facts, would not anticipate that there was a real risk of bias.

17. Having disposed of that application, the list of issues was discussed and agreed and a tentative timetable agreed for the matter to be heard within the time allocated.

Findings of Fact

18. The Claimant was employed by the Respondent on 5 May 2012 and remains employed at the date of the hearing. She is employed as a Care Assistant at the Respondent's Pinehurst House Nursing Home in Sevenoaks. The nursing home provides care for vulnerable elderly residents.

19. The Respondent is a well-known name in the care industry and the Tribunal was told that it provides residential, nursing and dementia care for more than twenty thousand residents in three hundred care homes in England, Scotland and Wales.

20. Mrs Shaw the Claimant was a credible witness. She has a genuinely held view that the care of the residents at the home where she worked was not always appropriate and clearly she was aggrieved by what she perceived to be the Respondent's failure to respond to her concerns.

21. Turning to the Respondent's witnesses, we were disappointed that Mrs Bruton failed to attend the hearing having given a witness statement and we noted that has put the Claimant at a disadvantage. We were also disappointed that there was no evidence from a more senior manager, perhaps Ms Cox who we heard about on the papers, to explain how these events unfolded in the unfortunate way in which they did unfold and why the Respondent has left an employee in what amounts to limbo for more than one year.

22. We noted that Mrs Osborne had taken some steps to move matters along but we have to say that the other witnesses were not impressive.

23. We were in particular surprised, given the size and resources of the Respondent company, that there was a failure to take notes of meetings and telephone calls; that there was a failure to respond in terms to the many requests and allegations made by the Claimant; that several managers were dealing with the Claimant's case without apparently knowing the background to that case, certainly when they started their involvement; and generally the poor handling of the matter which we can see has led to the Claimant coming to the view that there has been some kind of conspiracy. We note that that was her view, but ultimately we have found that there was no such conspiracy and that the difficulties were largely caused by the Respondent's ineffective management practices.

24. We accept the Claimant's evidence that there was an incident with a resident in July 2014 and she raised this with Nurse Manolova and on 15 July the Claimant wrote her report which set out that incident and other incidents in which she suggested that Nurse Manolova's care of the residents was not appropriate; that was supported by a report from the Claimant's colleague Ms Rodell.

25. It was the Claimant's evidence that this statement was put under the door of the manager's office and we know that at the time Ms Bonsall was the Manager and Mr Yates was the Deputy Manager. We don't know exactly when Ms Bonsall left and when Mr Yates became the Deputy Manager. It appears from the documents in the bundle that he was acting Manager for some time and that he told staff in September that he was now to be the Manager. In any event the Claimant received no response to that letter. It was her evidence that she chased Mr Yates about that in September 2014 and he said to her that it was none of her concern, she should simply write in with her concerns if she had any.

26. We noted that the Claimant did not present a grievance or go to the Speak Up Team which was the Respondent's team that could be approached with any concerns at that time. Matters carried on without any resolution until there was a further incident on 18 October 2014 and that involved residents EP and to some extent PH and again it involved Nurse Manolova and the Claimant. We have read the Claimant's version of events about that in the bundle. We have found that there was an altercation between the Claimant and Nurse Manolova. We are satisfied that Mr Yates did to some extent investigate the Claimant's allegations about that incident because we have his notes in the trial bundle in respect of an interview he carried out with resident EP on 19 October. We can see that he sent an email to HR for some advice about the matter and in that email he says he has looked into the issues regarding Nurse Manolova, and he was satisfied with her response. What he was seeking advice about in particular, was the altercation between the Claimant and Nurse Manolova particularly because it appeared that there was some suggestion of racial abuse in as much as a suggestion that the Claimant had told Nurse Manolova who apparently is from Bulgaria that she should return to her home; so there were some allegations of abusive language from the Claimant to the nurse.

27. We are satisfied that Mr Yates interviewed Ms Hewitt who was another carer who was said to have been present at that altercation and he also had made a note which we see in the trial bundle of a conversation with another nurse, Nurse Pegas about her conversations with the Claimant at the time. We also have a note to show that he interviewed Nurse Manolova on 20 October.

28. We are satisfied that as a result of that altercation the Claimant was suspended on 21 October 2014 and the letter of suspension set out the allegations involved. Mr Yates invited the Claimant to an investigation meeting and she replied on 10 November asking about the allegations and asking for copies of her July complaint and her complaint in October.

29. The meeting took place on 12 November 2014 and there is a dispute about the accuracy of the notes made by the note taker who was present with Mr Yates. The Claimant herself has produced her own notes of that meeting but nevertheless, we don't think we need to get too involved in that dispute because it is clear that on that day Mr Yates completed a report to say that no action would be taken in respect of the altercation and he recommended that mediation be considered and that the Claimant return to work following a supervision meeting.

30. We know that the Claimant felt that after she made her disclosure in July 2014, there might have been some idea on the part of the Respondent that she should be removed from their employment but it seemed to us that if there was some concern in that regard it may be thought that the accusations of racial abuse and unbecoming conduct towards Nurse Manolova might have provided some grounds for the Respondent to take some disciplinary action against the Claimant and it is a fact that they did not take that action.

31. On 14 November 2014 Mr Yates sent a letter to the Claimant setting out the outcome of the investigation and that is a very poorly drafted letter, it has typographical errors and it reduces the reference to the allegations to a brief referral to racial abuse and what was referred to as threatening behaviour. The Claimant was concerned about the reference to threatening behaviour because she felt she had not been charged with that particular allegation and it had not been investigated. We were satisfied that it was simply a way of reducing the allegations and referring to them in different terminology, it wasn't a new allegation against the Claimant.

32. There is a dispute about when that letter was received by the Claimant in as much as the Claimant said she didn't receive it in time to attend the meeting on 20 November 2014, it had been sent to her by recorded delivery and she was unable to collect it from the post office until the date of the meeting and so she was unaware of the meeting. When she did not attend the meeting, Mr Yates sought some advice from HR and there was a question as to whether or not this was premature on his part. We were satisfied that it was not unreasonable for him to alert HR to the fact that she had not attended that meeting. What he had said to HR was that he had tried to telephone the Claimant on five occasions and we are satisfied as far as we can be that that email was accurate in as much as it does not say, as the Claimant later

suggested, that he had lost her telephone details, clearly, what he was telling HR in that email was that he had those details but he was simply unable to manage to speak to the Claimant.

33. The supervision meeting eventually took place on 24 November and there was a discussion about the Claimant's concerns about the use of the words 'threatening behaviour' in connection with the allegations, and also the typographical errors in the letter. In that meeting the Claimant declined to return to work because she said she felt unsafe in respect of Mr Yates' ability as a manager and she wanted written confirmation that there would be no action against her with regard to the allegations and she also mentioned that she did not believe that Mr Yates' letter had been sent from the Respondent. We are satisfied that it was sent from them. There were no grounds for suggesting that in some way Mr Yates had sent that letter on his own behalf.

34. On 25 November 2014 the Claimant wrote to Mr Yates reiterating her requests for copies of her documentation and again referring to the fact that she was a whistle blower and we were satisfied that from this very early stage in 2014, this letter emphasises that the Claimant regarded herself as a whistle blower and she told the Respondent as much; we found that clearly they were aware that that was how she was viewing the situation.

35. On 28 November the Claimant received a telephone call from Ms Bruton who was at that point the Area Manager and thus Mr Yates' Manager. The Claimant told us that Ms Bruton told her that she had 'got off lightly' in respect of the disciplinary investigation of the altercation between the Claimant and Nurse Manolova. Although we don't know what Ms Bruton would say about that allegation, we note that it would not be unreasonable for the Respondent to consider that Mr Yates was being relatively lenient where there was an allegation of racial abuse. One might expect that some form of disciplinary action would be forthcoming if that were the case and indeed the Claimant had accepted that she had used some words about 'going back home' to the nurse.

36. Mrs Bruton told the Claimant to speak to Mrs Knight, who was the Manager of another home run by the Respondent, in order to try to ensure that her concerns were considered and that she would be able to return to work. The Claimant was not entirely satisfied with that and she decided to report matters to the CQC.

37. In addition, she wrote again to Mr Yates on 1 December 2014 asking for further information about why she had been considered absent without leave when she did not attend the meeting on 20 November, and again requested copies of the procedures that were being followed. Also on that day Mrs Knight in accordance with what Mrs Bruton had said wrote to the Claimant to suggest that they meet on 4 December 2014 in order to explore issues.

38. On 2 December the Claimant produced a medical certificate saying that she was suffering from work related stress and in fact she has never returned to work.

39. On 4 December Mrs Knight noted that the Claimant was then on sick leave and asked the Claimant to write to her with her concerns and said that she would discuss a transfer to a different home with her if that was acceptable. This was the start of different managers being involved with the Claimant's case and apparently not being entirely up to speed with the allegations that the Claimant had already made.

40. We know from an email of 4 December 2014 that the Safeguarding Team at Kent County Council had alerted the Respondent to the fact that the Claimant had made a complaint or disclosure to the CQC and consequently Mrs Bruton set about collecting the information that she anticipated that the CQC would want to see. She also arranged for Nurse Manolova to be suspended and the CQC were told about that.

41. As far as the data that was collected is concerned, we know that the Claimant disputes the accuracy of some of that data, part of that is in the trial bundle and we do note from cross-referencing some of that data, that it appears that one death is not on the list of deaths or other incidents within the relevant timeframe but of course we are unable to verify all of the data that was supplied to the CQC, it was simply not our job to do so but we do note, of course, that that has caused some concern to the Claimant now that she has seen that document, although it was not something that she saw at the time.

42. The Respondent suspended Nurse Manolova on 4 December 2014 and it was her evidence that she had never been interviewed by the Respondent by Kent County Council Safeguarding or by the CQC in respect of the allegations about her care of residents. We know that Mr Yates had in fact interviewed her in October 2014 so that statement is perhaps not entirely accurate and the witnesses are of course trying to remember events of some three or so years ago.

43. We did find Nurse Manolova's evidence about not being interviewed by the Safeguarding Team or CQC to be surprising, but we are not aware of the CQC or KCC procedures and it may well be that that is the way they approach these matters. We note that during the course of the investigation Mr Yates made a statement about an alleged drug error and this was one of the allegations that the Claimant had made and so it seemed to us from the pieces of information that we have been able to put together from the bundle that those allegations were investigated.

44. We know that the CQC made unannounced visits to the home on 4 December 2014 and 10 December 2014 and then the KCC Safeguarding Team visited on 8 January 2015 and on 9 January 2015. Mr Yates completed a report about Nurse Manolova and in doing so he didn't investigate or interview her at that point, he relied upon the CQC and KCC investigation and said that as no evidence had been found to support those allegations, he would be putting forward his recommendation that she be brought back to work.

45. We have considered that carefully and we do find that it was not unreasonable, on balance, for the Respondent to rely on those investigations. It might be that the counsel of perfection was that they should also have embarked upon their own investigation and interviewed people but looking at it in terms of reasonableness, we could not say that they were unreasonable in saying that that had been looked into and they were prepared to accept those results.

46. The CQC report about their unannounced visits said that the home required improvement, some of the services were rated as good but the overall rating required improvement particularly because of the way in which medication was dispensed to residents and because of the number of staff on duty. Those were some of the matters that the Claimant herself had raised in her allegations about the home.

47. We noted that there was a return inspection on 4 and 5 April 2016, again we have the report in the trial bundle and the overall rating was said to be good and that those concerns had been addressed.

48. Meanwhile, on 7 December 2014 the Claimant had written to Mrs Knight setting out the issues she had raised previously with her manager. There is a dispute about whether or not Mrs Bruton herself carried out an investigation or a review or something of that nature. As I have said, we have not heard from Mrs Bruton and we wanted to ask her about that, we have what is said to be a paper review that she undertook with some handwriting in the margins and we have what seems to be have been a document found electronically later during the disclosure of the documents for this hearing.

49. What we do know from that review and from the surrounding correspondence is that when looking through the information to supply to the CQC, Mrs Bruton found the Claimant's July 2014 letter setting out her concerns and she included that in her notes in the review documentation.

50. On balance we do accept that Mrs Bruton carried out that review. It was by way of a desktop review in as much as she went back and checked documentation and cross referenced documents, notes and so on, it does not appear that she interviewed anyone and perhaps had she done so that would have been helpful for the Claimant to have known that that had been done but as we said earlier, in terms of reasonableness we could not say that it was unreasonable for Mrs Bruton to undertake the review in the manner in which she did.

51. Mrs Knight replied to the Claimant on 15 December and noted the errors in the letter that Mr Yates had sent to the Claimant in respect of the investigation that he had held into the allegations against the Claimant. She confirmed that there was nothing on the Claimant's file in terms of any disciplinary action. She said that the concerns had been reviewed and a full investigation had been carried out by the Respondent and that the CQC had done a full investigation. She noted that the Claimant might not be privy to the outcome of those investigations. She assured her that her absence which was formerly described as without leave would be treated as

sick leave and she said that the Claimant could contact her if she wanted to discuss any of those matters.

52. The Claimant was signed off for a further six weeks and we know that Mrs Knight was already entertaining the initial view, because she put it in an email of 5 January 2015, that in fact the Claimant had no intention of returning to work.

53. On 8 January 2015 Mrs Osborne wrote to the managers who had been involved so far, Mrs Bruton, Mrs Knight and Mr Yates urging them to consider a need to formalise what had been happening and referring to what she said were quite a few informal conversations and meetings with the Claimant and we found that it was regrettable that the managers did not take that advice at that early stage.

54. On or about 6 January 2015 we know that Mrs Knight had been looking for the long-term sickness absence policy. There was some email correspondence surrounding that and there was an email where she wrote to her colleagues that because the Claimant had produced a medical certificate for more than four weeks she said 'this is where we can step in so she has played right into the policy' and the Claimant suggested to the Tribunal that this was an indication that the Respondent was looking for a reason to be able to end her employment. We did consider that point and we found that the wording of that email can be described as unfortunate but certainly we know from a previous email that Mrs Knight had already obtained the impression that the Claimant was not planning to return to work and the Claimant was off sick and she did in fact fall into the policy because of the length of the time off given by her medical certificate. Given that was the case, we were unable to agree with the Claimant that this indicated that the Respondent wanted at that stage to dismiss her.

55. Mrs Knight wrote again to the Claimant asking her to a meeting to discuss how she could return to work and what needed to be put in place in order to reach that outcome and in that letter she said that a note taker would be present.

56. Before the meeting took place the Claimant wrote to Mr Cannon who was the General Manager setting out the allegations that she had made to her managers and asking to meet with him to discuss those allegations.

57. The meeting then took place with Mrs Knight on 19 January 2015 and again regrettably there was no note taker and no notes were taken and that seemed to be a common thread in respect of many of the meetings and telephone calls that took place in this case.

58. On 20 January the Claimant wrote to Mrs Knight with her recollections of the meeting and she indicated her concern that Nurse Manolova was back at work, despite the Claimant's understanding that the Respondent had not carried out an investigation because they had been unable to do so while the CQC were investigating. She noted in her letter that Mrs Knight had not seen the Claimant's written allegations and she requested that an investigation take place.

59. In her response Mrs Knight told the Claimant that all of her allegations had been fully investigated by the Respondent, by the CQC and by KCC and that the Claimant should let the Respondent know of any other concerns and she again confirmed that the absent without leave issue had largely been resolved as far as the Respondent was concerned and that the capability process was to commence and the Claimant would be referred to Occupational Health.

60. On 23 January Mr Cannon wrote to the Claimant thanking her for raising the issues with him and saying that he had reported the matter to the Speak Up Team and that they were aware of the Claimant and her grievance. We note that there had been no grievance from the Claimant and she had never presented anything under the grievance procedure itself but he said he could not discuss these matters until the grievance had been resolved and he said that there will be an investigation. We can quite understand, looking at both those letters, presumably received in fairly short order, that the Claimant was confused because one manager was saying that there had been an investigation and another manager was saying that there will be an investigation. We found that this difficulty by the Respondent's managers seemingly unable to give a consistent account of what had or would be done caused a great deal of concern to the Claimant.

61. The Speak Up Team telephoned the Claimant and there was a brief conversation about her concerns. Mrs Knight then wrote again on 3 February and this was in response to the Claimant's letter, some of these letters crossed in the post she said the matters had been fully investigated and they were able to continue with the internal processes. She also confirmed that all previous allegations had been investigated and closed including the July 2014 allegations. She also commented that the Claimant herself had approached the Speak Up Team which of course was not accurate and she asked the Claimant to let her know of any new allegations Again, there were some inaccuracies in these letters; these were noted by the Claimant and again added to her concerns that she was being given different versions of events.

62. On 19 February 2015 the Speak Up Team wrote a letter to the Claimant to say that they were satisfied that her 'issues' as they described them had been dealt with by the Respondent, the CQC and the KCC and they said that they would contact other members of staff to see if there were any recent issues and that the Claimant could telephone them if she had any questions. She didn't telephone them and as far as we can see she had no further contact with the Speak Up Team.

63. In March 2015 Mrs Taylor took over from Mrs Knight as the Claimant's point of contact. Again another manager was involved who had no background in respect of this matter and simply took it on as trying to get the Claimant back to work from her sick leave.

64. Mrs Taylor and the Claimant spoke on the telephone on 9 March 2015 and Mrs Taylor made a note of that conversation noting that the Claimant felt that she was unheard, that she was upset, that she had not met with Mrs

Bruton, that she was unable to work with Nurse Manolova and that she was uncomfortable with Mr Yates but that fortunately her health was starting to improve.

65. At the Occupational Health meeting on 26 March 2015 it was confirmed that the Claimant was still suffering with anxiety and depression, and that other conditions she had had flared up as a result of the stress that she had suffered but the prognosis was good and counselling would be necessary through her GP. The Occupational Health doctor confirmed that she was temporarily unfit for work and it noted that she would like the results of the Respondent's investigation and information about the measures put in place to resolve the issues and they recommended a two month review. They thought she might be able to return to work after two months, as they put I,t to some sort of duties.

66. The Tribunal found it unfortunate that the Respondent was not able to give the Claimant some further information in the light of the comments made by the Occupational Health doctor. Instead Mrs Taylor sent an undated letter to the Claimant trying to arrange the two monthly Occupational Health review. Clearly it was a pro forma letter because it referred to their previous meeting and they had not by that stage met.

67. The Claimant therefore wrote on 13 August to question the contents of that letter and again we have to note that it was the way in which the Respondent seemed to provide contradictory information to the Claimant which added to her concerns and her suspicions. The Claimant enclosed in that letter a long document that she had spent a great deal of time preparing, setting out the chronology of events from July 2014 and the incidents about which she was concerned and she sent a similar letter on the same date to Mr Cannon. Again, she requested a meeting with him and we found it regrettable that she did not receive the courtesy of a response from him.

68. Mrs Taylor responded on 2 September confirming that they had in fact not yet met and seeking to arrange a meeting on 9 September 2015.

69. That meeting took place and Mrs Taylor had taken some notes of that meeting. She noted that the Claimant felt that whistleblowing had gone wrong for the Claimant and there was some discussion because the Claimant had not been paid and so she could not afford to attend the next Occupational Health meeting; there was some discussion about the Respondent paying for her travel expenses.

70. There then follows a number of emails in the trial bundle where a number of managers became involved in trying to sort out payment to the Claimant for her travel expenses and despite the number of managers involved (or perhaps because of the number of managers involved) they were simply unable to sort that out amongst themselves, the Claimant was never given the money to attend that meeting and so she did not have the benefit of a further Occupational Health meeting. That was another example of the incompetence shown by the Respondent in dealing with this matter.

71. On 22 September 2015 Mrs Osborne was, as we found, also becoming concerned about what seemed to be some degree of incompetence in the way in which the matter was being handled because although she said to us, generally speaking, she would accept what managers told her as to what had occurred within their homes, she actually asked for the Claimant's files to be sent to her so that she could check to see what investigation had taken place into the Claimant's allegations. It was Mrs Osborne's evidence that she had not in fact found any evidence that there had been an investigation and we consider that this dates back to the fact that the July letter had in some way been misfiled and not actioned and that Mrs Bruton had undertaken a review rather than an investigation involving interviewing relevant parties. Mrs Osborne said in her email when she embarked upon this task that 'we need to be confident that previous issues have been dealt with' and we have to say that she was quite correct about that.

72. In October 2015 another manager came on board, Mr Edwards, but he seems to have done very little in the matter other than to ask Mrs Osborne on a couple of occasions whether she had undertaken her review into the Claimant's files.

73. In January 2016 yet another manager was appointed to deal with the Claimant's case and this was Mrs Andrew. Sshe wrote to the Claimant and suggested a meeting on 14 January 2016 to discuss her ill health and the way forward. We do find that the number of managers involved in this matter led to a lack of clarity and it also led to the Claimant feeling that she had to continue to reiterate her concerns because there seemed to be a complete lack of knowledge on the part of each manager who was assigned to deal with her case.

74. On 28 January 2016 the Claimant had a medical certificate which said that she was fit to return to work with amended duties. Her GP said that she 'feels unable to work in a care role'.

75. A meeting took place between Mrs Andrew and the Claimant on 14 January 2016. Again, regrettably there were no notes taken at that meeting. We had hoped when we read Mrs Andrew's statement and saw that her title was Regional Director that she would be able to shed some senior management light on the case, but it was her evidence that Regional Director was simply a new title for Area Manager.

76. In any event her witness statement did not give us very much information about what she herself had done; it referred mainly to matters that she wanted to refute in the Claimant's claim. In addition, we have to say that we found her to be most unforthcoming about the meeting and indeed about her role in the matter and it was very obvious that she answered very briefly "no" to most of the points that the Claimant raised with her and did not provide any explanation or give her own version in respect of each of those questions. We found her very defensive and unhelpful.

77. There is of course a significant dispute about the content of that meeting. We found that the Claimant's evidence about that meeting was compelling, it was detailed and it was credible and we noted that the Claimant had set

that out in a contemporaneous letter of 23 March 2016. Mrs Andrew's blunt denial of the Claimant's version without giving us details of her own version did not assist and we found that we were able on that evidence to draw an inference that Mrs Andrew had been sent in to try to resolve the issue by seeking an outcome which was acceptable to both parties and we found that that involved the suggestion of some payment to the Claimant.

78. We found that the Claimant was unlikely to have embellished the contents of the meeting to the degree that we see in her very detailed letter. We found that it was highly unlikely that the Claimant misunderstood what was said to her at that meeting to such an extent. Indeed, we can see that when Mrs Andrew replied to the Claimant she did not contradict much of what the Claimant had put in her own letter. We found therefore that Mrs Andrew had suggested that the Claimant write to her, with a proposal for the way in which matters could move forward which would involve either some sort of settlement or termination of her employment. Again, of course, the need for keeping notes at meetings which is normal good practice is underlined by the difficulties in understanding what happened at this meeting.

79. The Claimant wrote to Mrs Andrew on 1 February 2016 and she referred to some of the contents of that meeting and she put forward her suggestions for a payment for loss of earnings, compensation for ill health upon which she would terminate her employment and it was not until some six weeks later that Mrs Andrew responded on 11 March 2016. Her letter does not address many of the Claimant's points, she says that the Claimant's July 2014 letter had been misplaced and she apologised for that. She said that she was now taking appropriate action to speak with the management team in post at the time, but we noted that it was Mrs Andrew's evidence that all she did was speak to Mrs Bruton briefly on the telephone while she was driving and there were no notes of that. Mrs Bruton simply told Mrs Andrew that she had undertaken a review but again this was contradicting what the Claimant had been told by other managers that there had been an investigation.

80. Mrs Andrew also confirmed that although the Claimant felt her job had been taken away it was not, it was there ready for her when she could return to work and she said if the Claimant wanted to resign it was up to her but there would be no ex gratia payment. What the letter does not say is that the Claimant's letter in some way misrepresented the conversation at their meeting.

81. The Claimant responded to Mrs Andrew with a very detailed letter on 23 March 2016. We have found that that letter was received by the Respondent on 30 March 2016, we see the recorded delivery slip in the trial bundle and we accepted that that letter was a reasonably accurate account of what the Claimant understood Mrs Andrew had said at the meeting for all the reasons that I have set out above. Mrs Andrew did not respond to that letter. Indeed, the Respondent produced no response to that letter. It was Mrs Andrew's evidence that she passed it to HR and they took some legal advice. We found that that was not a satisfactory reason not to respond to an employee at all. It was the Claimant's evidence that she was fit to return

to work without adjustments on 28 March 2016, although we have no documentary evidence about that.

82. With regard to the failure to respond to the Claimant in respect of her letter of 23 March, we have found that it was a deliberate failure to respond. We have noted the evidence of Mrs Andrew and Mrs Osborne that a stalemate had been reached; we have found that the Respondent did not know how to handle this situation and we found that the reason they did not know how to handle the situation was because they knew that the Claimant had made protected disclosures and they were concerned about that.

83. The way we have come to that view is as follows:

84. If the Claimant was an employee who was simply declining to return to work then we have no doubt that the Respondent would have followed a disciplinary procedure, they have those procedures in place, they know how to use them. If the Claimant had been an employee on long-term sick leave the Respondent would have followed its capability long-term sickness procedure. Again, they have that procedure, and they know how to use it and so they would have known how to handle that situation. The added ingredient here was the protected disclosures that the Claimant had made. We draw an inference from those facts that the protected disclosures materially influenced the Respondent's failure to reply to the Claimant at that stage of events. We have concluded that the Respondent was worried that the Claimant was a whistle blower and that any steps taken by the Respondent might be perceived as detriments on the grounds of having made that disclosure.

85. The Respondent submitted that by that stage the Claimant was' impossible to manage'. We consider that that is not a sustainable argument given the size of the Respondent's operation, the availability of HR and legal advice, the applicability of policies about a refusal to work and/or long-term sick leave. There was no satisfactory reason provided for failing to respond to a letter from an employee and allowing matters to drag on unresolved. There was no contemporaneous evidence showing the reason for the decision not to reply to the Claimant.

86. One final matter to touch on in the findings of fact is in respect of a request for a reference from a prospective new employer Hadlow College. The Claimant had been able to obtain what looked to be a good and congenial post with the college and in March 2016 the Respondent received a request for a reference from them. We have found that the Respondent has a procedure for giving a standard reference which is restricted to dates of employment and title of post and that was provided on 30 March 2016. Hadlow College responded by asking further questions and in particular, asking a safeguarding question about whether the Respondent knew of any reason why the Claimant could not work with children and vulnerable adults. The Respondent declined to answer that question; Mrs Osborne took some legal advice about that and a decision was made not to deviate from their usual practice. As a result, Hadlow College withdrew the conditional offer made to the Claimant and in their letter of 27 May 2016 to the Claimant they

said that this was because of the Respondent's refusal to answer that question.

Submissions

87. We received written submissions from Mr Jones and Mr Brown, and having read them we invited supplementary oral submissions. As the submissions were largely committed to paper, we do not reproduce them here.

Brief summary of the law

88. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure means a qualifying disclosure as defined by Section 43B which is made by a worker in accordance with any of the Sections 43C to 43H.

89. Section 43B defines a qualifying disclosure as a 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 matters. The matters relied upon by the Claimant is that there was a breach of a legal obligation; and/or the health or safety of any individual has been, is being or is likely to be endangered; and/or that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

90. Section 43C covers disclosure to an employer or other responsible person.

91. A qualifying disclosure is made in accordance with Section 43C if the worker makes the disclosure to his employer or to another person where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer or any other matter for which a person other than his employer has legal responsibility.

92. Where a worker who, in accordance with the procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, he is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

93. Section 43F makes provisions in respect of disclosures to prescribed persons; they are set out in lists contained in various Orders. The CQC are named within the list.

94. Section 47B provides that 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.

95. In Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, the EAT distinguished between 'information' and 'allegation'. Information is conveying facts, and not merely expressing an opinion. However, in Kilraine v London Borough of Wandsworth 0260/15 the EAT sounded a note of caution and noted that 'reality and experience suggest that very often information and allegation are intertwined'.

96. In order to prove a causal link between a disclosure and a detriment, the Court of Appeal in Fecitt v NHS Manchester 2012 ICR 372 considered that section 47B would be infringed if the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistle blower.

97. The claim in respect of unlawful deductions from wages comes to the Tribunal under section 13 of the Employment Rights Act 1996. An employer shall not make a deduction from wages unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement to that deduction. Where the total amount of wages is paid on any occasion is less than the total amount properly payable, then the amount of the deficiency is treated as a deduction from the worker's wages.

98. Section 23 provides that a complaint must be presented before the end of the period of three months beginning with the deduction, or, if it is a series of deductions, within three months of the last of that series.

99. Section 38 of the Employment Act 2002 provides that where a claim is successful and at the time the claim was presented there had been a failure to provide written terms of employment, an award of two weeks pay or four weeks pay can be made in accordance with the provisions of the section.

Conclusions

Did the Claimant make protected disclosures

100. Turning to the question of whether the Claimant made protected disclosures, we have a schedule of disclosures from 7 July 2014 through to 23 March 2016 and in short, having examined the schedule and having compared the contents to the facts we have found, we are satisfied that each of those conversations or letters from the Claimant amounted to protected disclosures. All of them disclosed information relating to health and safety or legal obligations that the Claimant reasonably believed, because she was reporting matters that she had witnessed, showed that information. She set out her concerns, either orally or in writing, giving details of incidents she said that she had witnessed in respect of the care given to residents, and which she considered to be deficient. We were in no doubt that it would be entirely reasonable for the Claimant to believe that it was in the public interest to disclose information that tended to show that residents of a well-known care home were not being treated properly. We have decided that all of those disclosures of information qualified as protected disclosures. In any event, in the response form the Respondent conceded that the Claimant's letter of 15 July 2014 was a protected disclosure.

Did the Claimant suffer any detriments

101. The next question is whether the Claimant suffered any detriments and we have a second schedule of documents which I will now go through.

102. Turning then to the schedule of detriments the first detriment is said to be on 14 July 2014 being verbally attacked by Nurse Manolova. We were satisfied that this could not constitute a detriment, this was an exchange of views about the care of a particular resident. Nurse Manolova said that she would sort that out, this may have been said in a sharp tone but there was no disadvantage to the Claimant.

103. The second detriment is said to be Mr Yates' failing to investigate the July 2014 complaint. We accepted that this was a detriment in as much as the Claimant was left not knowing the answer to her complaints and whether the nurse involved would be investigated.

104. The third detriment is said to the verbal attack by Nurse Malolova on 18 October 2014 and we have made some findings about that incident. We are satisfied that the Claimant herself abused Nurse Malolova to a greater extent than Nurse Manolova responded to the Claimant during that altercation, and in fact the nurse was simply responding to those heightened emotions that were on display. This was not a detriment.

105. Detriment 5 (I am following the numbering in the schedule) is said to be Mr Yates misleading the Claimant in not taking a proper note of the Claimant's concerns that the nurse had ensured that his contact details were not available to staff. We are satisfied that this was not a detriment. The Claimant herself had told Mr Yates of the concern and we know that later he investigated her concerns, in general terms perhaps, but he did investigate.

106. Detriment 6 is the suspension of the Claimant on 21 October 2014; suspension we agree can amount to a detriment.

107. Detriment 7 is said to be the way in which the notes of the meeting of 12 November 2014 were produced. Clearly the content of those notes was not agreed but we found that there was no detriment here because in the circumstances the matter did not progress beyond that stage. There was no disciplinary action taken against the Claimant.

108. Detriment 8 is the production of the outcome letter which the Claimant says contained false allegations. This is in respect of the typographical error and what the Claimant thought was an added allegation of threatening behaviour. As we have found, it wasn't an added allegation, it was the use of different terminology to describe the allegations in the original letter.

109. Detriment 9 is being invited to a meeting in a letter which arrived too late. We found that there was no detriment here. We rehearsed the facts of the matter above and we can see no detriment. The meeting was re-arranged and took place on 24 November and there was no disadvantage to the Claimant. The fact is she did not attend the meeting on 20 November and she could not be contacted, but once contacted the matter proceeded as normal.

110. Detriment 10 is that Mr Yates is said to have pretended that her contact details were lost. We found that he did not do that and there was no detriment here.

111. Detriment 11 is falsely stating that the Claimant had failed or refused to undertake a supervision meeting. We understand this is the meeting on 20 November. Again, as we have set out in the findings, Mr Yates did not suggest that she had refused to attend the meeting on 20 November, he simply reported that she had failed to attend and in fact she had failed to attend; this was not a false statement and was not a detriment.

112. Detriment 16 is a failure to provide a note taker for the meeting on 19 January. We have indicated our criticisms of the Respondent in respect of their failure to take notes generally. It was not a formal meeting, it wasn't a disciplinary or a grievance meeting or indeed an investigation meeting. It would have been better and it would have been good practice to have taken a note but we could see no detriment to the Claimant there.

113. Detriment 18 is Mrs Knight falsely stating in a letter that a full investigation had taken place. It is right that Mrs Knight's letter does say that the Respondent had investigated the matter and there was some debate about whether or not they had done that. We have accepted that Mrs Bruton undertook a review and so in those terms we could not say that this was a false statement. In any event the CQC and the KCC had undertaken a full investigation into the Claimant's concerns.

114. Detriment 19 is the failure by the Speak Up Team to take any details about the Claimant's concerns. We can see no detriment to the Claimant here because even if the conversation with the Speak Up Team was relatively brief, they had the letter that she had sent to Mr Cannon which had enclosed her chronology of events and so they had all the details that they needed.

115. Detriment 21 is said to be a failure to investigate the Claimant's concerns and this involves almost all of the managers we have heard about on various dates, so it is rather a catch-all claim. We have found that there was no such failure to investigate the Claimant's concerns. We found that the failure was in not explaining clearly to the Claimant what had been done and when it had been done. The Claimant had provided detailed accounts of events in July 2014 and October 2014 and really had no clear response about those matters. We found that this failure to explain was a detriment in as much as the weight of concern felt by the Claimant was growing with the lack of a clear response, and inconsistent responses, from the Respondent's managers.

116. Detriment 23 is said to be repeated refusals or failures to provide the Claimant with copies of her complaint letters and the procedures. We found that there was no refusal in respect of providing those procedures and indeed the Claimant's evidence does not say that there was a refusal. Mr Yates had said he would send them and he did not; there is a letter in which it is said the procedures were enclosed and the Claimant says they were not. We found that there was no 'refusal'. It simply just did not happen and

we are satisfied that that was a detriment because the Claimant was not able to check the policies and procedures that were being followed. We don't think (although it was suggested on behalf of the Respondent) that the Respondent's policies are available online generally, and she was not at work and able to access the intranet.

117. Detriment 25 is said to be Mrs Andrew falsely stating that the Claimant's disclosures to Mr Yates had been disposed of or misplaced. In fact, Mrs Andrew's letter says that the July 2014 letter was 'misplaced'. It doesn't refer to it being disposed of and we were satisfied that explaining that to the Claimant was not a detriment. As far as can be ascertained it was misplaced, we accept that, and certainly when it was found those allegations were reviewed. Once found, there was no question of it being hidden or put in some other place where it could not be found. The Respondent was quite open about that, which suggests that their version of events about that is accurate.

118. Detriment 27 is failing to respond in a reasonable time or at all to the Claimant's letter of 23 March. Again, you have heard what we have said about this. The Claimant was entitled to a response from a manager who should, both under the Speak Up policy and by way of general courtesy, be supporting her and responding to her letters. The failure to do so was a detriment, because the Claimant was left in limbo at that point.

119. Detriment 28 is Mrs Andrew falsely stating that she was to take action to speak to the management team. Mrs Andrew's evidence was that she had spoken to Mrs Bruton. We appreciate that piece of evidence was not in her witness statement, but it was part of her evidence that seemed to flow quite naturally when compared to her very brief denial of other matters raised with her. We could not conclude that the fact that she told the Claimant that she would speak to the team amounted to a detriment.

120. Detriment 29 is the Respondent refusing to provide the wider reference requested by Hadlow College. Certainly, the Respondent did refuse to provide an answer to the safeguarding question and we are satisfied that that was a detriment because it did place the Claimant at a disadvantage.

121. Detriment 32 is again rather vague in the sense that it's a bit of a catch-all, referring to the lack of assistance provided by any of the managers to the Claimant from 1 December 2014 onwards. We concluded that it was really too vague for us to make any specific decisions about it. We have made specific decisions on specific points raised and that is all we can do in terms of the findings of fact.

122. Accordingly, we concluded that there were six detriments for us to look at in terms of the next part of the test, causation. In other words, to sum up, there have been protected disclosures, there have been six detriments, so the final question is whether the Claimant was subjected to those detriments *on the ground that* she made her protected disclosures. That is the next part which I will be addressing.

Was the Claimant subjected to detriments on the ground that she made protected disclosures

123. The first of the matters that we found to be a detriment was Mr Yates failing to investigate the July 2014 allegations put by the Claimant (detriment 2). The evidence was not clear as to who was the manager at the time those allegations were placed under the office door. It could have been Ms Bonsall who was the manager when Mr Yates was the Deputy Manager, or Mr Yates himself could have been the manager at that time; neither of them gave evidence and it difficult for us to say which was which. What we do know, however, is that Mr Yates did investigate the October allegations and we have his notes of his discussion with the resident to see what her version of events was, and with the other care worker, with the nurse and so on, and given that he did that, we concluded that he was clearly prepared to investigate allegations when they were put to him. We have decided that there was insufficient evidence to say that any failure on his part, if indeed it was on his part, to investigate the July allegations was influenced by the fact that it was a protected disclosure.

124. The next detriment that we found was number 6 and this was the suspension. We considered that being suspended would amount to a detriment. In this case we consider that the evidence shows that the Respondent had sufficient cause to suspend the Claimant; in other words it was her conduct towards Nurse Manolova that caused the suspension and that had nothing to do with the protected disclosure.

125. Detriment 21. We understand this not as it states a failure to investigate, but a failure to explain to the Claimant precisely what had been done at what stage. On the facts of the matter, and knowing that the CQC had investigated and the KCC had investigated, it was not unreasonable for the Respondent to consider that they did not need to carry out a full scale investigation. Mrs Bruton carried out her paper review. We have concluded that the failure to explain clearly to the Claimant was caused by the number of managers that were involved, without apparently proper briefing. This meant that the Respondent lost sight of the issues for the Claimant and what they did was each time they wrote to the Claimant they provided what was on occasions confusing information about what had been done or what would be done. We have concluded that this was because of the incompetence of the Respondent and their various management practices at that time rather than because of the protected disclosures themselves.

126. Detriment 23 was the failure to provide the Claimant with copies of her documents and the procedures. We have been unable to find any evidence to suggest that the reason that the Respondent failed to do that was because she had made a protected disclosure. We concluded that it was because several managers were involved, some of the issues they just lost sight of, the administration was not satisfactory (we know that from the typographical errors), there are no notes of important meetings and telephone calls and again we are satisfied that it was really incompetence here rather than the protected disclosure that led to the failure to provide the requested copies.

127. Detriment 27 is the failure to respond to the Claimant's letter of 23 March 2016. The Respondent did fail to respond as set out above. The evidence of the Respondent's witnesses was that the letter was sent to HR and then to the legal adviser, and that in the Respondent's view there was some kind of stalemate between the parties and so they did not reply. That is an indication from the Respondent that there was a deliberate failure to act. As I have indicated, we found that this was not an acceptable way of dealing with the Claimant as an employee and I have set out the matters that we took into account in coming to that view, including the size of the Respondent's organisation, the advice available to them and so on. The Respondent's explanation about this failure to reply to the Claimant was not persuasive. We found that she was not 'impossible to manage' at that point in time. We have concluded that the decision not to respond to the Claimant was materially influenced by the fact that she had made protected disclosures. The Respondent was aware that she had done so, and was reluctant to take any steps, including replying to her letter, in case they were found to be causing a detriment on the ground of the protected disclosure. In fact, it was their failure to act that caused a detriment, because the Claimant was left in limbo, unsure as to the Respondent's position. This part of the claim is successful.

128. In terms of the timing of this complaint I should say a few words on that. In the schedule of detriments, the Claimant suggests the date of that failure to respond to her letter was 7 April 2016. We think that she must be wrong about that because as we have found, and we think there is no dispute, the Respondent received that letter on 30 March, we know that from the recorded delivery slip signed upon delivery. In that letter the Claimant asked for a reply within fourteen days, and so we think she has put 7 April in the schedule because she has counted fourteen days from 23 March, the date of the letter, but in fact we consider we have to allow fourteen days from 30 Marc, the date of receipt, which takes us to 14 April and that would bring her claim within the time limit.

129. The final issue about causation in respect of the detriments that we have identified is about the detriment concerning the refusal to answer the safeguarding question from Hadlow College (detriment 29). We have found that it was the Respondent's policy to provide the briefest of references. Arguably it was harsh in the circumstances. Certainly, I think we could say that it was not in either parties' interests because a positive response to the question might have been the answer to everyone's concerns, and would have allowed the Claimant to obtain that new job. We do however accept that Mrs Osborne's evidence was persuasive, and that that is their standard approach. We can see therefore no evidence that by following the standard approach they were in any way influenced by the protected disclosures. If they were influenced by the disclosures, they might have answered that question in order to ensure the Claimant was able to leave their employment.

130. Those are the protected disclosures claims.

Is the Claimant owed wages for the period from November 2014

131. In respect of the claim for unpaid wages, we have decided that claim is unsuccessful. The Claimant was not working during that period and so there is no obligation on the Respondent to pay her. We understand she has received sick pay for the period of sick leave covered by the sick pay policy, and in respect of the period thereafter we were not shown any contractual term which would mean that wages were 'properly payable' such that the Respondent was obliged to carry on paying her, even though she was not at work. That claim is unsuccessful.

Section 38

132. As one of the protected disclosure claims is successful, then Section 38 comes into play. There is no dispute that the Claimant was not provided with written particulars of employment by the Respondent and so she is entitled to an award for that omission. In the circumstances and given the length of her service and the size of this employer, we consider that an amount equivalent to four weeks is the appropriate amount.

Stayed claims & remedy

133. Some of the claims had been stayed by a previous order. When we announced our decision, we directed that the Claimant write to the Respondent and the Tribunal office by 14 July 2017, having considered this judgment, to explain her position in respect of the stayed claims. The Respondent should present their views by 28 July 2017. The Judge will then decide how to proceed in respect of the stayed claims.

134. We agreed a date for remedy with the parties of 22 September 2017. We suggested that in view of all the circumstances the parties might now, having heard our decision, be able to agree a resolution to this difficult situation, and urged them, if possible, to do so. If not, we will consider remedy in respect of the successful claim on that date.

Employment Judge Wallis

Date 17 August 2017