EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105165/2016

Held in Edinburgh on 24, 25, 26 and 31 May; 1, 2 and 9 June 2017 and 25 October 2017

Employment Judge:	**Mrs M Kearns**
Members:	**Mr F Russell**
	Mr D Loughney

Mrs A Qaraqish — **Claimant**
Represented by:
Mrs D Reynolds - Solicitor

1. Rossa Home Care Limited — **First Respondent**
Represented by:
Mr M West - Consultant

2. Tamanna Anjum — **Second Respondent**
Represented by:
Mr M West - Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was that:-

(1) The claim of direct race discrimination contrary to Section 13 Equality Act 2010 is dismissed;

(2) The claims under Sections 103A and 47B Employment Rights Act 1996 are dismissed.

(3) The claimant was unfairly dismissed by the first respondent. The first respondent is ordered to pay to the claimant the sum of **Twelve Thousand, Four Hundred and Sixty Nine Pounds (£12,469)** in compensation.

The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

(4) The first respondent is ordered to pay to the claimant the sum of **Fifteen Hundred Pounds (£1,500)** agreed payment of holiday pay.

(5) The first respondent is ordered to pay to the claimant **One Hundred and Fifty One Pounds (£151)** in arrears of pay agreed to be due.

REASONS

1. The claimant who is aged 49 years was employed by the respondent as a Care Home Manager until her summary dismissal for alleged gross misconduct on 14 June 2016. Having complied with the early conciliation requirements she presented two applications to the Employment Tribunal in which she claimed that she was subjected to detriments by reason of having made protected disclosures. She also claimed race discrimination, automatically unfair dismissal, 'ordinary' unfair dismissal, unpaid wages, breach of contract, holiday pay and notice pay.

Issues

2. The issues for the Tribunal were:-

(i) Whether the first and/or the second respondent discriminated against the claimant because of her race;

(ii) Whether the claimant made one or more protected disclosures;

(iii) Whether she was dismissed for the reason or principal reason that she made one or more protected disclosures;

(iv) Whether she was subjected to detriment(s) on the ground that she made one or more protected disclosures;

(v) Whether or not the first respondent's dismissal of the claimant was fair;

(vi) If it was unfair the percentage or other chance that a fair procedure would have reached the same result;

(vii) Remedy if appropriate;

(vii) Whether the claimant is owed unpaid wages;

(viii) Whether the claimant is entitled to notice pay;

(ix) Whether the first respondent breached the claimant's contract of employment;

(x) Whether the claimant is owed holiday pay.

3. The first respondent admitted dismissal but otherwise resisted the application. However, during the course of the evidence, the respondents accepted that if it was demonstrated that holiday pay was outstanding, the

first respondent would be happy to make payment of this. Similarly with any arrears of pay shown to be due. It had been directed by EJ Young at the Preliminary hearing on 20 January 2017 that the respondent would lead.

Evidence

4. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The claimant lodged a supplementary bundle in support of her schedule of loss ("C"). The second respondent gave evidence on behalf of both respondents. The respondents also called Mrs Sarah Yardley, a staff nurse employed by the first respondent. The claimant gave evidence on her own behalf and called the following witnesses: Mrs Sura Miyasar, Care Home Administrator and Mrs Malika Tatai, a former care assistant at the Home.

Findings in Fact

5. The following facts were admitted or found to be proved:-

6. The first respondent is a company engaged in the provision of residential care services to elderly residents. The first respondent's two directors are the second respondent, Mrs Tamanna Anjum and her business partner, Mr Singh. The Bennochy Lodge Care Home ("*Bennochy Lodge*") is the only Home the first respondent runs. The claimant was employed by the first respondent as Manager of Bennochy Lodge. A TUPE transfer of all Bennochy Lodge staff to the first respondent had taken place on or about 17 December 2015. Prior to that date, the Home had been owned and operated by Four Seasons Health Care Group Limited ("*Four Seasons*"). The claimant's employment with Four Seasons had begun on 25 November 2012. Her employment ended with her summary dismissal by the first respondent for alleged gross misconduct on 14 June 2016.

7. The second respondent had ten years' experience as a lecturer at a nursing college in Pakistan. She had also worked in care homes as a carer and a team leader. However, she had not previously been responsible for running a care home. Prior to the first respondent's acquisition of Bennochy Lodge, the second respondent had had a number of discussions with the Manager of Four Seasons about what would pass to the first respondent on the acquisition date. It was agreed that Four Seasons would leave everything in the home as it was except the IT System and their Policies and Procedures, which they would remove.

8. The claimant is a Muslim from the Middle East and speaks Arabic. Her friends, Sura Miyasar, the Home Administrator and Malika Tatai, the Moving and Handling Trainer, are also Muslims from the Middle East. The second respondent is a Muslim from Pakistan.

9. The second respondent and her business partner, Mr Singh met with representatives of Four Seasons three times prior to their takeover of the home. On two of these occasions the second respondent met the claimant. The claimant wears a hijab. On one visit the claimant asked the second respondent what her relationship was with Mr Singh. The second respondent replied that he was her business partner. The second respondent asked the claimant *"Where are you from?"* The claimant said: *"Palestine"*. The second respondent did not ask the claimant if she was a Muslim. This was apparent to her from the claimant's hijab.

10. On 27 November 2015 the second respondent attended a meeting at Bennochy Lodge along with Mr Singh. The meeting was also attended by residents' relatives, the claimant, two representatives from the Care Commission, the Four Seasons' Regional Manager and Four Seasons' HR Manager. When the meeting started the relatives started to raise issues about the quality of care, health and safety and other matters. The second respondent observed that the claimant raised her voice in responding to the relatives. Afterwards, Carol Ambrose from the Care Commission told the

second respondent that it was important for the claimant to listen to the relatives and try and sort out their issues. The second respondent told her that when she took over she would try to sort it out. She did not have any communication with the claimant about how the meeting had gone that day. However, after the second respondent took over the home, she asked the administrator, Sura Miyasar for the minutes of the meeting in order to follow up on the issues the relatives had raised. The claimant was also in the office and the second respondent told her she had promised to resolve the relatives' issues. The administrator (Mrs Miyasar) said she would give her the minutes later. With reference to the earlier meeting, the second respondent said to the claimant: *"You need to control your voice tone. It's not appropriate to behave in that way. If the service users' relatives have complaints we will try to sort them out."* Mrs Miyasar left to get the minutes and the second respondent said to the claimant*: "Don't raise your voice with the service users or relatives. Just go in a smooth way. If they are raising any concerns just tell them you will deal with them. You don't have to argue with them."* The claimant replied that she felt it was appropriate to speak confidently to them.

11. The first respondent took over the home at 5pm on 17 December 2015. Four Seasons paid all the staff, including the claimant for the first half of the month. The first respondent encountered difficulties in taking over the payroll at that time and the staff pay did not go through in time for them to be paid at the end of December. This caused the staff anxiety and inconvenience.

12. Prior to the takeover on 17 December 2015, the Four Seasons HR Manager, Ms Martin told the second respondent that all the employee records would be left in the home with the exception of the manager's record, which was kept centrally by Four Seasons' HR. Ms Martin said that once the first respondent took over, she would have the claimant's employee file sent to the second respondent by recorded delivery post. When Four Seasons left the home on or about 17 December they took with them most of the computers, their policies and procedures and documents concerning ex

employees. They left everything else including one computer with the hard disc removed.

13. As soon as the first respondent took over, the claimant asked the second respondent who she would now be reporting to and whether the first respondent had its own care plans and documentation. The second respondent said that the claimant would now report directly to her. She told her: *"Whatever you want to know, ask me. I am the responsible person."* The second respondent had put computers in place and had handed over passwords, usernames and details of the website. She explained to the claimant that her policies, procedures and forms, such as the incident reporting form were on the computer and could be printed out as required. The second respondent then handed the claimant a folder containing a paper set of the documents, printed for use in the home which included her policies, procedures, care plans and other essential forms. The next day the claimant gave the folder back to her saying that the nurses and carers did not want to use them and that the care plans were not appropriate. She did not say why. The second respondent said that in that case they should carry on using the Four Seasons documents until she had sorted this out with them. The second respondent then spoke to the nurses and carers and asked if they wished her to modify the documents but they denied having told the claimant that they did not want to use them. It is not possible to get Care Inspectorate registration without policies and procedures and the Care Inspectorate had indicated to the second respondent that they were satisfied with her policies and procedures and had granted registration. When the Care Inspectorate next visited, the second respondent showed them her documentation. They told her it was better than Four Seasons' and asked her why she was not using her own documentation.

14. Shortly after the first respondent had taken over the home, the claimant raised the issue of her salary and bonus with the second respondent. She said she had been offered a manager's post by Four Seasons but she would stay if the first respondent increased her salary. The claimant told the second

respondent that other care home managers got higher salaries and that Four Seasons had not increased hers because they were selling the home. She asked if the first respondent would increase her salary and said that she received a bonus. The second respondent said that she wanted the claimant to stay and did not want her to move but that she could not make any commitment to increase her pay until she saw her contract. She said that she did not have any information in relation to the claimant's bonus and she asked the claimant "*Regarding your bonus, how much were you getting from Four Seasons?"* The claimant said she was getting 25% a year. The claimant told her that she got the bonus divided in two in April and September each year and that she had a separate contract with the Four Seasons Regional Manager about the bonus. She did not say that the bonus was discretionary. The second respondent told the claimant that she had not received any information from Four Seasons about this but that when she got it she would let the claimant know. She asked the claimant to show her the contract. The second respondent telephoned the Four Seasons HR Manager Ms Martin about it. She was told by her that the claimant's bonus was discretionary and non-contractual. They said that Four Seasons had set their own criteria regarding payment of the bonus and that it was for the first respondent to set their criteria. They were not able to confirm the bonus amounts that had been paid on that call. Later, when the second respondent received the claimant's personnel file, she discovered that the claimant had been paid a bonus of 25% of a month's salary, not 25% of a year's salary.

15. The claimant asked about the bonus again on other occasions after the first respondent took over. On each occasion the second respondent asked to see her contract but the claimant did not provide it. The second respondent told the claimant that she had requested that her contract and file be sent from Four Seasons but they had not yet arrived. She said that when she received them she would be able to discuss the claimant's bonus.

16. On or about 18 December 2015, the second respondent's IT contractor, Marc Jacobs came to connect the internet. He instructed Mrs Miyasar not to

take out the sockets but she did and the internet did not work. Mr Jacobs was angry and he then instructed Mrs Miyasar what to do to try and put the matter right. On Saturday 19 December Mrs Miyasar attended work on her day off as Mr Jacobs had asked her to. The claimant also attended although she had not been asked by Mr Jacobs to come. The internet was still not working so the second respondent said to Mrs Miyasar and the claimant that there was no point in them both staying because the IT company would send in an engineer. At the meeting on 27 November 2015 the second respondent had been asked by staff about overtime. She had told them that if the manager asked them to work additional hours they would be paid but that this would not apply if they just stayed on themselves. On Saturday 19 December the second respondent asked the claimant *"Why did you come?"* She replied "*Because Sura didn't have a car."* The second respondent replied: *"This time I'm going to pay you but another time if someone comes voluntarily I'm not going to pay for it."* The internet and email system were fixed and up and running by 21 December 2015.

17. On 21 December 2015 the second respondent went into the home expecting the claimant to be on duty. Another member of staff explained that she was not in because she had covered a carer's night shift the previous night as they were short of carers. The second respondent was annoyed because on every night shift there should be a nurse and a carer. Carers are paid £7.20 per hour. However, if the manager (a qualified nurse) does the job she must be paid for the shift at manager rate, not carer's rate. The second respondent asked the claimant about it when she arrived, to clarify matters. The following conversation ensued: The second respondent said: "*Ahlam why are you late?*" The claimant said: "*I was here yesterday and this and this and this happened.*" The second respondent asked: "*Who told you to come?*" The claimant said she had not been able to get staff or agency cover. The second respondent asked: "*You expect me to pay for this? Why you don't call me?*" The claimant replied: "*If I call you how can you help? You don't even know each room in the care home. You don't have your SSSC registration. You don't have, you don't have you don't have*.." The second

respondent said "*Next time call me*." The claimant said "*OK, why am I the manager on call then?*" The second respondent replied: "*You are the manager on call but if you have an emergency, call me and I will tell you what to do.*" The claimant said "*OK what if there is a flood?*" The second respondent said to her *"Please try the other carers first and only if you can't get another carer then the manager can come."*

18. The claimant asked the second respondent on a number of occasions whether her personnel file had arrived. On 23 December 2015 the second respondent telephoned the Four Seasons HR Manager Ms Martin to chase it up. The Manager told her that the file was in front of her on the table in a parcel addressed to the second respondent and marked 'private and confidential' and that she was going to post it that day and it should arrive the next day. The second respondent relayed this information to the claimant on or about 23 December.

19. In the early days the second respondent and Mr Singh were going in every day to the care home. If anything urgent was required, they would sort it out but the claimant did not like them doing things when she was there. The second respondent felt the claimant did not seem happy and was finding things to complain about and being difficult. She therefore started avoiding going into the home while the claimant was on duty but going in instead after 5pm when the claimant had gone home. One day, Mr Singh hung his jacket on an empty hook on the manager's door. He then forgot his jacket and where he had left it. He checked his house and went back to ask in the shops. The second respondent reminded him that he had left it in the manager's office. They went to the office the next day but it had gone. The second respondent spoke to the cleaning staff and they said they had not moved anything from the manager's office. Mr Singh was worried because his mobile phone and bank cards were in the jacket. Eventually he found it in the staff room. He checked the pockets and his mobile phone and bank cards were still there. However, when he found his jacket had been moved to the staff room, he was a bit upset and angry. He asked the claimant whether

she had moved it from her office. She said "*No*". The second respondent told Mr Singh that they shouldn't blame anybody. She noticed the claimant's expression and said to her: "*Ahlam, I am extremely sorry if you didn't like him asking. We have asked the other staff as well but it is your office*."

20. A disagreement took place around this time between the claimant and the second respondent over the hours of the claimant's friend, Sura Miyasar. Mrs Miyasar had three different jobs at the home: administrator, activities co-ordinator and carer. The second respondent discovered that Mrs Miyasar was working and being paid as activities co-ordinator from 2pm until 4.30pm and as a carer from 3.30pm until 10pm on the same days. She raised the overlapping jobs with the claimant and said that, in any event, the residents' activities were supposed to start at 1.15 pm when they finished their lunch. The claimant said that she could not make any changes to this because Mrs Miyasar had transferred under TUPE. The second respondent asked the claimant whether Mrs Miyasar had finished her probation period. The claimant replied that she had. The second respondent asked the claimant for the keys to the cupboard where the employee records were held. The claimant initially made an excuse and would not hand over the keys. The second respondent persisted and eventually was reluctantly given the keys. She checked Mrs Miyasar's file and found that she had not finished her probationary period as the claimant had told her. She was worried that as the claimant had not been truthful with her about the matter she might try to change the contract so she took it away with her. A big argument then ensued between the claimant and the second respondent over the matter.

21. On 1 January 2016 the claimant was not working but she came into the home to celebrate a colleague's birthday and brought in her daughter. She then went to the office to speak to the second respondent. During this meeting an argument developed and the claimant raised her voice. The second respondent was upset because they were arguing almost every day but she did not raise her voice. The claimant left and came back later in informal clothing with her husband. She gave me the second respondent her

hand and said: "*sorry I didn't mean to be rude*." The second respondent said: "*sometimes you behave like a child. You should not get emotional so quickly*". She went on: "*Maybe you have concerns about your family and your home. If there is anything distracting you with your family you can tell me. It happens sometimes. Maybe there are other factors. You can share with me. It happens sometimes but try to control your behaviour and your voice tone*."

22. As set out above, on 23 December 2015 the second respondent had telephoned the Four Seasons HR Manager Ms Martin to chase up the claimant's personnel file. The HR Manager had told her she would be posting it that day. The second respondent accordingly was looking out for the parcel containing the file. When the file did not arrive, the second respondent assumed it had been delayed in the Christmas post. By 6 January 2016 she still had not received it so she telephoned Four Seasons on that date and made inquiries. They told her that they had sent the file by recorded delivery mail, addressed to her personally and marked '*strictly private and confidential*' on 23 December 2015 and that it ought to have arrived at the Home on 24 December. The second respondent took the matter up with the Administrator, Mrs Sura Miyasar who said she would ask the claimant where it was. In addition, Ms Martin from Four Seasons called a number of times to ask whether the parcel had been found. When Ms Martin first called on 6 January she told Mrs Miyasar that the parcel had been sent recorded delivery on 23 December and that it had been received and signed for at the care home.

23. When the staff pay had still not gone through by 5 January 2016, various members of staff began to complain. The second respondent got on to her accountant and eventually got it sorted out. However, the situation was unsatisfactory. The second respondent spoke to the claimant, who said that she was trying to sort out her tax code with HMRC. After discussion, her expectation was that she would be paid on 26 January for her pay from 17 December to the end of January. For some reason, the first respondent paid

her on 26 January for the period 15 December to 14 January and did the same monthly thereafter until she left on 14 June. This appeared to be due to the second respondent understanding that this was what the claimant had asked her to do. Some of the staff were put on emergency tax codes including Mrs Miyasar and Mr McAulay. The January salary payments were late and some were incorrect. Mrs Miyasar spoke to the second respondent because she had direct debits coming out of her account. She asked for a cheque. The second respondent refused and said it was not her fault. Mr McAulay did receive payment of his salary by cheque but only after making very firm representations to the second respondent.

24. On 7 January 2016, Mrs Miyasar telephoned the second respondent to say she had found the missing parcel. The second respondent went to the home straight away. When she entered, the claimant and Mrs Miyasar came over to her. Mrs Miyasar was holding the parcel containing the file. The corner of the parcel had been torn revealing that it contained a file. The second respondent asked her where she had found it and she said they had found it behind the shelf unit in the manager's office. The shelf unit in the manager's office was, at that point empty because Four Seasons had removed all their policies and procedures. The desk used by the second respondent when she was working in the home was situated in the manager's office next to the empty shelf unit. The second respondent felt sure the parcel had not been on or behind the shelf unit because she used to keep her bag near the unit. She felt that something was wrong because it was not as they had described it. The second respondent asked how this had happened. The claimant and Mrs Miyasar said they did not know because so many people were using the office. The claimant said that she had told the second respondent to change the lock but she had not done so. The second respondent said she had tried but the locksmith had been closed for Christmas. The second respondent said that she would need to investigate the disappearance of the parcel. She went to the Post Office but they could not immediately find the recorded delivery record so they said they would let her know once they found it. The next day the Post Office contacted the second respondent to say that the

name of the person who had signed for the parcel at the home on 24 December 2015 was Jordan Samson. Jordan Samson was a care assistant at Bennochy Lodge and the second respondent asked her whether she remembered receiving the parcel on 24 December and if she could recall what she had done with it. Ms Samson said she did remember signing for the parcel and that she had taken it to the claimant in her office. Ms Samson said that Mrs Miyasar had been present, and that when she had taken the parcel in, the claimant had turned her face to the administrator, then turned to Ms Samson and said to her *"OK put it here".* Ms Samson had put the file on her desk then left the office.

25. On 8 January 2016 the claimant emailed to the second respondent a letter which she dated 3 January 2016 (C72) which contained the following paragraphs:

> *"The first point I wish to raise is relating to the governance and structure of the care home. My role as 'Home Manager' as I understand was not to change after transitioning from Four Seasons to you. However, I am finding it difficult to ascertain exactly where my authority ends and where yours begins. This includes the flow of information which is passed from owners to managers then to the rest of staff. What is the structure for the flow of information you wish to implement? Furthermore you have not made it clear who has authority and responsibility for certain tasks. This includes, but isn't limited to; care plans for residents, recruitment, company policies (which I was asked to provide however this is a responsibility for Rossa Home). As far as I am aware I am working within the remit of my job description but feel that occasionally I am not being allowed to make decisions I require to make. You commented before that you can 'change my job description' and that I must 'follow all your instructions'; whether or not this will benefit the residents, staff or goes against my very successful track record with Four Seasons. When I question any new decisions that are being made this is to make sure your decisions are being*

made to benefit the residents. As you have already commented I am confident in my job because I know I perform well whilst maintaining full professionalism. Can you please clarify what your input will be in the day to day running of the care home and how decisions are going to be formed?

My second point of discussion is linked to the above. There are tasks you have personally asked me to complete that is outwith my remit, this includes reading company policies from QCS and adjust them to suite [sic] *the care home and organising staff pay and payroll. I'm more than happy to support and co-operate as I have already started (for example completed all documents required for care plan). However, I don't want the care home running to be affected as fewer hours are then spent in managing the home. The policies and staff pay should be completed by Rossa Home with their legal representation or accountants. Can you please confirm moving forward when you will publish company policies and that you will continue to manage staff pay from February 2016?*

Furthermore, my salary should have been paid on the 23rd December 2015. I have now discussed this with you on three separate occasions…..

As a note, we have had some concerns from staff in regards to the date of pay which should be 5th January 2016. You were provided all staff pay information and pay dates from Four Seasons during the handover period in early December – you confirmed this with me at the time – and you advised there would be no disruption in dates of pay. Can you please clarify why they haven't been paid?

One of my main concerns relates to the quality of care provided to service users in recent weeks. I appreciate that this is a stressful and difficult time for you; however, we still do not have correct and

sufficient documentation at Bennochy Care Lodge. This includes bed rail charts, position charts, food and fluid charts, fire and water safety, maintenance log, gas and electric documents, risk assessments, health and safety in the kitchen…Etc. I know that you have already provided us with some documentation however as I have advised you these were inaccurate and confusing to the staff. When I advised you of the concerns from staff I was told this was my job to change the documents. You told me personally to use the same Four Seasons documents but just to change the logos for the time being. Although I 'followed your instructions' I feel uneasy about this and am unsure of the legal ramifications.

….

Care plans were provided a week after the transition however, again in my professional opinion and my personal knowledge of the service users in the care home over the last 9 years, these were unsuitable and incomplete. We discussed this and you agreed several points needed to be adjusted; can you please advise when we will receive not only proper care plans but the rest of the records. How can we provide the correct care if these are not present? Furthermore we have had two new residents at Bennochy Care Lodge. I still have not been able to complete their documentation as I am waiting for information Rossa Home should have provided weeks ago.

Regarding documentation relating to my own role, I cannot complete my duties to make sure care quality is not being affected. This includes the paperwork required to complete staff appraisals, audits, staff meetings, etc. Furthermore I have not been made aware of any budgets you wish to set on any aspect of the care home. I am now in essence 'flying blind' in terms of what I can purchase/how to organise such areas as the kitchen, recruitment, staff vacancies or staff hours.

Also regarding incomplete documentation we do not have appropriate headed paperwork from Rossa Home which includes receipt books, headed paper for all care home correspondence, receipt books, fees paperwork, required information regarding each residence including their date of entry, personal allowances for each residence and accounts for each residence. Families have been asking to see up to date accounts for their relative's personal allowances. As far as I am aware you advised our administrator that we no longer have a separate account for our residents. I am concerned that the families will become understandably upset. Please clarify for the administration assistant and myself if the above documents and spreadsheets should be created/ completed by us or will you provide us with the above documentation. I understand the above takes time, however we are not equipped with all information we require to complete the above. We are happy to help complete these however this will require additional hours but as you have repeatedly advised you wish to not to give any extra hours for the purpose of completing documentation. Please clarify how we can complete documents required.

….we do not have a secure and professional way in which to communicate with outside partners or even with each other in the care home. It is great that you have set up emails for our administrator, one for myself and a general email for the care home for all outside enquiries, however when I asked how to access them you were unsure at the time. Can you please confirm these details as; again, this is important to the running of Bennochy Care Lodge in a professional and efficient manner.

My third point relates to staff responsibilities. You suggested changes to the roles of carers, Laundry staff and kitchen assistant staff but I am unsure if you wish to proceed with the potential improvements you wished to make. I respect you as the new owner of Bennochy Care

Lodge however I still feel as Home Manager any changes to staff roles should be discussed with me. My concern is to make sure the quality of care we provide here is kept to the highest standard and is in line with the rules and regulations set out by our regulating body "the Care Commission". Can you please clarify any changes you wish to make to staff roles and how these will benefit our service users further?

The final point I wish to raise is in regards to the way in which you communicate with me. At Bennochy Care Lodge we have always had fantastic relations between staff, management and owners. However some of the comments that have been made in recent weeks have made me feel belittled and harassed; no one should be made to feel this way by the owners of the business in which they work. For example, you mentioned that you had 'bought the business and the people'; which may also be a breach of the UK quality of Regulations [sic]. *In another meeting you raised your hand in a way that made me feel disrespected to stop me from discussing important points. Another way in which I feel belittled is when you have discussions with staff giving information against which you have previously discussed with me in private. For example, you advised me that you are thinking about shifting roles and changing hours; staff came to me concerned as they heard suggestions regarding hours and shifts were to be changed; I advised this may have been a possibility as already discussed with you; when staff asked you regarding the hours you advised that I made up this rumour and reprimanded me for advising staff 'incorrectly'.*

Furthermore you have advised certain staff that they can bypass my authority and complete tasks that are in my job description without prior discussion with me. The flow of information has been inappropriate the last few weeks.

I feel that any discussions or information that requires communication to you as owner, to staff or to me as Home Manager should be documented in writing and passed onto the parties involved. Too many verbal discussions have been made but then people backtrack onto what was agreed. Any decisions made and discussions we have together or with other staff members I wish to be properly documented or recorded from now on please; this is the most professional way forward I can see.

In lieu of making sure we have all been given the correct information and that everyone is happy to move forward, I wish to hold a staff meeting on Monday 11th January at 2pm to discuss not only the points raised above but to allow the staff to raise any concerns that they have…"

26. On or about Monday 11 January 2016 the second respondent asked Jordan Samson to confirm in writing what she had done with the parcel (C106). She wrote: *"On 24/12/15 I did sign for a private parcel and then handed it into the office at Bennochy to manager."* After she had given the second respondent her statement Ms Samson told the claimant about it. The claimant approached the second respondent and asked her what parcel she had been speaking to Ms Samson about and why. The second respondent replied that it was the one the claimant had given her on 7 January and that she was doing an investigation. She asked the claimant whether she had received the parcel from Ms Samson and the claimant said *"No, she is lying."* She became angry and, raising her voice said: *"What are you talking about?"* The second respondent asked the claimant to give her a statement about this and the claimant replied: *"I don't want to give you any statement. I want to speak to my solicitor first."* The second respondent left the care home and went to the CAB for advice about what to do.

27. On or about 12 January 2016 an incident occurred with a resident when the claimant was on the floor as a nurse. The claimant filled in an incident

reporting form and gave it to the carer. The form contained a box for setting out what action had been taken to prevent a recurrence. The claimant spoke to Malika Tatai, the moving and handling trainer and asked her to fill in the form. The claimant chased this up again with her the next day but she said: *"I'm busy now. I'll do it tomorrow."* The form had not been finished at the point when the claimant was suspended so she telephoned Ms Tatai later on 14 January and asked her to complete it.

28. On or about 14 January 2016 the nurse on duty, William McAulay came into the office where the second respondent was working and told her that he had received a telephone call from a resident's daughter asking whether a letter had arrived for her father. The second respondent told Mr McAulay that she did not know where the letters were kept and asked him to find out. Mr McAulay found a basket on the shelf containing three letters addressed to the second respondent and one to her business partner, Mr Singh. All the letters had been opened. One of the letters was from the home's insurer sending out the insurance policy. This had been awaited by the second respondent for some weeks. There were also letters from the solicitors and suppliers. The second respondent spoke to the claimant and Mrs Miyasar about the matter. The claimant said "*I don't know who opened your letters and put them here*. *Most people have keys and use the office.*" Mr McAulay told the second respondent that when Four Seasons' staff had come to collect their paperwork from the premises on 15 or 16 December, prior to the transfer, he had seen the claimant removing documents from the office and putting them in her car. He said that he had asked her what she was doing and she had replied that she was trying to remove paperwork so that Four Seasons would not know that she had taken it.

29. Later that day, the second respondent came back into the office to pay an employee her salary. She had not had the employee's bank details and had phoned ahead to ask the claimant to get them ready. The claimant handed the second respondent the bank details and at the same time said to her *"What have you decided about Sura's hours?"* (As set out above, Sura

Miyasar was doing three different posts in the home and the second respondent had said she would have to check her hours because the hours for one post were overlapping by an hour with those for another post. The second respondent was concerned that she might be paying twice for the same hour.) The second respondent replied to the claimant *"When I have decided I will let you know."* At this, the claimant raised her voice and said to the second respondent: *"You are not allowed to touch anybody's hours. We are all protected under TUPE."* The second respondent replied that she would not do anything illegal. She went on *"I don't want to argue with you. It's better that I leave the office."* The claimant then shouted at the second respondent: *"You should just leave the building".* The second respondent said: *"Why should I?"* The claimant replied: *"I am the manager and I am telling you to leave the building."* The second respondent sat down and began writing a letter on the computer. The claimant said to her: *"Oh you're going to terminate me. You can't terminate me. I will speak to my solicitor and take you for so much."* The claimant was looking over the second respondent's shoulder as she typed. She then said: *"Oh, you're going to suspend me."* She went and fetched two of the carers and said to them: *"Look what she's doing. She's suspending me."* The carers asked what was going on. The second respondent said: *"Did I call you into the office? Ask the person who called you in."* The second respondent printed and signed the letter she had typed (C76) and handed it to the claimant. The letter stated that the claimant was suspended from 14 January 2016 because the second respondent wanted to start a disciplinary investigation into the disappearance of the parcel. The letter indicated that the claimant would be on full pay but was required to stay away from the workplace and not talk to colleagues during the investigation process. When the claimant was handed the letter she became distressed. Mrs Miyasar gathered the relatives and visitors and told them the claimant was being suspended. She tried to involve the employees but they did not want to be involved. The second respondent telephoned the Care Inspectorate for advice.

30. Later on 14 January 2016 the second respondent went into the lounge and noticed that one of the residents had a big bruise near her eye. On investigation the second respondent was told that there had been an incident with a hoist four days previously. She was told by the resident's daughter that it was the fourth incident in four weeks. The second respondent did not want to make any comment without seeing the record so she checked the incident folder. She could not find anything recorded there so she spoke to the nurse and also to Malika Tatai, the moving and handling trainer. There was a suggestion that there may have been a problem with the hoist so the second respondent took the hoist out of service and instructed staff to use the other one. The maintenance company came to check the hoist but could not find anything wrong with it. The second respondent then arranged for all staff to have further training in manual handling.

31. On 27 January 2016 the claimant emailed the second respondent (C79). The email was addressed: *"To the manager Bennochy Lodge Care Home" Dear care manager I have been unfairly suspended from work as a care manager in an insulting and intimidating way on unfounded basis on 14/1/2016 at 1:00pm. The new owner of the care home accused me of holding confidential letter addressed to them though she attended the care home and share the manager office with me daily. She claimed that one of the staff handed that letter to me which is totally untrue. However that letter was found unopened in the shared office. Yet the owner without any warning and before other staff she asked me in total disrespect and humiliation to leave the care. It is worth mentioning that the office space can be accessed by any staff. I actually raised this issue with the new provider. I pointed out that the office should be secure and access to it should be limited due to confidentiality issues but My request was ignored. I believe that my suspicion on the above grounds is unfair, disrespectful and discriminatory. This has caused me considerable distress and disruption of family and social life."* On the same date, the second respondent emailed to the claimant a letter inviting her to attend a grievance hearing on 29 January 2016. The claimant

declined on the grounds that it was too short notice and that she wished to have the disciplinary matter resolved first.

32. On or about 8 February 2016 the respondents sent the claimant a letter (C80) inviting her to an investigatory meeting on 11 February. The letter listed a number of "*matters of concern"* including: spreading rumours among staff; disrespectful and abusive behaviour and refusing to follow instructions; threatening and aggressive behaviour; giving misleading information about her own and other staff contracts; *"an allegation that a strictly private and confidential parcel … received on 24th of December ..was hidden from me for 2 weeks"*; opening mail and not handing it over with serious financial consequences; poor punctuality; falsification of time sheets; inappropriately leaving the site during breaks; failing to keep incident and accident records properly and breach of the equal opportunities policy.

33. The investigation meeting was rearranged and took place on 17 February 2016. It was attended by the claimant and her union representative, Nicky McKinstrey. The meeting was chaired by the second respondent. Sarah Yardley, night nurse took a note (C121). At the meeting (C122) the second respondent went through the list of allegations in the letter of 8 February (C80) and asked the claimant for her response. She asked the claimant about keeping records of incidents and accidents and following policies and procedures. The claimant stated that she did so. The second respondent raised the case of a specific resident who was said to have had four incidents in four weeks. The claimant responded that she had been dealing with this when she was suspended and that no one had informed her about it before. The second respondent had checked the office and had not found any completed incident reporting forms in relation to these incidents. She had spoken to the relevant carer who told her that the necessary management review had not been done in relation to the incidents until 14 January 2016. A second resident who had had two falls during the night was also mentioned. The claimant replied that no one had informed her of this.

34. At the meeting, the second respondent raised with the claimant allegations she had received of possible racial/religious discrimination by the claimant. Between 14 January and 17 February 2016 three employees had spoken to the second respondent and alleged that the claimant was discriminating against them. Their names were Christina Urquhart, Maureen Martin and Kelly New. They had told the second respondent they had worked at the home a long time and had been trying to get the claimant to give them more hours. They said that each time they asked her she said there were no hours or that she would get back to them. However, the claimant had then taken on Sura Miyasar as administrator. They said when Sura came for the administrator post there were seven or eight more experienced applicants but they alleged that the claimant had hired Sura because she was her friend and from the same community. They said very soon after that, Sura was also given two other permanent jobs in addition to the administrator post – the jobs of carer and activities co-ordinator. The respondent did not say anything about the claimant being from the Middle East. She told her what the staff had said to her – that they felt discriminated against because Mrs Miyasar had been given hours and they had not. In relation to the allegations of preferential treatment of Sura Miyasar and alleged discrimination against non-Muslim members of staff, the claimant denied this and said that she had increased the hours of Kamlesh, Kelly and Courtney and they were not Muslim. Finally, the second respondent brought up an alleged controlled drug discrepancy from 15 July 2015. The claimant said that she had checked and signed and it was the night nurse's duty to sign the book.

35. On or about 17 March 2016 the second respondent emailed to the claimant two letters of that date (C86 and C87). The first letter advised the claimant that she was required to attend a disciplinary hearing on 22 March 2016 at the Home to discuss the following matters of concern [numbering added for ease of reference]:

"(i) An allegation that you have maliciously spread rumours among members of staff causing disruptions amongst the team and potentially bringing the company into disrepute;

(ii) Alleged disrespectful and abusive behaviour when asked to complete a reasonable management instruction, and insubordination;

(iii) Alleged serious breach of company rules and procedures in respect of the health and safety of fellow workers namely, it is alleged that on 01/01/16 and 14/01/2016 without reasonable excuse you behaved in a threatening and aggressive manner towards your senior management causing them to feel intimidated, alarmed and distressed about your conduct. The company alleges that this matter, if proven represents a gross breach of trust.

(iv) *It is alleged you have given misleading information about your own and other staff members contracts in attempt to mislead senior management and receive contractual privileges to which you are not entitled;*

(v) *It is alleged that you have taken part in activities which have caused the company to lose faith in your integrity namely, misappropriation of company property, further particulars being, it is alleged that on 24/12/15 you accepted a strictly private and confidential parcel from Jordan Samson and failed to pass that parcel as required onto senior management without reasonable excuse. It is in fact alleged that you consciously took steps to hide this parcel. The company alleges that this matter, if proven, represents a gross breach of trust.*

(vi) *It is alleged that you received some mails in the month of December which required to hand over to the senior management but you failed to do so and it was found on 14/01/16 from your office in unsealed condition and due to this company incurred huge financial impact. It is in fact alleged that you consciously open these mails and didn't handed over to me. Company alleges this matter, if proven, represents a gross breach of trust.*

(vii) *It is alleged that your timekeeping is extremely poor and used to be disappear from premises during your working hours after signing in, what would be expected?*

(viii) *Taking part in activities which cause the company to lose faith in your integrity namely, alleged falsification of time sheets. Further particulars being that on 30/01/2016 [sic]*

(ix) *you submitted time sheets for payment of overtime to the amount of (hours) to claim payment of (approximate amount of payment) and falsely represented/purported to the company that you worked these hours. It is alleged that in fact you commenced your shift at (hours) and completed your shift at (hours) and not at the times which you state on your time sheet as (enter details or see attached schedule if multiple falsifications). [sic] The company alleges that these matters, if proven, represent a gross breach of trust.*

(x) It is alleged that you have been taking breaks and leaving site far beyond that which would be seen as inappropriate.

(xi) Taking part in activities which cause the company to lose faith in your integrity namely, it is alleged that you failed to record and note 4 incidents between 10/12/15 to 12/01/2016 involving an

accident where a resident was injured. You failed to keep records and take necessary preventative measurements which caused 4 incidents in one month with the same service user and also failed to report the incidents to the regulatory authorities as required under care standards legislation. Given the nature of your position and responsibility you carry as home manager this is amounts to a gross breach of trust, breach of policy and procedure and breach of duty towards the residents in your care."

36. The letter stated that if the allegations were substantiated they would amount to gross misconduct and could result in termination of employment without notice. A copy of the disciplinary procedure and rules (C92) was enclosed. Also enclosed were the following documents:

- the brief statement by J Samson (C106) in which she said: "On 24/12/15 I did sign for a private parcel and then handed it to the office at Bennochy to manager.";

- a statement by William McAuley (C107) in which he stated that while searching with him for a letter in connection with a resident's pension the second respondent had found three unsealed letters addressed to herself in a pile of other letters in the "front office";

- a statement from Reena Anil, staff nurse (C108) in which she stated that after any incident or accident it was the duty of a staff nurse to inform the manager and complete the accident form, and confirming that she had done so;

- a statement by Karen Ritchie dated 24 February 2016 (C109) in which she said that on 20 December 2015 she had been informed of an incident by carers Jordan and Courtney where the hoist bar had hit a

resident near the eyebrow. Ms Ritchie stated that she had informed the claimant and requested an incident form and that the claimant had said she would give her one but had not done so. Accordingly, she had recorded the incident in the resident's care plan;

- a copy of the relevant care plan (C110), which contained an entry stating that at 17:30 on 20 December 2015, while being assisted with a hoist into an armchair, the resident had been hit by the metal bar below her left eye and that her daughter had been informed. The care plan also contained another entry about a bruise noted on the left side of the resident's forehead, for which a datex record number was given. The date is illegible but the care plan states "*Home Manager informed*" (C112);

- the minute of a meeting on 18 February 2016 between the second respondent and the resident's daughter (C113) in which the daughter is recorded as stating that she had spoken to the Home's moving and handling trainer after the first incident where her mother had been injured by the hoist and that she had spoken to the claimant after every incident but did not feel enough had been done to prevent the incidents. [The minute records that the second respondent said: *"But manager is refusing to accept any acknowledgement about these incidents except 12/01/2016."* The daughter is recorded as then having said: *"She is lying. I informed her after every incident and that thing was really annoying me that I couldn't see any action against this matter while I was informing to the manager after each incident but no investigation or any step has been taken to prevent it which caused this incident again and again from 9th of December to 12th of January 4 incidents within one month. I put my mum here to live in like a home not for abuse."*] and

- copies of the day shift rotas for the weeks commencing: 21.12.15; 28.12.15; 4.1.16; and 11.1.16.

37. The second letter sent to the claimant on 17 March 2016 (C90) informed her that a grievance hearing had been scheduled for 22 March 2016 at 9am. The claimant was certified unfit to work by her GP. However, the claimant's husband became critically ill on 22 March 2016 and the hearings were rescheduled to 30 March 2016. They did not take place on that date because on 29 March, the claimant was certified unfit by her GP.

38. The claimant had given instructions to Four Seasons to deduct her trade union membership dues from her salary and pay these to her union. She had also had private medical insurance for herself and her family through Four Seasons. The monthly premium of £91.90 was deducted from her salary by Four Seasons and paid to the insurance company. This information was not passed to the first respondent and they initially therefore omitted to make and pay over these deductions. In or about April 2016 the claimant contacted the second respondent because she had been told by the insurer that her policy had lapsed in circumstances where her husband was very sick and needed to make a claim. The second respondent contacted the insurer and explained that she had been unable to make the deductions for the claimant because she had not had the necessary information. The company agreed to revive the policy but said that the claimant would need to make payment of the three missed premia from January to April. They said that the claimant could do this by cheque or bank transfer. The claimant said she could not afford to make the payment so the second respondent telephoned the company on her behalf. They asked her to get the claimant to contact them directly and they would sort it out. The first respondent thereafter deducted the premium from the claimant's monthly salary and paid it over to the insurance company and the policy was reinstated. The policy lapsed on 14 June 2016 when the claimant was dismissed.

39. The claimant had a close friendship with two of her colleagues, Mrs Miyasar and Mrs Tatai. On at least one occasion during her suspension she gave Mrs Miyasar a lift to work in her car and picked up Mrs Tatai and took her home.

40. By letter dated 8 April 2016 the disciplinary hearing was rearranged to 15 April. On or about 15 April 2016 the claimant sent an email to the second respondent (C141). In it she stated that she was not fit to attend the disciplinary hearing and had sent in a medical certificate. In the same email she requested further specification of the allegations against her and stated that the second respondent had refused to allow her witnesses to attend. The second respondent answered by email of 21 April (C142). She stated: *"You have been provided with the evidence and allegations in the January. During any meeting you can question the evidence and we may investigate further, if necessary. I have never denied you the right to bring witnesses, but stated that I did not want you to contact employees and residents family directly. If you wish to ask questions of specific employee or relatives of the residents, please let me know what the questions you wish to ask and I'll contact them and provide you notes of the responses.."*

41. The disciplinary hearing was held on 5 May 2016 following an email on 27 April. It lasted approximately four hours. The meeting was attended by the claimant, accompanied by her union representative Nicky McKinstrey. The second respondent attended as decision maker. She did consider trying to find an alternative decision maker. Mr Singh had advised her that he was unable to travel to the hearing from London. The respondents' HR advisers said they could assist but that they would charge for sending someone from Manchester. The second respondent reasoned that because the claimant was the home manager, it would not be appropriate for anyone junior to her to hear the case. A brief minute (C153) was taken. The claimant raised a concern that the respondents had refused to allow her to call witnesses. The second respondent replied that she did not refuse and that the claimant could call anyone who was on duty. With regard to the alleged incidents involving the resident, the second respondent had indicated in an email of 4

May 2016 (C152) that she was unhappy about bringing the resident's relative to the hearing and having her challenged but was happy to discuss some other way of questioning her. In relation to the same matter, although the disciplinary invite letter had referred to four incidents, in fact the first respondent only had information in relation to three. The three incidents were alleged to have taken place on 10 December 2015; 20 December 2015 and 12 January 2016. The claimant had been given the statement by Karen Ritchie in relation to the second incident. She had also been given the minute of the second respondent's conversation with the resident's daughter (C113). She had been given a copy of the relevant sections of the care plan. With regard to the allegations about timesheets and overtime, the claimant had been provided with copies of the rotas. The second respondent had checked the rotas and the signing in book when making up the claimant's salary. She had noted that on a few occasions between 17 December and 14 January (notably 4 January and 8 January) the claimant had arrived late and/or left early. On checking the diary where staff signed in and out she noted the claimant had mentioned when she had worked late (for example on 5 January 2016) but not when she had arrived late or left early. The second respondent had accordingly marked up these changes herself. She did not provide to the claimant copies of the relevant pages of the signing in book. The second respondent considered that the claimant would understand the sheets and rotas included in the information for the disciplinary hearing because she made up or approved the salaries for other employees. She had put her overtime and timing on the sheets because the first respondent had made salary payable according to the rota.

42. At the hearing, the second respondent raised with the claimant the allegation in relation to "*4 incidents between 10/12/15 to 12/01/2016 involving an accident where a resident was injured."* She stated: *"You failed to keep records and take necessary preventative measurements which caused 4 incidents in one month with the same service user and also failed to report the incidents to the regulatory authorities as required under the care standards legislation.."* The claimant gave a detailed response in relation to

these allegations. In relation to the first bruise she said the doctor had indicated a seizure during the night, though the cause was unclear. She said the second incident had happened on a Sunday when she was not on duty and she had not been informed until later. She said she had asked the moving and handling trainer to refresh staff training and to call the company to check the hoist. With regard to the last incident she said she had instructed the moving and handling trainer to fill in the form. The second respondent then asked her about two other incidents involving another resident in April and August 2015. The claimant said she did not know about these and had been respectively in hospital and on holiday at the times.

43. The claimant's grievance hearing was also held on 5 May 2016. Again, the second respondent chaired the meeting and was the decision maker, despite the fact that part of the grievance concerned her personally. On 29 or 30 May 2016 the second respondent sent the claimant a grievance outcome letter (C156) advising her that her grievance had not been upheld and the reasons. The grievances considered were those set out in the claimant's letter dated 3 January 2016. In relation to the 'governance and structure of the care home' and in particular, the issue of where the claimant's authority ended and the second respondent's began, which was her principal concern, the second respondent confirmed that she was the claimant's line manager and said that this had been clear since the transfer. In relation to the claimant's allegation that she had been asked to complete the respondents' policies and procedures, which was outside her remit, the second respondent said that she had already had her policies and procedures approved by the Care Inspectorate and she was only asking the claimant to provide some basic information. In relation to the claimant's allegation that there had been no food and fluid charts or incident forms [presumably between 17 December and the date of the letter] the second respondent said that there were and they just needed to be printed off. She stated that there was no gap in the food and fluid records during the transition period. With regard to the claimant's criticisms of the care plans and other documentation regarding the claimant's own role, the second respondent stated that the

claimant's representative, Nicky had confirmed that this related to the transition period and was now resolved. The second respondent said she had also been told by Nicky that the claimant's criticisms of the menu changes had also been resolved.

44. With regard to the issue of communication problems and alleged bullying and harassment by the second respondent, the outcome letter stated: *"You raised a specific incident where you alleged that I raised my hands to your face and said that you had mental issues. I recall an incident where you raised your voice and spoke to me inappropriate, gesturing with your hands. Later that evening you returned to apologise, which you denied in our meeting. We sat down and it was during this conversation I said to you that I felt that your attitude was childish. I did not say that you had mental issues. On reflection I see that this comment would be insulting and unprofessional and I apologise for this. However, you were unable to detail any other incidents and this was a one off occasion which has to be seen in the context that we had just had an argument. I am not bullying or harassing you."* In relation to the claimant's complaint that by speaking directly to the chef about menus she was bypassing the claimant and undermining her authority, the second respondent said she had come to the claimant for this information but had found her argumentative and unco-operative and had therefore found it easier to discuss with the chef directly. She stated: *"This was not an attempt to undermine your authority but a symptom of the fact our working relationship had become strained."*

45. The claimant appealed the grievance outcome by email dated 2 June (C158) and followed this up with a detailed letter stating her grounds on 5 June 2016 (C160). These included that the matters had been poorly investigated; that no unbiased party had conducted the hearing; that the second respondent's recollection was poor and that minutes of meetings had not been provided.

46. Before taking a decision on the outcome of the claimant's disciplinary hearing, the second respondent sent a referral to the Nursing and Midwifery

Council ("NMC"), believing that she was required to do so in circumstances where she was proposing to dismiss the claimant for misconduct. The referral (C208) was begun some time before 11 June 2016 and principally concerned the allegations about hiding the file and the handling of the incidents involving the resident, as well as a third issue which was not part of the claimant's disciplinary procedure. The referral was sent to the NMC some time prior to 21 July 2016. They duly investigated and on 9 September 2016 found no case to answer in respect of the claimant's fitness to practise as a nurse. In the course of their investigations the NMC took a statement from a resident's daughter. She told the investigator: *"She was aware of an atmosphere between the registrant and Tammana during the time the incidents occurred and felt that their responses were always blaming each other for things that were not really central to her concerns and her mother's care. She likened it to a "he says, she says" situation and it was obvious to her that they did not get on……"* She referred to "*the focus being on the bickering between the registrant and Tammana".* The NMC also took a statement from Malika Tatai, the moving and handling trainer. Ms Tatai also referred to tension between the claimant and the second respondent and said that this was evident to staff members. She told the NMC *"they shared an office and even with the door closed the staff members could hear shouting and raised voices from them both."* (C216f).

47. By letter dated 14 June 2016 (C164) the second respondent advised the claimant of the outcome of her disciplinary hearing on 5 May. The letter stated that the claimant was summarily dismissed by reason of gross misconduct. With regard to the allegations, the letter stated: *"You did accept that you had left your shift early on several occasions to go shopping and told staff. I am disappointed that you did not seek authorisation from myself….I find this a gross dereliction of your duty as registered manager."*

> *"Apart from the above allegation, throughout the meeting you denied the allegations or simply asked for witnesses despite the fact that I have given you details during the investigation and the hearing. You*

did not offer an alternative explanation for any of these allegations. I considered this against my evidence from other members of staff. I have no reason to disbelieve them.

I understand from staff that you informed them that I was planning to cut their hours which was not true. The staff members concerned trusted that this information was correct given it was coming from the registered manager. You are aware that any changes following the transfer of the home to myself had to follow a statutory process. Your actions could have resulted in staff walking out and making a claim against Rossa Care. I think you did this to undermine me and it could have affected the relationship I had with the staff who are entitled to be consulted with before any changes are made."

"I find it particularly dishonest that you took a package that you knew contained important employment documents from your previous employers, when you were aware that I had requested it. ..In fact, you had told me that you are entitled to a bonus and an increase in the salary and you were aware that I was expecting your documents file from the four seasons at the time you hid the package. Your decision to hide the package could have left your employer at risk of employment claims if I was found to be in breach of contract. You told me you felt I had made this up when there is no reason for me to do this. Jordan specifically recalls giving you the package and has been consistent in her evidence. I do believe you took the parcel deliberately knowing it would leave me at risk of claims. I am also aware from our discussions that you took a large amount of confidential information relating to Bennochy Lodge Care Home from the four seasons immediately before the transfer. Therefore I have every reason to believe that you would take confidential information deliberately and without permission."

> *"I am very concerned that several incidents have occurred where residents have been injured and the matter has not been handled correctly or properly…"*

48. The letter informed the claimant of her right of appeal.

49. The reason for the second respondent's dismissal of the claimant was that she believed her guilty of gross misconduct. Firstly, the second respondent believed the claimant had taken the parcel addressed to her and deliberately hidden it from her. Secondly she believed the claimant guilty of the misconduct set out in the preceding paragraphs. In relation to the allegations of leaving her shift early to shop, and falsely telling staff the respondents were going to cut their hours, the grounds for the belief were the second respondent's conversations with members of staff whom she did not identify to the claimant. These allegations were discussed with the claimant at the disciplinary hearing but no details were provided to her in advance of the hearing, despite the claimant's request for further specification. Furthermore, statements from the witnesses to this allegation were not provided to the claimant in advance, nor was she given an opportunity to know the identity of the complainers or to challenge their evidence in a meaningful way. The claimant was therefore not given a fair opportunity to prepare her case on these points.

50. With regard to the allegation about hiding the parcel, the grounds for the second respondent's belief were that: (i) Jordan Samson had stated she had given the parcel to the claimant; (ii) the second respondent recollected that the parcel had not been on or behind the shelf as the claimant had claimed; (iii) the wrapping paper on the parcel was torn at the corner, which the second respondent believed was evidence that the claimant had checked its contents; and (iv) the circumstances of its reappearance set out above. The second respondent believed that the claimant had an interest in hiding the parcel in that she had been pressing the second respondent to agree the terms of her bonus and salary increase. Information in the file would have

been relevant to that negotiation. The second respondent concluded that the claimant had hidden the parcel after first tearing back the paper from the corner to check what was in it. She considered that the claimant had done this because she did not want the second respondent to have the information in the file about her bonus and previous disciplinary record when negotiating the terms upon which the claimant would stay as manager of the home (instead of taking the job she had been offered at Four Seasons). In relation to her mail, the second respondent did not conclude that the claimant was guilty of this because although the letters were found opened in the manager's office and the second respondent had not experienced any further problems receiving her mail once the claimant had been suspended on 14 January, she considered that she did not have proof that it was the claimant who had opened them. Accordingly, this was not part of the reason for dismissal.

51. The steps taken by the first respondent to investigate the allegations against the claimant were as follows: The second respondent spoke to numerous members of staff and to the daughter of one resident. If she considered a person had something useful to say, she asked the person to sign a written statement. However, she also relied on allegations made by members of staff without taking statements from them, such as the allegation that the claimant had been telling staff that their hours would be cut. In relation to the parcel incident, the second respondent obtained the recorded delivery information from Four Seasons, tracked the delivery with the post office and questioned the person who had signed for the parcel, the claimant and Mrs Miyasar. With regard to the allegation about failure to properly handle resident incidents, the second respondent took a statement from the resident's daughter, and from Reena Anil and Karen Ritchie. She checked the forms, records and care plans and took copies where relevant. In relation to the allegation about the opened letters, the second respondent took a statement from William McAuley and questioned the claimant and Mrs Miyasar. In relation to the allegation that the claimant had been leaving work early to shop, the second respondent obtained copies of the staff rotas. After

the disciplinary hearing, the second respondent made some further inquiries. She spoke again to Karen Ritchie about the incident with the hoist. She asked her for further details about where she had been standing and who had been doing the hoisting. Ms Ritchie said that as the nurse, she had been supervising and not directly doing the handling. She said that she had asked for the form. She also checked with the moving and handling trainer.

52. The claimant's appeal against dismissal (C175) and her grievance appeal were heard together by Mr Singh on 22 November 2016. By letter dated 15 March 2017 (C268) the claimant was advised that neither of her appeals had been successful.

53. At the time of dismissal the claimant was aged 48 years. Her weekly basic pay was £585.57 gross and £459.79 net. Her average net weekly overtime with Four Seasons was £239.04 (see calculation below). The first respondent's weekly pension contribution was £6.92. The claimant did not claim Jobseekers Allowance following her dismissal.

54. The claimant did regular overtime before and after the transfer. The 'total pay year to date' on the claimant's pay slip dated 14 January 2016 (C22) was £36,469.65 gross. Tax for the year to date was £8,703.70 and employee NI was £280.29. Total net pay for the nine months of the tax year was £27,485.66. The claimant's net weekly basic pay was £459.79. The bonus received from Four Seasons in the 2015/16 tax year (C29) was £456.75 gross and £309 net. The claimant's net average monthly overtime for 2015/16 was £1,035.87 and her average weekly net overtime was £239.04.

55. The claimant is an experienced and well qualified nurse in a sector where there is a general and chronic shortage of nursing staff. The claimant did not make sufficient reasonable attempts to find alternative work. She did apply to New Cross Nursing Agency and had an interview with them but matters did not proceed. While the claimant would not have obtained a good reference

from the first respondent, she had worked for Four Seasons for three years and it would have been open to her to have asked them for a reference.

56. The Regional Manager at Four Seasons had offered the claimant the opportunity to stay with Four Seasons rather than transferring to the employment of the first respondent. She had told her: *"If you want to stay, just send me an email."* Four Seasons has other care homes within a reasonable travelling distance of the claimant's home in Kirkcaldy. There is another home in Kirkcaldy (Gowrie House Care Home) and one in Kelty. The claimant did not apply to the Four Seasons Home in Kelty because she had done some shifts at the Kelty Home some years previously, before becoming a permanent nurse with Four Seasons and she had not been happy there. Four Seasons also has a home in Newport on Tay, two further homes in Fife and two in Edinburgh. The claimant did not contact Four Seasons directly. She did put in an application through their website for a job at their Rosemount Care Home in Glasgow but the concern, which was not resolved, was how she would get there from Kirkcaldy and nothing came of the application.

57. The claimant's husband was diagnosed as terminally ill in August 2016. He was in receipt of a carer's allowance and the claimant was providing the care to him and receiving the benefits. She able to do this because she was not working. The allowance was £400 per month.

58. As mentioned above, in or about November 2016 the claimant applied to New Cross Nursing Agency (C35 to 38). She had had an interview with New Cross on Monday 28 November 2016 (C36), had produced her disclosure certificate and was about to start their training course when she was stopped from proceeding because the agency had received a poor reference. This was confirmed in an email from New Cross dated 19 December 2016 (C37) which stated: *"We are unable to proceed with your application at this time."* The email offered her feedback.

59. Had the claimant made reasonable attempts to apply for agency work and/or nursing/ care home manager vacancies, she could reasonably have expected to have found suitable replacement employment within six months from the date of her dismissal, that is by 14 December 2016, even allowing for the effect of the NMC investigation.

Observations on the Evidence

60. Where there was a conflict between the claimant's evidence and that of the respondent's witnesses, we generally preferred the latter evidence for the following reasons.

61. It was not in dispute that the claimant gave to the second respondent a letter bearing the date "*3rd January 2016*" (C72). However, there was a major conflict about the date the letter was given. The claimant testified that she emailed it to the second respondent on 3 January and handed a copy to her on 4 January. She was quite adamant about this. She did not produce the email. Her solicitor put to the second respondent: *"The claimant will give evidence that it was 3 January* [that you received the letter] *and on 14 January she did not speak to you about Sura's hours. She came and asked you when she could expect an answer to her grievance?"* The second respondent was adamant that the letter, though ostensibly dated 3 January, was in fact emailed to her on 8 January 2016. The second respondent explained that the significance of this latter date was that it immediately followed the production by the claimant and Mrs Miyasar on 7 January of the lost parcel containing the claimant's personnel file; and the second respondent's announcement that she was going to start an investigation - which ultimately revealed that the parcel had arrived and had been handed to the claimant on 24 December 2015. The second respondent stated of the letter in cross examination *"I believe that because I said on 7 January I'm going to start an investigation, on 8 January she raised this grievance."*

62. It is clear from the following paragraph of the claimant's letter (at C73) which she dated 3 January that she did not write it on that date and that it must have been written, or at least completed and sent later than 5 January: "*As a note, we have had some concerns from staff in regards to the date of pay which should be 5th January 2016. You were provided all staff pay information and pay dates from Four Seasons during the handover period in early December – you confirmed this with me at the time – and you advised there would be no disruption in dates of pay. Can you please clarify why they haven't been paid?"* It follows from the claimant's inclusion of this paragraph in her letter that her testimony that she emailed the letter to the second respondent on 3 January and handed her a hard copy on 4 January cannot be true. Furthermore, she has put a date on the letter which makes it appear to have been written earlier than it was. The claimant could not have known and stated that staff had not been paid on 5 January 2016 until that date had passed.

63. Another conflict arose in the evidence about the first respondent's documentation (care plans, charts, incident forms etc) at the time of and just after the takeover. The claimant stated in her ET1 that there were "*manifold issues in the respondent's business but the most important were*": breach of the regulation requiring at all times sufficient numbers of suitably qualified and competent persons on duty, record keeping and care plans. Reference was made to the letter dated 3 January 2016. On the issue of documentation, that letter stated that the second respondent had not made it clear who had authority and responsibility for it; that it was not the claimant's responsibility to complete or adjust policies; that although the second respondent had provided documentation this was "*inaccurate and confusing to the staff"* and that: *"When I advised you of the concerns from staff I was told this was my job to change the documents.*" She also stated in that letter that "*Care plans were provided a week after the transition however, again in my professional opinion and my personal knowledge of the service users in the care home over the last 9 years, these were unsuitable and incomplete."* The claimant's evidence in chief was inconsistent on this point. She was

asked: *"Four Seasons removed the paperwork. Did you have a replacement?* She replied: *"Unfortunately not."* She was asked: *"What did you have and not have?* She stated: "*For one week to ten days we didn't have anything on the system. Tamanna said everything was on the system but we didn't have the hard copies until after the Christmas holidays. She said she'd provide this on the electronic system so she said 'you can go on the Four Seasons electronic system and access the policies'. For two days the computers were broken, on 17 and 18 December. There was a problem on the connections between Rossa Ltd and Four Seasons. I can't remember how many days but after more than a week she said if you need any paperwork you can go to their system and adjust the paperwork. For a week there was no paperwork. One day a carer came to me and said 'Ahlam do you see what the new provider brought?' It was a care plan. It was very confusing. It was just there to say: 'I gave you something'. When Tamanna came I said 'you gave this to the night nurse. Their feedback is not good and it is not the paperwork they need for the care plan.' I said 'why don't you bring the care plan to me first so I can go through it and we can involve the staff."* Later in her evidence in chief she stated that there were no hard copies of the paperwork until 14 January and before this there was nothing.

64. Mrs Miyasar's evidence about the policies and procedures and other paperwork was rather vague, considering her role as administrator. She was asked in chief: *"When Four Seasons removed almost everything was there anything to replace it?"* She replied: *"Staff records, care plans and service user records were all kept. Tamanna promised she would bring her policies and forms to continue but we didn't see anything."* Later in her evidence in chief she was asked: *"The policies and procedures, when were they there?"* She answered: *"Tamanna asked Ahlam to download policies and procedures from some website and to update them. Ahlam didn't have time to do this. I went to the internet and there was the download. She had downloaded some document to work on and later we received the downloaded document…There was so much to be done, no paperwork, nothing. We had to start again."* Her evidence was not pinned down on the 'when' question.

However, when she was asked about the paperwork in cross examination she said that they had carried on using the forms and policies already in use until the second respondent had provided her own. Thus, she did not corroborate the claimant's evidence that there were initially no forms and policies in use at all. Malika Tatai's evidence about the documents and policies was that Four Seasons had taken all the documentation away; they were left with nothing; and there were no policies or procedures for about two months. However, she then said that the respondents had in fact provided documents but they were not clear and '*all the staff*' had said '*we're not working with that'* so they had carried on using Four Seasons documentation and policies without the logo for a while.

65. The second respondent's evidence, which we accepted was that on the first day after taking over the home, all policies, procedures and necessary documentation were in place both electronically and in hard copy. She testified that on or around 17 or 18 December the claimant had asked her '*Do you have your own care plans?'* and she had said yes and given the claimant the whole folder of documents she had prepared, including the care plans. She testified that the next day the claimant gave her documentation back to her and said that the nurses did not want to use it because it was 'not proper documentation'. The second respondent said she had replied that it was and that she would speak to the nurses. When she did so they told her that they had not refused to use it. She also testified that the Care Inspectorate (Carol Ambrose) had said they were very happy with her paperwork. With regard to the electronic system, the second respondent testified that on the first day after the take over everything was in place. She had provided computers, given out passwords, user names and the website address. She had explained to the staff "*If you want to use any document, policy or procedure, for example an incident reporting form then just print it out."* Thus, her evidence was that she had spoken to the staff about the forms and told them where to find the forms, policies and procedures on the system. She testified that the system had been down initially for two to four days because Mrs Miyasar had disconnected something she had been told

by Marc Jacobs not to disconnect and he had had to fix it. Mrs Sarah Yardley, a staff nurse was called to give evidence by the respondents. Her testimony was that there was no problem with the documentation. She said that they had carried on using Four Seasons documentation as the respondents' policies came in steadily. We preferred the second respondent's account of this matter of the documentation. She was consistent and coherent in her evidence and we found her statement that the Care Inspectorate had asked to see her documentation before granting her application for registration plausible. The claimant's account of this matter was inconsistent across her pleadings and evidence. At one point she was saying there was no documentation provided at the start at all, at another she testified that there was documentation but she did not approve of it. Mrs Tatai's evidence did not tally with anyone else's and Mrs Miyasar's was vague and somewhat evasive as to dates and details.

66. Thus, we concluded on the evidence we accepted that the respondents *had* provided documentation including care plans, charts, logs and all necessary forms and policies both electronically and in a paper folder from the outset; that the Care Inspectorate had required to see these as a condition of granting registration and had been satisfied with them; and that notwithstanding this, the claimant had told the second respondent that her documentation was inaccurate and that staff were confused and unhappy with it. In response to this, the second respondent had told her to use Four Seasons' documentation without their logo in the interim while she sorted things out. She had then consulted the staff and found they were not, in fact unhappy with her documentation as the claimant had said. This matter of the documentation was important because it was one of the main alleged protected disclosures in the claimant's letter dated 3 January 2016 and is therefore relevant to the question of whether the claimant reasonably believed she was making disclosures in the public interest; or alternatively, whether she was just furthering a private grievance or trying to deflect possible disciplinary action as the second respondent suggested.

67. There was a third conflict in the evidence regarding the events of 14 January 2016 when the claimant was suspended. The second respondent's account of events was that she had phoned the claimant and asked her to look out some employee bank details. When she got to the office the claimant handed these to her and at the same time said to her: *"What have you decided about Sura's hours?"* (This was a reference to an earlier discussion about Mrs Miyasar's overlapping hours.) The second respondent testified that she replied to the claimant: *"When I have decided I will let you know"* and that at this, the claimant raised her voice and told her: *"You are not allowed to touch anybody's hours. We are all protected under TUPE."* The second respondent replied that she would not do anything illegal and went on *"I don't want to argue with you. It's better that I leave the office."* Her evidence was that the claimant then shouted at her: *"You should just leave the building"* to which she objected: *"Why should I?"* The claimant replied: *"I am the manager and I am telling you to leave the building."* The second respondent said that she then sat down and began writing a letter on the computer. The claimant said to her: *"Oh you're going to terminate me. You can't terminate me. I will speak to my solicitor and take you for so much."* She testified that the claimant was watching as she typed and said: *"Oh, you're going to suspend me."* She then went and fetched two of the carers and said to them: *"Look what she's doing. She's suspending me."* The carers asked what was going on and the second respondent said: *"Did I call you into the office? Ask the person who called you in."* The second respondent printed and signed the letter she had typed (C76) and handed it to the claimant. The letter stated that the claimant was suspended from 14 January 2016 because the second respondent wanted to start a disciplinary investigation into the disappearance of the parcel. At this, the second respondent testified that Mrs Miyasar gathered the relatives and visitors and told them the claimant was being suspended. She also tried to involve the employees but they did not want to be involved. Mrs Reynolds put to the second respondent in cross examination: *"The claimant will say that she put in a grievance on 3 January and that she asked you on 14th when she could expect an answer to her grievance and that was what angered you?"*

68. The claimant's account of events in her evidence in chief was that the second respondent had come into the office and stood behind the claimant. She had then said to the administrator (Mrs Miyasar) "*I need to change your hours."* Mrs Miyasar had been upset and had said to the claimant: *"Ahlam she can't change my hours under TUPE."* The claimant testified that she had then said to the administrator: *"I don't think she can do it because you've finished your probation and are permanent but for the other contract I don't think you've finished your probation yet."* The specific details of this and the alleged reference to probation periods (which addressed a point from the second respondent's earlier evidence) were not corroborated by Mrs Miyasar. Her evidence was: *"Tammana was talking about she want to cut my hours. Every second day we have a meeting about my hours. That day I asked about 'I want to know why you want to cut my hours. 16 hours activities, 15 carer, 10 administrator. I asked the claimant if it would be effected. I left the office…*"

69. The claimant testified that after Mrs Miyasar left the office, the claimant was sitting on the chair and said to the second respondent *"What happened with my response?"* to which she replied: *"I told you you are rude again. You have to learn how to communicate with people because you are rude."* The claimant testified that she then said: *"How am I rude?"* and the second respondent replied: "*you have to follow instructions and be co-operative*." She stated that she then asked: *I need to know what's happening with my grievance"* and the second respondent then started shouting; said *"ok I will leave you"* and reappeared with Christine the laundry assistant, saying: *"What do you want me to do? Do you want me to leave the building?"* The claimant's testimony continued: "*Christine went away. Tammana then said: "OK I need a statement from you. I know you hid the parcel." I said 'How?' She said 'because Jordan Samson said she handed it to you.' I said: 'You need a statement?' She said 'yes.' I said: 'OK I'm busy just now. She said: 'I don't want you in this building.' I said: 'you don't want me in this building?' She said 'yes'.."* We preferred the second respondent's account of the

events of 14 January and concluded that the incident began with a question from the claimant about Mrs Miyasar's hours and not about the grievance. Our concerns about the claimant's evidence are set out above and we considered the second respondent's evidence generally more reliable. We also found her account of the matter more plausible. Furthermore, the detail of the claimant's account was not corroborated by Mrs Miyasar.

70. The respondent's witness Sarah Yardley gave only brief evidence but we found her a satisfactory witness who made appropriate concessions and gave her evidence in a careful and measured way.

Applicable Law

Whistle-blowing claims

Automatically Unfair Dismissal contrary to Section 103A ERA

71. Section 103A provides that:-

> *"**103A***
>
> *An employee who is dismissed shall be regarded for the purposes of this Part 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."*

Part IVA of the Act defines "protected disclosure". Section 43A provides:

> *"**43A Meaning of "protected disclosure"***
>
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H."*

72. A 'qualifying disclosure is defined in Section 43B as:-

> *"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 –*
>
> *(a) …….*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) ……*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) ……., or*
>
> *(f) ……."*

Detriment claims

73. Section 47B ERA provides:-

> *"**47B Protected disclosures***
>
> *(1) 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."*

Direct Race Discrimination claim

74. Section 13 Equality Act 2010 provides:

> "***13 Direct Discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

75. Section 136 of the Equality Act 2010 deals with the burden of proof and provides as follows:-

> ***"136 Burden of Proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
>
> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision."*

Unfair dismissal

76. Section 98 of the Employment Rights Act 1996 indicates how a Tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of the employee is a potentially fair reason under Section 98(2).

77. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant believed that he was guilty of misconduct. Thereafter the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The onus is neutral in relation to the issue of the grounds for the respondent's belief and the sufficiency of the investigation.

78. If the employer is successful in establishing the reason, the Tribunal must then move on to the second stage and apply Section 98(4) which provides:

> *"…where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

79. In applying that section the Tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used.

80. Finally the Tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question. The Employment Tribunal is not

permitted to substitute its view on any of these issues for that of the employer. Instead it must consider whether the process and decisions of the respondent fell within the range of a reasonable employer.

Discussion and Decision

Direct Race Discrimination claim

81. We first considered whether the respondent directly discriminated against the claimant contrary to Section 13 Equality Act 2010. The claimant testified (and we accepted) that she is an Arabic speaking Muslim from the Middle East and that the second respondent is a Muslim from Pakistan. We were happy to accept that the claimant had established the protected characteristic of race. She then referred to there being a difficult relationship in the Middle East (specifically Jordan) between Muslims of Middle Eastern heritage and those from Pakistan. Mrs Reynolds requested us to extrapolate from the claimant's personal experience and make general findings on relations between the two groups, but we did not consider we had a sufficient basis in evidence for doing so.

82. The direct discrimination claim depended upon whether the claimant was treated less favourably than other employees of the respondent were or would have been treated because of her protected characteristic of race. The less favourable treatment identified in the claimant's ET1 was *"the conduct at my investigatory meeting"*; and the claimant's dismissal (ET1 C31). At the Preliminary Hearing on 20 January 2017 the claimant was ordered to provide further and better particulars of her race discrimination claim and her response to the order was set out at C64 of the bundle of documents. The Tribunal carefully considered the evidence given by the claimant, Mrs Miyasar and the second respondent about these allegations and, having considered conflicts in the evidence, we made findings in fact accordingly as set out above. Generally, we preferred the evidence of the second respondent to that of the claimant for the reasons set out in our observations

on the evidence above and for the following additional reasons. The claimant used direct speech a lot, both in her evidence in chief and in the document at C64, thereby indicating that she could recall and was quoting exactly what was said. However, her evidence on a number of occasions was substantially different from what was set out in C64. For example, at C64 she alleged the second respondent had said: "*If you want to resign right now, I will be more than happy for you to as my lawyer has told me that in a few months I can become the care manager and save you salary for myself".* However, her account of this alleged remark in her examination in chief was that the second respondent had said: *"I can see you're tired and stressed. If you are not happy you can resign".* Mrs Miyasar also did not corroborate the claimant's evidence in relation to some occasions when she was said by the claimant to have been present.

83. By way of further example, the claimant stated in C64 that at the investigatory meeting on 17 February: "*When the second respondent raised an allegation that the claimant was discriminating against a member of staff she said "because you are Middle Eastern people, you do that.."* and "*you know what you do, this racist thing, because you are Middle East, both from Middle East Muslim."* She also alleged that at the same meeting the second respondent had stated: *"I don't like you here and from the first day you are going to ruin my business."* However, her evidence in chief on the subject was: "*At the end* [of the investigatory meeting] *she said 'you are racist'. She said one of the staff complained you are racist and you don't give her extra hours – why? And that you give them to your friend from the Middle East."* She did not refer in her examination in chief to anything said about the second respondent not liking her there or accusing her of ruining the business. We concluded from this that the claimant's evidence was not reliable regarding what had been said to her. We preferred the second respondent's evidence which was carefully given, more measured and consistent and not taken out of context. The second respondent testified that she had spoken with the claimant about discrimination at the investigatory meeting because between 14 January and 17 February three employees

had spoken to her and said the claimant was discriminating against them. She gave their names and detailed what they had told her and why they were concerned.

84. ***Stockton on Tees Borough Council v Aylott [2010] ICR 1278*** is authority for the proposition that it is not always necessary to construct a hypothetical comparator in cases where it is clear from the facts that the treatment was because of a protected characteristic. The fundamental question is the reason for the act complained of. In the present case if one were to construct a hypothetical comparator it would be an employee of the respondent who did not share the claimant's protected characteristic but whose relevant circumstances were otherwise the same.

85. The EAT recently pointed out in the case of ***Efobi v Royal Mail Group Ltd UKEAT 0203/16*** that the wording of this section in the Equality Act 2010 differs from that of the preceding legislation. Although it is headed '*burden of proof*', it states "*if there are facts from which the court could decide, in the absence of any other explanation, …"* whereas the sections of the various Acts which preceded the Equality Act provided in sum, that '*where* ***a complainant proved*** *facts from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent that…*' Thus, the EAT held in ***Efobi*** that there is no burden on claimants to prove facts from which a tribunal could decide that the respondent discriminated. Rather, the test requires the Tribunal to consider all the evidence from all sources at the end of the hearing to decide whether or not there are facts from which it could decide etc…" We approached the matter in this way. It is trite law that he mere fact of the claimant establishing a protected characteristic and there being a difference in treatment on the facts only indicate a possibility of discrimination. They are not sufficient on their own for the court to decide on the balance of probabilities that the respondent discriminated. There must be "*something more*" in the factual matrix from which the court could decide that the protected characteristic was the reason for the treatment and any explanation by the respondent must be considered.

86. The first allegation was that on an unknown date shortly before the first respondent acquired the business from Four Seasons the second respondent asked the claimant and Sura Miyasar if they were Muslim and where they were from. It was averred that the claimant replied "*from the Middle East*" and that the second respondent simply said "*okay*" and made no further comment or attempt at conversation. The implication was that on learning of their ethnic origin the second respondent had treated them less favourably by not making conversation. Mrs Miyasar did not corroborate the detail of this in her evidence or indicate that there had been any adverse reaction or any failure to converse. The second respondent denied having asked whether the claimant was Muslim. She said she knew this from the claimant's dress. She accepted asking where she was from. We accepted the second respondent's evidence on this point. It seemed perfectly feasible and included an appropriate concession. We did not conclude that the second respondent treated the claimant less favourably than she would have treated others because of her race. We did not conclude that simply asking someone where they were from was less favourable treatment, nor did we regard it as 'something more' in the circumstances.

87. Thus, taking matters as a whole, we found that on an occasion shortly after taking over, the second respondent asked the claimant where she was from; that, having been concerned about her manner with relatives, she requested the claimant to control her voice tone when speaking to them; that she had explained that she would pay the claimant for attending work voluntarily out of hours on 18 December but would not do so on a future occasion; That she had asked the claimant to try the other carers before stepping into a shift herself at manager's rate; that Mr Singh had been upset and angry that his jacket had been moved from the office to the staff room and had expressed this to the claimant; that on 1 January 2016 the second respondent told the claimant: "*sometimes you behave like a child. You should not get emotional so quickly*"….. "*Maybe you have concerns about your family and your home. If there is anything distracting you with your family you can tell me. It*

happens sometimes. Maybe there are other factors. You can share with me. It happens sometimes but try to control your behaviour and your voice tone." We found that the second respondent had asked the claimant at the investigatory meeting about allegations she had received from three members of staff of preferential treatment of Sura Miyasar and alleged discrimination against them by the claimant. There was no suggestion that these complaints to the second respondent were not genuine. Clearly, if an employer receives allegations of workplace discrimination she must investigate and the second respondent did so in the manner we record in our findings in fact. We did not conclude that the second respondent had treated the claimant less favourably than she would have treated a hypothetical or real comparator not of her race in the circumstances. We concluded in relation to each incident that the second respondent (and on one occasion Mr Singh) had non-discriminatory reasons for acting as they did and that the claimant's race was no part of the reason why any of the above acts were done and furthermore that it was no part of the reason for dismissal (for which reason, see below).

88. We considered the issue of late payment of the claimant's December salary. We carefully considered Mrs Miyasar's evidence of her conversation with the second respondent about her own late payment. We noted that all staff salaries were paid late and that it was not confined to any person or group of people. We viewed the second respondent's handling of the late payment of her staff and the conversations we have recorded in our findings in fact as highly unsatisfactory. However, we did not conclude that it had anything to do with the race of the claimant or Mrs Miyasar, nor did we conclude that race was the reason why Mr McAulay had managed to secure a cheque and they had not. By this stage, the relationship between the claimant and the second respondent had become difficult on the evidence of both parties. On her own evidence, some of the things the claimant had said to the second respondent were inflammatory and disrespectful and would have been likely to lead to an evaporation of goodwill and we find that this, and not the claimant's race was the reason for the treatment.

89. In these circumstances, the claim of direct race discrimination does not succeed.

Whistle-blowing claims

Did the claimant make qualifying disclosures as set out in the ET1?

90. The definition of a 'qualifying disclosure' is "*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 states of affairs set out in Section 43B from (a) to (f). In this case the claimant relies upon (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and/or (d) that the health and safety of any individual has been, is being or is likely to be endangered. It is necessary for the Tribunal to analyse each of the suggested disclosures to establish whether (a) they communicate information rather than simply make allegations; (b) in the reasonable belief of the claimant, they were made in the public interest; (c) whether they tended to show one or more of the states of affairs listed in section 43B ERA. If so, we must consider (d) whether the reason or principal reason for the claimant's dismissal was that she made one or more protected disclosures; and (e) whether the protected disclosures individually or collectively resulted in the particular detriment alleged by the claimant.

91. We found the claimant's submissions regarding the alleged protected disclosures confusing. A very large number of alleged disclosures were said to have been made and this has greatly added to the length and complexity of this judgment. At the start of the hearing, the Employment Judge requested Mrs Reynolds to confirm which communications were said by the claimant to be protected disclosures. She took us to paragraph 3 of the ET1 (C29) which refers to alleged verbal disclosures between 1[7] December 2015 and 14 January 2016 and the letter dated 3 January 2016. In addition

to the letter dated 3 January 2016, Mrs Reynolds referred to a letter (C144) which she stated, the claimant would say was sent on 25 April 2016.

92. However, in her written submissions sent in after the end of the hearing Mrs Reynolds greatly expanded the list of alleged protected disclosures. Her final list (per paragraph 12 of the written submissions for the claimant) was as follows: (i) verbal disclosures to the second respondent on several dates in the period commencing 17 December 2015 to 14 January 2016; (ii) written disclosures by letter dated 3 January 2016; (iii) written disclosures said to be contained in (to quote from Ms Reynolds' submissions) "*an undated letter sent under covering email dated 15 April 2016 to Mrs Anjum*". (No document number given). (iv) further written disclosures in an undated letter said to have been sent by recorded delivery in or around mid-April 2016. Again, no document number was given by Mrs Reynolds in her submissions. On the basis of her statement at the outset of the hearing, we have assumed this is a reference to the undated letter at (C144), which the inventory of productions dates "25 April 2016"; (v) Mrs Reynolds submitted that the claimant made protected disclosures at the investigatory meeting, the disciplinary hearing, the disciplinary appeal hearing, the grievance meeting and the grievance appeal meeting; and finally (vi) she submitted that protected disclosures were made in both the claimant's undated grounds of appeal against dismissal, and her grievance appeal. No document numbers or dates were given. We have assumed that the reference to 'undated grounds of appeal against dismissal' is a reference to document (C175) said to have been attached to an email of 29 June 2016; and that the reference to the grievance appeal is to (C160) dated 5 June 2016. The specific disclosures said to have been made in the documents and meetings were not set out. As the claimant has put forward a number of alleged disclosures we are required to examine each in turn as best we can in the circumstances:-

(i) Alleged verbal disclosures made between 17 December 2015 and 14 January 2016; In the ET1 these are stated to have been

communicated verbally *"on various occasions including two management meetings"* and to concern "*failings in terms of care which the respondent was providing to the residents since taking over the business".*

93. The claimant's evidence regarding her alleged verbal disclosures to the second respondent was vague and general and it was not possible to make any detailed findings in fact beyond those in the relevant section above. For example, she was asked by Mrs Reynolds in relation to incident reporting forms: *"Can you be very clear for the Tribunal if and when you raised this with Mrs Anjum?"* Her response was: *"Most of the time my conversation with her was about these concerns. 'We need this for that'. I was feeling worried about and that she knows we need this paper".* She did make one specific statement in evidence to the effect that on 20 December 2015 the second respondent wanted to do a shift as a carer and that the claimant had told her that in order to do this she would need SSSC registration. However, there was no other detail given and the point was not put to the second respondent in cross examination in the absence of which we were not prepared to give it any weight. On balance, therefore we did not conclude on the evidence we heard that the claimant had made verbal qualifying disclosures between 17 December 2015 and 14 January 2016.

(ii) Written disclosures by letter dated 3 January 2016.

94. The claimant testified that she emailed this letter to the second respondent on 3 January 2016 and handed it to her on 4 January. We found as fact that this letter was emailed to the second respondent on 8 January 2016.

(a) Did the disclosures convey information or simply make allegations?

95. In the case of ***Cavendish Munro v Geduld 2010 ICR 325*** the EAT made a distinction between the disclosure of information and the making of an allegation. They held that the ordinary meaning of giving "information" is

'conveying facts' and put forward the following example: "*The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around*" would be a disclosure of information. By contrast: *"You are not complying with health and safety requirements"* would be an allegation and not the communication of information. We considered the content of the claimant's letter in this light and concluded that the following extracts from the letter dated 3 January appeared to disclose information which might show one of the states of affairs in section 43B:-

> *"I am finding it difficult to ascertain exactly where my authority ends and where yours begins. ….. you have not made it clear who has authority and responsibility for certain tasks.*
>
> *we still do not have correct and sufficient documentation at Bennochy Care Lodge. This includes bed rail charts, position charts, food and fluid charts, fire and water safety, maintenance log, gas and electric documents, risk assessments, health and safety in the kitchen*
>
> *Care plans were provided a week after the transition however, again in my professional opinion and my personal knowledge of the service users in the care home over the last 9 years, these were unsuitable and incomplete.*
>
> *Furthermore we have had two new residents at Bennochy Care Lodge. I still have not been able to complete their documentation as I am waiting for information Rossa Home should have provided weeks ago.*
>
> *we have had some concerns from staff in regards to the date of pay which should be 5th January 2016. You were provided all staff pay information and pay dates from Four Seasons during the handover period in early December – you confirmed this with me at the time –*

and you advised there would be no disruption in dates of pay. Can you please clarify why they haven't been paid?

we do not have appropriate headed paperwork from Rossa Home which includes receipt books, headed paper for all care home correspondence, receipt books, fees paperwork, required information regarding each residence including their date of entry, personal allowances for each residence and accounts for each residence. Families have been asking to see up to date accounts for their relative's personal allowances. As far as I am aware you advised our administrator that we no longer have a separate account for our residents.

….we do not have a secure and professional way in which to communicate with outside partners or even with each other in the care home."

(b) In the reasonable belief of the claimant were these disclosures made in the public interest per section 43B?

96. What is at issue is the reasonable belief of the worker making the disclosure, not the reasonable belief of a reasonable worker. The focus is on what the claimant believed, not what anyone else might have believed in the circumstances. Thus we asked ourselves: Did the claimant reasonably believe that the statements were true and that she was making these disclosures in the public interest?

97. This is a subjective test with an objective element. We are required to take into account the claimant's personality and individual circumstances when judging whether her belief was reasonable. The requirement that the belief must be 'reasonable' suggests there must be some proper or substantiated basis for it. The requirement for a 'reasonable belief' does not mean that belief must necessarily be true and accurate. However, a worker cannot

reasonably believe that an allegation tends to show there has been a relevant failure if she believes the allegation to be false. It was held by the Court of Appeal in ***Babula v Waltham Forest College [2007] ICR 1026*** that a worker can still avail herself of the statutory protection even if she is mistaken about the existence of the legal obligation on which the disclosure was based. There can be a qualifying disclosure even if the worker is wrong but reasonably mistaken in the belief. The focus is on what the claimant believed and the threshold of belief is low. The matter must be judged on the facts as understood by the claimant at the time the disclosure was made. On this test, we concluded on balance, that the disclosure in the letter which the claimant reasonably believed was true and tended to show one or more of the states of affairs in Section 43B was the disclosure in relation to the late payment of staff. Otherwise, we did not conclude that the claimant reasonably believed the other statements were true and tended to show one of the states of affairs listed in Section 43B. We are applying a subjective test with an objective element. We concluded that the timing of the letter and the claimant's predating of it suggested that the claimant's primary motivation for sending the letter was the impending employment dispute rather than the public interest. In saying this, we appreciate that motivation is only one factor and that it may be possible for a worker with ulterior motives to reasonably believe that her disclosure is made in the public interest but it will be a question of fact in each case and we think on balance here that with the sole exception of the disclosure about staff pay being late, the claimant did not reasonably believe that she was making the disclosures in the public interest. We find that the respondents had provided documentation that had been accepted by the Care Inspectorate. Mrs Yardley testified that there was no difficulty with documentation. Whilst the claimant may not have liked the respondents' documentation, on the evidence we accepted did not conclude that she reasonably believed it did not comply with a legal obligation or would endanger the health and safety of any individual. The (serious) allegation that the first respondent no longer had a separate account for residents was not addressed in evidence by either the claimant or Mrs Miyasar. The home's internet was fixed by 21 December 2015 and the

claimant was clearly communicating by email before 8 January. We did not find on the evidence we accepted that she reasonably believed there was no secure or professional means of communication internally or with the outside world on 8 January 2016 when the letter was sent. With regard to the allegation about the two new residents, it was not clear what the outstanding information was and in the context above, we did not accept on the facts that the claimant reasonably believed this to be the case.

(c) *Did the disclosures tend to show one or more of the states of affairs listed in Section 43B?*

98. In this case the claimant relies upon (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and/or (d) that the health and safety of any individual has been, is being or is likely to be endangered. This is discussed in the previous paragraph.

(iii) written disclosures by undated letter said to have been sent under cover of an email of 15 April 2016 (C138);

99. These written disclosures were said to be contained in (to quote from Mrs Reynolds' submissions) "*an undated letter sent under covering email dated 15 April 2016 to Mrs Anjum*". No document number was given in the submissions and it is unclear which document is being referred to. Document (C138) is an email dated 15 April 2016 but it appears to be addressed to the claimant from Mrs Miyasar. The next document in the bundle at C139 is an undated letter to Mrs Anjum from the claimant responding to the disciplinary invite letter of 17 March. The claimant's evidence about this was that she was not certain if or when she sent it. In any event, it was not put to the second respondent in cross examination and we are not, on the basis of this evidence, prepared to make a finding that it was sent.

(iv) Further written disclosures in an undated letter said to have been sent by recorded delivery in or around mid April 2016 (C144);

100. Mrs Reynolds stated at the outset of the hearing that the claimant would say this letter was sent on 25 April 2016. In her submissions at the end of the hearing, she referred to the letter being sent by recorded delivery. No recorded delivery slip was produced. Furthermore, the letter was not put to the second respondent in cross examination. It was not put to her that she had received it, whether by recorded delivery or otherwise. The claimant's evidence in chief about the letter was that she could not remember when or how it was sent. In cross examination Mr West asked the claimant: *"C144 is a letter you say you sent Tamanna. She has told me she didn't receive it. Do you say it was sent by email?"* The claimant responded: *"No. I sent the letter recorded delivery."* Mr West asked whether there was a recorded delivery receipt and the claimant replied: *"I can look at home but I don't have it at the moment."* Thus, the claimant could not remember when or how she sent the letter when giving her evidence in chief. However, she recalled in cross examination that she had sent it by recorded delivery. No receipt or slip was produced. Furthermore, the letter was not put to the second respondent in cross. In these circumstances, we did not conclude that the letter was sent.

(v) Mrs Reynolds submitted that the claimant made disclosures at the investigatory meeting, the disciplinary hearing, the disciplinary appeal hearing, the grievance meeting and the grievance appeal meeting.

101. With regard to the disclosures said to have been made at the investigatory meeting, disciplinary hearing and disciplinary appeal hearing, it was unclear what the contents of these disclosures were said to be. They were not set out in the submissions, nor are they supported by the findings in fact. With regard to disclosures at the grievance meeting and grievance appeal meeting, they are presumably the same as those made in the original grievance letter dated 3 January 2016. Thus, the analysis set out under (ii) above would be relevant. The only difference is the dates the disclosures were made. Any disclosures made at the grievance appeal meeting on 22 November post-date the decision to dismiss and all the alleged detriments

with the exception of the failure to uphold the grievance. We did not conclude on the evidence before us and in the absence of detailed submissions on the point that qualifying disclosures were made at these meetings.

(vi) It was submitted that protected disclosures were made in both her undated grounds of appeal against dismissal, said to have been attached to an email of 29 June 2016 (C175) and her grievance appeal dated 5 June 2016 (C160).

102. Mrs Reynolds submitted that protected disclosures were made in both the claimant's grounds of appeal against dismissal and appeal against the grievance outcome. No document numbers were given in her submissions. In the absence of document numbers, we have assumed that the reference to 'grounds of appeal against dismissal' is a reference to the document said to have been attached to an email of 29 June 2016 (C175) and her grievance appeal dated 5 June 2016 (C160). Again, we did not conclude on the evidence before us and in the absence of detailed submissions on the point that qualifying disclosures were made.

Was the claimant dismissed for the reason or principal reason that she made a protected disclosure, contrary to Section 103A ERA?

103. The only qualifying disclosure we find was made by the claimant related to the late payment of staff in the letter dated 3 January 2016, which disclosure was made on 8 January 2016. We turned to consider whether the making of this disclosure was the reason or principal reason for the claimant's dismissal. As submitted by Mrs Reynolds, under section 103A ERA, if the reason or principal reason for the claimant's dismissal is that she made a protected disclosure then the dismissal is automatically unfair. She referred the Tribunal to ***Kuzel v Roche Products Limited [2008] EWCA Civ 380*** (Case 2) in which, she submitted, the Court of Appeal held that it is for the employer to prove that it had a potentially fair reason for dismissing an employee, or to prove that the reason asserted by the employee was not the

real reason. She stated that when an employee asserts a different reason as the claimant does in this case, the burden of proof does not pass to them. We have assumed for present purposes that the burden is on the first respondent to prove the reason for dismissal. Mrs Reynolds submitted that the rapid deterioration in the relationship between the claimant and the second respondent from the outset was caused by the claimant's protected disclosures and the respondent's strong and unreasonable reaction to them. She went on "*It is for the respondents to prove that this is not in fact the reason for the claimant's dismissal and it was on the grounds of misconduct. We submit they cannot do so."* In this case we concluded that the protected disclosure was not the reason or principal reason (or, indeed, any part of the reason) for dismissal. We consider that the first respondent has proved that the reason for dismissal was its belief in the claimant's misconduct. It is true that the relationship between the claimant and the second respondent did rapidly deteriorate. However, a number of the statements the claimant testified that she made to the second respondent quite early on were somewhat intemperate and inflammatory (see below) and we were not surprised that the relationship became problematic.

Alternatively, was x a detriment?

104. "Detriment" is normally understood to mean 'putting under a disadvantage'. The question is; compared with other workers (real or hypothetical) has the claimant suffered some disadvantage? A detriment has been said to exist if a reasonable worker might take the view that the employer's action was to his detriment in all the circumstances. In this case, the detriments alleged (paragraph 13 ET1 C30) are: "*my suspension, the failure to address my grievances, the allegations of gross misconduct against me and the failure to follow a fair disciplinary procedure."* These would be detriments.

Was the claimant "subjected to" this detriment?

105. It is not enough that the detriment arises and that the claimant suffers as a result. Liability under Section 47B will only be established if the claimant shows that the detriment arises from the act or deliberate failure to act by the respondent. Here we concluded that the claimant was subjected to the detriments she alleged.

Was the claimant subjected to it on the ground that she had made a protected disclosure?

106. The issue in this case is whether the claimant was subjected to the detriments on the ground that she had made the protected disclosure(s) identified above. In ***Fecitt v NHS Manchester [2012] IRLR 64***, it was held that there must be some causative link between a protected disclosure and the alleged detriment. A mere connection is not enough. The Court of Appeal gave helpful guidance on the issue of causation in the ***Fecitt*** case. At paragraph 45 Elias LJ said this: *"s. 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."*

107. When considering this it is important to note that Section 48(2) ERA states: "*On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done."* Thus, the respondent bears the burden of proving, on the balance of probabilities, the ground on which it acted or failed to act. The following further passage from Elias LJ's Judgment in ***Fecitt*** is of assistance: *"Once an employer satisfies the tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles."* At paragraph 51 he further states: *"where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a*

critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."

108. Interestingly, the claimant was asked by Mrs Reynolds why she thought she was suspended on 14 January 2016. She replied: *"The first reason I believe is that* [she] *doesn't want me at the home because of my personality, my plan as a manager, because I am Arab from the Middle East, because she wants to save the money and because I am not a yes person and she wants a yes person."* The claimant did not mention a protected disclosure as any part of the reason. Similarly, we did not conclude that the claimant's suspension, nor indeed any of the other detriments to which she was subjected; the alleged failure to address her grievances, the allegations of gross misconduct against her and the failure to follow a fair disciplinary procedure, were on the ground that she made a protected disclosure. We concluded that none of them was materially influenced by the disclosure. In our assessment, the second respondent genuinely believed the claimant guilty of gross misconduct as alleged. With regard to the failure to follow a fair disciplinary procedure, we considered that this stemmed from lack of experience and the initial mistaken decision that the second respondent would be an appropriate decision maker in the circumstances. (This latter point also applied to the grievance). We thought the claimant's assessment that there was a personality clash between the second respondent and herself was probably correct and we certainly had the impression that she was '*not a yes person*'. Mrs Yardley's evidence was that the second respondent was a gentle person who was unsupported, was subjected to 'quite a lot of aggression' and felt unwelcome in her own home.

Unfair dismissal claim

Reason for Dismissal

109. We were satisfied that the first respondent had shown that the claimant was dismissed for a reason relating to her conduct and furthermore, that they had shown that the dismissal was neither discriminatory nor automatically unfair. It was the second respondent who made the decision to dismiss the claimant. It was clear from the evidence that she genuinely and sincerely believed the claimant guilty of gross misconduct. The second respondent believed the claimant had taken the parcel addressed to her and hidden it from her. At paragraph 47(a) of her submissions for the claimant Mrs Reynolds stated: *"During the course of her evidence Mrs Anjum stated that the parcel had been found in three different locations. This is not therefore a solid foundation upon which an employer can assert they have a genuine belief in its employee's guilt."* We were confused by this argument (which was not, in any event in accordance with the Judge's notes of the second respondent's evidence) because it was not the second respondent who had found the parcel.

110. The second respondent also believed the claimant guilty of other heads of misconduct as set out in the findings in fact above. In relation to the allegations of leaving her shift early to shop, and falsely telling staff the respondents were going to cut their hours, the grounds for the belief were the second respondent's conversations with members of staff whom she did not identify to the claimant. We have discussed this further below.

111. With regard to the allegation about hiding the parcel, the grounds for the second respondent's belief were that: (i) Jordan Samson had stated she had handed the parcel in to the claimant on 24 December 2015; (ii) the second respondent recollected that the parcel had not been on or behind the shelf as the claimant had claimed; (iii) the wrapping paper on the parcel was torn at the corner, which the second respondent believed was evidence that the claimant had checked its contents; and (iv) the circumstances of its reappearance set out in the findings in fact above. The second respondent

believed that the claimant had an interest in hiding the parcel in that she had been pressing the second respondent to agree the terms of her bonus and salary increase. Information in the file would have been relevant to that negotiation. The second respondent concluded that the claimant had hidden the parcel after first tearing back the paper from the corner to check what was in it. She considered that the claimant had done this because she did not want the second respondent to have the information in the file about her bonus and previous disciplinary record when negotiating the terms upon which the claimant would stay as manager of the home (instead of taking the job she had been offered at Four Seasons). We concluded on balance that the second respondent had reasonable grounds for her belief. In relation to her mail, the second respondent did not conclude that the claimant was guilty of this because although the letters were found opened in the manager's office and the second respondent had not experienced any further problems receiving her mail once the claimant had been suspended on 14 January, she considered that she did not have proof that it was the claimant who had opened them. Accordingly, this was not part of the reason for dismissal.

112. The steps taken by the first respondent to investigate the allegations against the claimant were as follows: The second respondent spoke to numerous members of staff and to the daughter of one resident. If she considered a person had something useful to say, she asked the person to sign a written statement. However, she also relied on allegations made by members of staff without taking statements from them, such as the allegation that the claimant had been telling staff that their hours would be cut. In relation to the parcel incident, the second respondent obtained the recorded delivery information from Four Seasons, tracked the delivery with the post office and questioned the person who had signed for the parcel, the claimant and Mrs Miyasar. With regard to the allegation about failure to properly handle resident incidents, the second respondent took statements from the resident's daughter, Reena Anil and Karen Ritchie. She checked the relevant forms, records and care plans and took copies where relevant. In relation to

the allegation about the opened letters, the second respondent took a statement from William McAulay and questioned the claimant and Mrs Miyasar. In relation to the allegation that the claimant had been leaving work early to shop, the second respondent obtained copies of the staff rotas. After the disciplinary hearing, the second respondent made some further inquiries. She spoke again to Karen Ritchie about the incident with the hoist. She asked her for further details about where she had been standing and who had been doing the hoisting. She also checked with the moving and handling trainer whether she had called the company to check the hoist and whether she had been asked to provide refresher training.

113. Turning to the investigation carried out by the second respondent, Mrs Reynolds submitted that it was insufficient in scope. Firstly, she submitted, the respondents ought to have made inquiries into whether it was possible that the claimant or someone else using or entering the office had accidentally picked the parcel up either on its own or with other papers and accidentally moved it. With regard to the sufficiency of an investigation, the test is whether the investigation carried out by the respondent was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. It is not for us to substitute the steps we might have taken. We did not consider the failure to make this specific inquiry would take the respondents' investigation outside the range; particularly given that the claimant's evidence was that the parcel was found down the back of the shelf unit. If this was true then asking people if they had accidentally moved it would presumably have been futile. Secondly, Mrs Reynolds submitted that the respondents ought to have made further inquiries into whether the three letters had been opened accidentally. In fact, the second respondent's evidence was that she concluded from the disciplinary hearing that the allegation against the claimant that she had opened the second respondent's mail was not proven and that it should not form part of the reason for dismissal. This criticism therefore does not apply.

114. Mrs Reynolds submitted that the investigation was required to be rigorous given that dismissal for misconduct might blight the claimant's career and reputation and we accept that this was one of the factors against which the range of reasonable investigations should be considered. Mrs Reynolds submitted that there ought to have been interviews with the resident's daughter and Mrs Tatai (on the second respondent's evidence this was done) as well as further statements taken from Karen, Jordan and William. In paragraph 50 of the claimant's submissions Mrs Reynolds lists other steps she submits ought to have been taken in the investigation. In relation to whether sufficient investigation had been carried out, we considered that the investigation done by the respondent was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances, albeit that there were other investigations that might have been done.

115. In the circumstances, we are satisfied that the respondents have shown that the claimant was dismissed for a reason relating to her conduct. That is a potentially fair reason for the purposes of Section 98(2) of the Employment Rights Act 1996 (ERA).

Reasonableness

116. We then turned to consider the application of Section 98(4) to the facts of this case. In the context of the reason for dismissal we considered the procedure adopted by the first respondent in reaching its decision.

117. Looking at the procedure used by the respondent in the round, we had some serious concerns: Firstly, the second respondent was not an impartial decision maker. She was the complainer and primary witness of many of the complaints. We were also of the view that her relationship with the claimant had broken down quite early on. We did take into account the first respondent's size and administrative resources. They are a small to medium sized company on a tight budget. The second respondent had considered

trying to find an alternative decision maker. She had asked her business partner Mr Singh but he was said to be unable to travel to the disciplinary hearing from London. (No further detail was given). The respondents' HR advisers had said they could assist but that they would charge for sending someone from Manchester. (We were not told how much or why this was unaffordable.) In all the circumstances of this case, including the state of the relationship between the claimant and the second respondent and the importance of the matter being considered impartially we concluded that potentially practicable alternatives were available and that the lack of an impartial decision maker was a serious flaw in the proceedings. This was further compounded by the fact that the second respondent conducted both the investigation and the disciplinary hearing. The third area where we considered the fairness of the procedure was seriously flawed was in relation to the allegations that the claimant had been leaving her shift early to shop, and falsely telling staff the respondents were going to cut their hours. The grounds for this belief were conversations the second respondent had had with members of staff whom she did not identify to the claimant. These allegations were discussed with the claimant at the disciplinary hearing but no details were provided to her in advance of the hearing, despite the claimant's request for further specification. Furthermore, statements from the witnesses were not provided to the claimant in advance, nor was she given an opportunity to know the identity of the complainers or to challenge their evidence in a meaningful way. Thus, in our view, claimant was not given a fair opportunity to prepare her case on these points. Nor did the appeal carried out by Mr Singh (who did not give evidence) remedy matters to any extent on the evidence we heard.

118. The test is whether, in all the above circumstances the procedure adopted by the respondent was within the range of reasonable procedures a reasonable employer might have adopted in the same circumstances. We bore in mind the small size and limited administrative resources of the first respondent, and the fact that the claimant was the manager. However, we concluded that notwithstanding these matters, the procedure was not within that range for

the reasons set out above. Had the same belief been arrived at by an impartial decision maker, using a fair procedure then the reason for dismissal would have been sufficient for the purposes of section 98(4) ERA. We mention this because it is relevant to the Polkey considerations below.

Remedy for Unfair Dismissal

Basic Award

119. The claimant is entitled to a basic award. At the time of dismissal she was aged 48 years. Her gross weekly pay was £585.57 capped at £479. She had completed 3 years' service. 3 x £479 x 1.5 = £2,156 (rounded to the nearest whole pound).

Compensatory Award

120. Under Section 123(1) ERA 1996, the amount of any compensatory award

> "*shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

Financial Loss

121. At the time of her dismissal the claimant was earning £459.79 net basic pay per week. She was also in receipt of an employer's pension contribution of £6.92 per week. Her average net weekly overtime was £239.04 (see paragraph below). Thus her total net loss per week was £705.75. She was dismissed on 14 June 2016 and is awarded loss to 14 December 2016 (26 weeks) for the reasons set out below. Her net loss before adjustments was 26 x £705.75 = £18,349.50 rounded to £18,350.

122. The fairest way to calculate the claimant's average overtime is to take the 'total pay year to date' from the claimant's pay slip dated 14 January 2016 (C22) and average this out over the nine months of the tax year. The figure for gross pay to date is £36,469.65. Tax for the year to date is £8,703.70 and employee NI is £280.29. This gives total net pay for the nine months of the tax year at £27,485.66. The claimant's net weekly figure in evidence (which we accepted) was £459.79. That figure multiplied by 52, divided by 12 and multiplied by 9 will give the total net basic pay for the first nine months of the 2015/16 tax year: £459.79 x 52 = £23,909.08/12 = £1,983.76 x 9 =£17,853.81. Total net pay for the tax year less basic net pay for that year gives the amount of net pay earned in the tax year for overtime and bonus: £27,485.66 - £17,853.81 = £9,631.85. The bonus received from Four Seasons in the 2015/16 tax year is shown on the August pay slip (C29) as £456.75 gross. This would be £309 net. £9,631.85 less £309 should give the figure for net overtime for the nine months of the tax year: £9,631.85 - £309 = £9,322.85. Divided by 9 this gives average monthly overtime of £1,035.87 and weekly average net overtime of £239.04. (There are 38.99r weeks in 9 months). This is the best evidence we have to calculate the claimant's average net overtime. There was no evidence of any major change in the staff complement after the transfer (as would be expected) so we have assumed the claimant would have continued to earn overtime at the same rate for the period of loss.

Mitigation of Loss

123. The common law rule that a person in receipt of compensation must take reasonable steps to mitigate their losses is given statutory force in unfair dismissal claims by Section 123(4) ERA. The respondent submitted that the claimant is an experienced and well qualified nurse in a sector where there is a shortage of nursing staff. The claimant accepted in cross examination that there is a general shortage of nurses. On behalf of the respondents, Mr West suggested that the claimant had failed to make any real attempts to find alternative work. He produced a print out of nursing jobs advertised in Fife on

26 January 2017 by way of example (J93). The claimant's position was that she had made attempts to find alternative work. Although she testified that she had letters between herself and recruitment agencies, we were not taken to them. She did refer in her evidence to having applied to Newcross Nursing Agency and this was supported by documentation (C35 to 38). This was the only documentary evidence we were taken to regarding mitigation of loss. The claimant testified that she had had an interview with Newcross, had produced her disclosure certificate and was about to start the training course when she was stopped from proceeding because the agency had received a poor reference. Document (C36) was an email indicating an interview on Monday 28 November 2016. The claimant then produced an email from Newcross dated 19 December 2016 (C37) which stated: *"We are unable to proceed with your application at this time."* The email offered her feedback. We concluded that whilst the claimant would not have obtained a good reference from the first respondent, she had worked for Four Seasons for three years and we considered that she could have asked them for a reference. We did not accept that the negative feedback from the first respondent to which the claimant referred would have had a lasting effect on her given the short duration of her relationship with them.

124. The claimant testified in cross examination that her Regional Manager at Four Seasons had offered her the opportunity to stay with Four Seasons rather than transferring to the employment of the first respondent. She had told her: *"If you want to stay, just send me an email."* Whilst the claimant elected not to do this at the time, the offer suggests that she would presumably have been favourably regarded had she applied to Four Seasons after June 2016. It is, after all, not unknown for transfers of undertakings to new owners not to work out for people in senior positions. However, the claimant did not know when asked in cross examination how many care homes Four Seasons has within one hour of her home in Kirkcaldy. (There are at least seven). She accepted that Four Seasons had another home in Kirkcaldy (Gowrie Care Home) and one in Kelty. She said she had not applied to the Four Seasons Home in Kelty because she had

done some shifts at the Kelty Home before becoming a permanent nurse with Four Seasons and she had not been happy there for reasons personal to her. She did not elaborate and we were unclear what the problem was said to be, given that a number of years had since elapsed. She said she had applied to Four Seasons' Rosemount Home in Glasgow via their website (rather than her personal contacts) but that an unresolved concern had arisen about how she would get there from her home in Kirkcaldy and nothing had come of the application. There was no evidence that she had applied to any of the other homes. We concluded that her failure to take the obvious step of rekindling what she described as a successful relationship with Four Seasons and her failure to provide documentary evidence of other steps taken suggested that she had not taken appropriate steps to mitigate her loss.

125. The respondents also referred to the claimant's role in caring for her husband, who the Tribunal were sorry to hear had been diagnosed as terminally ill in August 2016. The claimant testified that her husband was in receipt of a carer's allowance and that she was providing the care to him and receiving the benefits. She accepted that she was able to do this because she was not working but said the allowance was only £400 per month.

126. In all the circumstances the Tribunal concluded from the paucity of evidence of job applications before them and the failure to approach Four Seasons locally that the claimant had not applied for vacancies or agency work beyond that for which documentary evidence was provided and that she had therefore done so to a very limited extent. As Mr West submitted, the claimant is an experienced and well qualified nurse in a sector with a chronic shortage of such qualified staff. The claimant herself accepted this in cross examination. Whilst we accepted that the NMC investigation may have impeded her initially, this was concluded on 9 September 2016. We consider that if the claimant had applied for agency work and/or nursing/ care home manager vacancies, she could reasonably have expected to have found suitable replacement employment within six months from the date of her

dismissal, that is by 14 December 2016, even allowing for the effect of the NMC investigation.

Consideration of whether to make a 'Polkey' deduction

127. Section 123 ERA provides that the Tribunal should award such amount as it considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The reference to 'Polkey' is a reference to ***Polkey v AE Dayton Services Ltd [1988] ICR 142*** in which the House of Lords held that whilst the chance that an employee may have been dismissed in any event is not relevant to liability, it may still be relevant to the issue of compensation.

128. In the case of ***O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 CA*** it was stated: "*If the facts are such that an industrial tribunal, while finding that an applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis.*"

129. In **Software 2000 –v- Andrews [2007] IRLR 568** the EAT reviewed all the authorities on the application of ***Polkey*** and held that in assessing compensation for unfair dismissal the tribunal must consider the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have remained in employment had the unfair dismissal not occurred. The Tribunal should have regard to all relevant evidence on that issue both from the employer and the employee. The EAT held: "*in determining the loss sustained, it is plainly material for a Tribunal to consider what would have happened had no dismissal occurred. Sometimes that*

might be a matter of fact, such as where the workplace closed shortly after the dismissal making everyone redundant….. In most cases, however, it involves a prediction by the Tribunal as to what would be likely to have occurred had employment continued". The question is "*not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.*" The Tribunal therefore requires to have regard to any material and reliable evidence which might assist it in fixing just and equitable compensation and to consider the likelihood (normally but not always expressed as a percentage chance) that the claimant might have been dismissed fairly in any event.

130. We considered whether, on the facts of the present case it was possible to make any assessment with sufficient confidence about what was likely to have happened had the unfair dismissal not occurred. Mrs Reynolds submitted *"The claimant would not have been dismissed in any event even if the Respondent had followed a proper procedure. There was no fair basis on which to dismiss the Claimant and should the Respondent have followed a proper process the Claimant's dismissal would still have been an unfair one. If the Claimant had not been unfairly dismissed the clear likelihood is that she would still be working for the Respondent."* In considering this issue we have to bear in mind that the claimant held the most senior key role in the care home and that the relationship between the home's owners and herself was in serious difficulty quite early on. All the witnesses, including the claimant spoke of conflict. We note some examples from the evidence we accepted:

131. The following conversation (paragraph 17 above) was taken from the evidence in chief of the claimant and largely corroborated by the second respondent. The incident occurred the morning after the claimant had covered a night shift for a carer on 20 December 2015: The second respondent said: "*Ahlam why are you late?*" The claimant said: "*I was here*

yesterday and this and this and this happened." The second respondent asked: "*Who told you to come?*" The claimant said she had not been able to get staff or agency cover. The second respondent asked: "*You expect me to pay for this? Why you don't call me?*" The claimant replied: "*If I call you how can you help? You don't even know each room in the care home. You don't have your SSSC registration. You don't have, you don't have you don't have*.." The second respondent said "*Next time call me*." The claimant said "*OK, why am I the manager on call then?*" The second respondent replied: "*You are the manager on call but if you have an emergency, call me and I will tell you what to do.*" The claimant said "*OK what if there is a flood?*" It appeared to us that from this passage of the claimant's own evidence that even by 21 December 2015, only a few days after the transfer, the claimant was speaking to her new boss confrontationally and without respect.

132. Aspects of the tone and content of the claimant's letter which she dated 3 January 2016 also suggested the relationship was problematic: "*I know that you have already provided us with some documentation however as I have advised you these were inaccurate and confusing to the staff. When I advised you of the concerns from staff I was told this was my job to change the documents."*

> "*The final point I wish to raise is in regards to the way in which you communicate with me. ….. some of the comments that have been made in recent weeks have made me feel belittled and harassed; no one should be made to feel this way by the owners of the business in which they work. For example, you mentioned that you had 'bought the business and the people'; which may also be a breach of the UK quality of Regulations* [sic]. *In another meeting you raised your hand in a way that made me feel disrespected to stop me from discussing important points."*

133. The grievance outcome letter (C156) records that in relation to the claimant's complaint that by speaking directly to the chef about menus (presumably

prior to 14 January 2016 when the claimant was suspended) the second respondent was bypassing the claimant and undermining her authority, the second respondent said she had come to the claimant for this information but had found her argumentative and unco-operative and had therefore found it easier to discuss with the chef directly. She stated: *"This was not an attempt to undermine your authority but a symptom of the fact our working relationship had become strained."* (Paragraph 44 above.)

134. In the course of the NMC investigations they took a statement from a resident's daughter. She told the investigator: *"She was aware of an atmosphere between the registrant and Tammana during the time the incidents occurred and felt that their responses were always blaming each other for things that were not really central to her concerns and her mother's care. She likened it to a "he says, she says" situation and it was obvious to her that they did not get on……"* She referred to "*the focus being on the bickering between the registrant and Tammana".* The NMC also took a statement from Malika Tatai, the moving and handling trainer. Ms Tatai also referred to tension between the claimant and the second respondent and said that this was evident to staff members. She told the NMC *"they shared an office and even with the door closed the staff members could hear shouting and raised voices from them both."* (C216f). (Paragraph 46 above.)

135. The final example for present purposes took place on 14 January 2016 and culminated in the claimant's suspension: The claimant asked the second respondent: *"What have you decided about Sura's hours?"* The second respondent replied: *"When I have decided I will let you know."* At this, the claimant raised her voice and said to the second respondent: *"You are not allowed to touch anybody's hours. We are all protected under TUPE."* The second respondent replied that she would not do anything illegal. She went on *"I don't want to argue with you. It's better that I leave the office."* The claimant then shouted at the second respondent: *"You should just leave the building".* The second respondent said: *"Why should I?"* The claimant replied: *"I am the manager and I am telling you to leave the building."* These

examples and others led the Tribunal to conclude that the claimant would not have remained in the employment of the first respondent beyond 14 December 2016 and that the chance of the claimant remaining in their employment even for a six month period had the unfair dismissal not occurred on 14 June 2016 was no better than 50%. It is therefore just and equitable to reduce the compensation awarded to the claimant for this six month period by 50% to reflect this.

Uplift for breach of the ACAS Code

136. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) provides for an adjustment of up to 25% to the compensatory award in circumstances where it appears to the Tribunal that the employer has failed to comply with a relevant Code of Practice and that failure was unreasonable. In such circumstances, the Tribunal may, if it considers it just and equitable to do so in the circumstances, increase the award by no more than 25%. The ACAS Code on Disciplinary and Grievance Procedures 2015 provides that in misconduct cases, where practicable different people should carry out the investigation and disciplinary hearing. It also provides that the employee should be given a reasonable opportunity to call relevant witnesses and to raise points about any information provided by witnesses. In these respects, we concluded that the first respondent failed to comply with the Code, although they did comply with it in most other respects. We concluded that their failure to comply with the Code was unreasonable. However, it was not deliberate and the first respondent is a small employer with limited resources. In these circumstances, we consider it just and equitable to uplift the award by 10%.

Unpaid wages and Holiday pay

137. Parties' submissions indicate that they have agreed that £1,500 is due in holiday pay.

138. With regard to the claim for unpaid wages, the respondents' closing submissions stated that it had been agreed that the following sums are due as shortfalls in monthly salary from January to May: £37.03; £37.03; £25.50; £25.50 and £25.50, making a total of £150.56. We also understand it to have been agreed that the payment of full salary for the month of June 2016 corrected the part month underpayment for December 2015.

139. The respondent's submissions state that they claim credit for two days where the claimant was paid by both Four Seasons and the first respondent. However, this is disputed by the claimant and as her solicitor submits, the matter was not covered by the respondents in evidence and no supporting documentation was referred to the tribunal. The claim for credit is accordingly not supported by findings in fact and is refused.

140. On all the evidence before us any bonus for which the claimant may have been eligible was discretionary and undeclared. There was no basis for a finding in fact that the bonus was payable on the evidence we accepted. Mrs Reynolds submitted: *"The evidence demonstrates a regular payment of bonus."* We disagree. We were only taken to documentary evidence for the August 2015 payment.

Notice Pay

141. It is not necessary to decide this claim. The period of loss, if any, would be covered by the compensatory award.

Breach of Contract

142. We were not addressed in sufficient detail (or at all) on the legal basis for the claim for loss of health insurance cover, nor were we taken to the relevant documentation in evidence or properly told how the claimant has calculated

loss. There was some oral evidence about missing premia but the totality of that evidence suggested that the situation had been resolved with the agreement of the insurer before the claimant's employment ceased. A payment under such a policy normally crystallises at the time of the death of the insured party. We are not in a position to make any findings about this matter and we simply record that position in case the claimant elects to raise the matter at a later stage in another forum.

Basic Award:		**£2,156**
Compensatory Award**:**	Financial Loss: Add: loss of statutory rights Less: Polkey deduction x 50% Add: 10% uplift Total Compensatory award	£18,350 £400 £18,750 £ 9,375 £ 938 **£10,313**

Employment Judge: Mary Kearns
Date of Judgment: 02 November 2017
Entered in Register: 07 November 2017
and Copied to Parties