RESERVED **Case No. 2423903/2017**
2424158/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr D Browne

Respondents: (1) My3 Limited
(2) Mr D Collins
(3) Mrs J Collins
(4) Mr A Tierney
(5) Ms L Tierney

HELD AT: Liverpool **ON:** 27, 28, 29 & 30 November 2018

BEFORE: Employment Judge Shotter

MEMBERS: Ms F Crane
Mr PC Northam

REPRESENTATION:

Claimant: Mr G Armstrong, solicitor
Respondents: Mr D Bansal, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows: -

1. The claimant made a protected disclosure on or around August 2017 and on 12 October 2017 concerning a breach of confidentiality.

2. The claimant was not caused a detriment except for detriment numbered 2 that was not causally linked to the protected disclosure or health and safety complaints, and his complaints brought under Section 47B and 44(c) of the Employment Rights Act 1996 as amended is not well-founded and is dismissed.

3. The claimant was not unfairly dismissed and his claim of automatic unfair dismissal brought under Section 103A of the Employment Rights Act 1996 is not well-founded and is dismissed.

4. By consent the first respondent is ordered to pay to the claimant the sum of £1052.00 in full settlement of his claims for unlawful deduction of wages and accrued holiday pay.

REASONS

Preamble

1. By two claim forms received on 27 November 2017 and 1 December 2017 (date of receipt by ACAS of the EC notification 21 November 2017, and 29 November 2017) the claimant alleged he had suffered 21 detriments after making three protected disclosures and resigned on 17 November 2017 claiming automatic unfair dismissal under Section 103A of the Employment Rights Act 1996 as amended ("the ERA") on the grounds that the detriments singularly and/or cumulatively amounted to conduct that would destroy the relationship of trust and confidence and thus was a fundamental breach of contract. The claimant also alleged he had been caused a detriment for health and safety disclosures under section 44 (c) of the ERA.

2. The respondents denied the claimant's claims. Initially, not accepting any protected disclosures had been made, and denied there was a fundamental breach of the implied term of trust and confidence, maintaining the claimant faced disciplinary proceedings for gross misconduct prior to his resignation, and this was the reason for his resignation. Mr Bansal confirmed during the liability hearing the respondent conceded the claimant had raised a protected disclosure regarding a memory stick/pen drive being left in a laptop in or around August 2017.

Agreed issues

3. The issues for the Tribunal to decide were agreed between the parties are as follows:

PIDA and Health & Safety Detriment s.47B ERA and S.44

4.1 Has the claimant made qualifying disclosures of information accordance with S.43B of the 1996 Act, and it's so, what where they, to whom and when where they made?

Specifically, the claimant relies upon the following three purported disclosures:

4.1.1 In the August/September 2017 oral conversation with Miss C Cook and Mr A McCarthy about sleeping arrangements at Wood Edge and whether

conversations with Mrs Collins in October 2017 were an extension of this disclosure.

4.1.2 In the September 2017 oral conversation with Mr A McCarthy about breach of confidentiality regarding memory sticks/pen drives.

4.1.3 In the October 2017 oral conversation with Mr A McCarthy concerning a breach of confidentiality involving a work colleague about a service user.

4.2 Did all or any of the above disclosures contain information that tended to show that a criminal offence had been committed, was being committed or was likely to be committed; that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject; that the health and safety of any individual have been, was being or was likely to be endangered or that any of the above information have been or was likely to be deliberately concealed?

4.3 In each case if the claimant reasonably believe that the information disclosed was substantially true?

4.4 In each case was the alleged disclosure made in the public interest?

4.5 In each case did the claimant make the disclosure in accordance with sections 43C, 43F or 43G ERA?

The claimant relies upon 21 individual alleged detriments set out at paragraphs 20(a) to (dd) of his particulars of claim.

4.6 Did the respondent subject the claimant to any such detriment on the grounds that he had made such disclosures in contravention of his right under S.47B ERA?

<u>Health and safety detriment</u>

4.7 Did the claimant any time bring to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed was harmful or potentially harmful to health and safety?

<u>PIDA dismissal S.103 A and S.44(C) ERA.</u>

4.8 Was the reason (or principal reason) for the dismissal of the claimant the fact that he had made such disclosures and/or

4.9 was the reason (or principal reason) for the dismissal of the claimant's the fact that he had raised health and safety concerns in the manner stated above?

Constructive dismissal

4.10 Was the respondent responsible for conduct which was without reasonable or proper course and calculated or likely to destroy and or undermine the relationship of trust and confidence?

In support of his claim for constructive dismissal the claimant seeks to rely upon the alleged PID detriments set out above.

4.11 Did the claimant leave in response to the above and for no other reason?

4.12 Did claimant affirm the contract by delaying his departure?

Remedy

4.13 Did the claimant act in good faith?

4.14 What was the likelihood of the claimant being dismissed in any event at the disciplinary hearing gone ahead (Polkey)?

4.15 Did the claimant's conduct contributed his resignation and if so to what extent?

4.16 Has the claimant acted reasonably in mitigating his loss?

4.17 Should the claimant's compensation be reduced on account of his failure or refusal to participate in the disciplinary/grievance process and is so, to what extent?

Witness evidence

4. The claimant gave evidence on his own behalf and was found to be an evasive and inaccurate historian by the Tribunal, who found he did not give credible evidence. Under cross-examination he explained how he had "barricaded" the door of the downstairs lounge by jamming the door with a chair, an action which proved to be impossible as the door opened outwards and there were two steps dropping into the lounge. This was not a matter the claimant could have been mistaken on, and the Tribunal concluded on balance, he had not told the truth in order to support and enhance his health and safety/protected disclosure allegations and the claimant's conspiracy theory involving at least three employees of the respondent.

5. It is agreed between the parties the fundamental issue in this case was the event of 27 October 2017 that gave rise to a serious allegation of gross-misconduct being raised against the claimant. It is notable that Mr Armstrong when cross-examining Mrs Collins (presumably on instruction by the claimant) suggested the claimant was not at work on the 27 October 2017. However, when faced with a log book signed by the claimant and dated 27 October 2017, this form of inquiry did not continue. Mr Armstrong had been involved in the claimant's case from the time of his

suspension, he was aware at no stage did the claimant deny being present at work on the 27 October 2017 and yet questioned this evidence by his cross-examination. Whilst this did not bring into question the claimant's credibility directly, it revealed to the Tribunal how the claimant with the support of his representative would use any argument, no matter how weak, to obfuscate and confuse the real facts in this case. The Tribunal has dealt further with the claimant's credibility and conflicts further in the evidence below.

6. On behalf of the respondent, the Tribunal heard oral evidence for Pam Throup, resident support worker employed by the respondent, and Dagmar Hunt, resident support worker and team leader also employed by the respondent. Both were key witnesses to the misconduct allegation, and were found by the Tribunal to be credible and honest, in direct contrast to the claimant. Turning to the events that had transpired on the 27 October 2017, the Tribunal was satisfied by the way they answered questions on cross-examination and their demeanour when doing so, that their evidence was credible and persuasive. Both were genuinely indignant that the claimant had accused them of lying when all they done was report his behaviour to the acting manager. The claimant attempted to cast doubt on their motive; this was explored in cross-examination and the Tribunal could find no motive for them making up a story about him because he had blown the whistle or for any other reason. Mr Armstrong accused them of colluding when writing their handwritten statements, and their response was that statements were regularly written as part of their work duties, the statement usually started as a matter of course "on the morning of the 27th" and the heading of statement was set out in accordance with usual practice, which the Tribunal accepted.

7. Mr Armstrong also cross-examined Pam Throup and Dagmar Hunt on the differences in the statements when the swear words attributed to the claimant were not identical in their description. The Tribunal found their responses, which was Pam Throup was hard of hearing, were credible. The differences reveal they had not colluded, and the differences were not so marked that the Tribunal could not reach the view the claimant had not described the service user in abusive terms. It is notable in oral evidence on cross-examination the claimant confirmed Dagmar Hunt (with whom he shared lifts to work) and Pam Throup (with whom he had worked), were trustworthy and honest and there was no work-related issue between them.

8. The Tribunal found the claimant to have been evasive as to whether the complaint made against him by Pam Throup and Dagmar Hunt was a safeguarding issue. He attempted to avoid answering the question until pressed on cross-examination when the concession was made that "it may amount" to a safeguarding issue. The claimant in giving this evidence underlined the seriousness of the allegations made against him, which resulted in his suspension pending investigation. On the issue of contribution, the Tribunal formed the view, based on the evidence before given by Pam Throup and Dagmar Hunt, the claimant had committed the act of misconduct as alleged by the respondent on the balance of probabilities. It has not proceeded to deal with the issue contribution and remedy given the outcome of this case.

9. On behalf of the respondent the Tribunal heard from Anthony McCarthy, a senior support worker/manager no longer employed by the respondent having

resigned in order to work closer to home. Anthony McCarthy gave evidence that the claimant's attitude had changed and he became "miserable, moody, ill-tempered and a regular complainer." This evidence was supported by Pam Throup and Dagmar Hunt who stated in cross-examination that after the claimant became team leader they noticed a change in his attitude, and he became "difficult and bossy…abrupt and sometimes rude." The Tribunal found this evidence persuasive and credible, and when it came to conflicts in the evidence preferred that given by Anthony McCarthy, Pam Throup and Dagmar Hunt to evidence given by the claimant, who denied this was the case.

10. However, with reference to the disclosure made on 12 October 2017 to Anthony McCarthy, there is an issue as to what precisely the claimant said, and whether he had used the words "whistleblowing" in that context, which Anthony McCarthy denied. The Tribunal on this conflict of evidence preferred that given by the claimant on the balance of probabilities. Anthony McCarthy in his written statement failed to mention being told by the claimant a young person was present during the telephone call, and yet during the investigation spoke to "the young person" about the female colleague's use of her mobile phone at work and produced a report titled "Whistle Blowing Investigation." As a matter of logic this points to Anthony McCarthy having been told this by the claimant. Given the fact Anthony McCarthy had produced the investigation report which clearly referred to the male client being questioned, the Tribunal concluded the conflict in his evidence did not undermine his credibility in general.

11. There was an issue whether David Collins and Anthony Tierney had day-today involvement in the running of the business and should have been included as named respondents. The Tribunal was satisfied, having taken their oral evidence into account and the contemporaneous written documentation, the directors had nothing to do with the operational side of the business. David Collin's name was on letters but they had been written on his behalf by his wife, Julie Collins, who was following legal advice. Neither David Collin's or Anthony Tierney were decision makers; the business was run by Louise Tierney and Julie Collins. The Tribunal took the view it could not infer David Collin's or Anthony Tierney held any knowledge concerning the claimant's actions without stronger evidence than the references in two letters, the reference to director in the respondent's disciplinary procedure and a grievance procedure, that has never been invoked before the claimant raised his grievance. The Tribunal was satisfied the references to David Collins denoting him as author of two letters sent to the claimant, had been written by Julie Collins on behalf of the first respondent.

12. Louse Tierney held and continues to hold the position of the responsible individual and is accountable to OFSTED. She gave forthright evidence on behalf of the first respondent dealing with the impact of Anthony Tierney, a director and shareholder to whom she was married, on the business, which the Tribunal accepted as credible. In addition, the Tribunal accepted her evidence as credible that she had instructed Anthony McCarthy to investigate an employee's use of her mobile phone at work, which he did in a supervision meeting. The claimant has made much of the difference between an investigation meeting and supervision meeting but the reality is that Anthony McCarthy questioned the employee, her work colleague and a service user and the vehicle by which he carried out this is by-the-by. It is more

relevant that the employee in question was then issued with a written warning as a result. There was no evidence before the Tribunal that it was inappropriate for the issue raised by the claimant to be dealt with in a supervision meeting as opposed to an investigation meeting; the result is the same and a disciplinary sanction was given.

13. Finally, with reference to the evidence of Julie Collings, who ran the respondent business with Louise Tierney, the Tribunal took the view that on a number of occasioned she had assumed facts without any basis for her knowledge, and gave answers to questions on matters when she did not know the answer. The Tribunal looked at her evidence closely, and it accepted on balance this was the first time Julie Collins had conducted a disciplinary matter and she relied heavily on legal advice given to her by Mentor. The Tribunal accepted she had no knowledge of the alleged protected disclosures until 14 November 2017 after the claimant's suspension, and therefore the motivation attributable to her by the claimant in respect of his detriments allegedly occurring before this date could not have been the case and so the Tribunal found.

14. The Tribunal was referred to an agreed bundle of documents including the additional documents duly marked. Having considered the oral and written evidence, and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has resolved the conflicting evidence and made the following findings of the relevant facts.

Facts

15. The first respondent was incorporated 19 January 2017. It has three directors including David Collins and Anthony Tierney who each have a shareholding of 40%. Julie Collins is married to David Collins, and as her husband's interests are purely financial he has no active role in the running of the business. The same applies to Louise Tierney married to Anthony Tierney who also had no active role, the business being run by the two wives as senior managers.

16. The respondent operates and runs two residential homes, including one at Woodedge in Ormskirk. It provides care and education for young people up to the age of 18 with learning disabilities and complex needs. The young people are of mixed gender and there can be severe problems with their behaviour including violence. The respondent is regulated by OFSTED, employs twelve people including agency workers, and during the relevant period it was understaffed and seeking to recruit three workers in order to reduce the need to use agency workers on the rota. It is not disputed all the staff were under pressure.

17. The claimant commenced his employment as a residential support worker on 3 August 2018, and does not have the continuity of employment to bring an unfair dismissal claim. He was not issued with a statement of terms and condition of employment in accordance with Section 1 of the ERA and the Tribunal concluded an oral contract existed and this was not for zero hours, preferring the claimant's evidence on this point.

Contract

18. The claimant was not issued with a copy of his contract of employment until 16 November 2017 dated August 2017 and signed by Louise Tierney. The contract did not reflect the oral agreement reached prior to the claimant commencing his employment on 3 August 2018.

19. The written contract produced in the agreed bundle was a zero hours contract. Mr Bansal submitted there were a contracted number of hours and the claimant was scheduled to work in excess of them. The respondent had advertised vacancies for two/three residential support workers on 8 November 2017 at £9.00 per hour, 40 hours per week plus £44 per sleep in, the exact terms on which the claimant was employed. The claimant's evidence was he was not offered and did not accept a zero hours contract, he accepted a 44-hour per week contract, two sleep shifts as per the advertisement, this was confirmed at interview and the practice thereafter. The Tribunal preferred the claimant's evidence, supported by Mr Bansal's oral submissions, that he was contracted to work a 44-hour week, the rota was prepared the month before, but it could and did change depending on circumstances.

20. The claimant was committed to his career and had worked with vulnerable children for a few years before his employment commenced with the respondent. It was early in in his career, he possessed a good degree and had experience. The claimant performed well, there were no issues with him and soon after starting he was promoted to team leader during his 6-month probation period on 30 August 2017.

21. The claimant worked with a number of other staff including Pam Throup and Dagmar Hunt, residential support workers based in the care sector for 15 and 25 years respectively. On cross-examination they were asked about their motivation for reporting the claimant, the suggestion being that they were unhappy with the claimant's promotion and resented him, which they denied. If this was their motivation (which the Tribunal found was not) then it cannot have been because the claimant had raised a protected disclosure. Pam Throup and Dagmar Hunt gave persuasive evidence that they did not seek advancement or promotion. They were happy working at a non-managerial level of responsibility, the priority being the clients. They worked well with the young clients and had no problem taking instruction from the claimant. Their problem was with the claimant's change of attitude both in respect of his line management responsibilities and his outward criticisms of the young clients. They described the claimant as having been abrupt and short towards the clients, and had raised a complaint with Anthony McCarthy, the acting manager, about the claimant's change in behaviour. Other employees also complained, including an alleged incident involving the claimant swearing whilst driving erratically with a client in the car. Anthony McCarthy also noticed a change in the claimant's attitude in or around October 2017, and he took the view the claimant was a "regular complainer" about the behaviour of the young clients. Nothing was done about the claimant's attitude, and the claimant was not made aware there was

an issue despite concerns held by staff about the claimant, and their perception that his behaviour could be attributable to lack of sleep, stress and possible ill-health.

Alleged disclosure 1

22. The claimant alleges that in August 2017 sleeping accommodation for him and other staff as not safe in that the staff bedroom could not be locked, putting employees in a vulnerable position. The bathroom annexed to a relative room upstairs was used by a client and unsuitable.

23. The claimant's alleged disclosure has changed over time, as explored by the Tribunal in its conclusion. On the balance of probabilities, the Tribunal preferred the evidence of Anthony McCarthy that the claimant had complained about the standard of the sleeping accommodation in the room downstairs, the emphasis being the discomfort of the inflatable bed, in or around August 2017. The claimant relies upon this allegation in support of his Section 44(1)(c) complaint. It is the case there was no health and safety representative in the respondent, and the claimant had brought to the attention of his line manager, Anthony McCarthy, the discomfort he suffered sleeping on an inflatable bed, but there was no suggestion made that sleeping on the bed was harmful or potentially harmful to his (or any other persons) health and safety, and so the Tribunal found. There was no credible evidence before the Tribunal that the claimant had raised safeguarding issues concerning the sleeping arrangements, and the Tribunal's view is supported by the fact the claimant never made mention of this allegation when he set out the protected disclosure relied upon in his legal advisor's correspondence prior to resigning. It is the Tribunal's view that had the claimant believed he had made a health and safety disclosure as alleged, this would have been set out in the correspondence threatening proceedings and alleging detriment. It is also notable, despite the seriousness of the health and safety issues alleged by the claimant, he made no mention of them to the second, third, fourth and fifth respondent in circumstances where he was under a duty to raise with Louise Tierney in her capacity as the responsible individual accountable to OFSTED any safeguarding issues. In cross-examination the confirmed that he had not done so because he was "informed" that it was dealt with, despite his evidence that it never was. The Tribunal did not find the claimant's evidence credible on this point, and refers to its conclusion below.

Alleged disclosure 2

24. The claimant pleaded that he brought to Anthony McCarthy's attention to the fact that there were "numerous aspects of personal information…pen drives were left in machinery that were unencrypted and open to anyone to gain access to". In the amended complaint the claimant added "this was a breach of the Data Protection Act," but there was no evidence that he had actually used these words at the time, and the Tribunal found the words had not been used. The undisputed evidence before the Tribunal is that only one pen drive had been left in the laptop on one occasion in or around August 2017, the claimant informed Anthony McCarthy by telephone of this, pointing out it was a breach of confidentiality. The claimant agreed to lock the pen drive away at Andrew McCarthy's request and that was the end of the matter. It did not cross Anthony McCarthy's mind the claimant had raised a protected disclosure, and he took the conversation as one that would take place between

colleagues when they were working together. The interaction was one that ordinarily took place between working colleagues on a day-to-day basis. The Tribunal took the view even if whistleblowing or a breach of the Date Protection Act had not crossed Anthony McCarthy's mind, the information provided by the claimant was capable of amounting to a protected disclosure due to the claimant's reference to confidentiality being breached.

25. On the balance of probabilities, the Tribunal did not find the claimant had complained about personal information regarding service users being left in the office, and preferred Anthony McCarthy's evidence on this point that this had not been said. It made no sense to the Tribunal that Anthony McCarthy would admit to the conversation about the pen but not to the personal information.

26. The Tribunal is satisfied on the balance of probabilities the claimant had made a protected disclosure concerning the pen drive breaching confidentiality as clients/service users could access the pen drive when in the office and this could result in safeguarding issues. The Tribunal did not accept Anthony McCarthy's evidence that the pen drive had care plans recorded that were not confidential; at the very least the plans had information relevant to individuals, their relations, address, history and personal care plan around how they were to be treated. The Tribunal was satisfied the claimant made the disclosure in the public interest to protect client confidentiality. He did not inform any other manager, particularly Louise Tierney who was responsible for safeguarding and OFSTED issues.

Disclosure 3

27. On the 12 October 2017 the claimant had a conversation with Anthony McCarthy alleging a female colleague had used her mobile phone in the kitchen in full hearing of a male client and discussed personal details of another male client who had been moved out of the home that night after a violent altercation. The claimant was keyworker for the male client, which left two clients remaining in the home who had their own keyworkers.

28. In conclusion, the Tribunal found, preferring the claimant's evidence, he contacted Anthony McCarthy and informed him he was whistleblowing about a colleague talking on her mobile phone to a friend, about another service user, imparting confidential information about that service user during the conversation and this was overheard by a male service user. Setting aside the outcome of the investigation, at the time the claimant made the disclosure it was serious enough to amount to a protected disclosure on the grounds that the female colleague was not complying with the respondent's procedures on the use of mobile phones and allegedly breaching service user's confidentiality. The Tribunal does not accept on balance the claimant reported possible health and safety repercussions, as now alleged. In oral evidence the claimant explained how the aggressive client had been moved to another home, and the male service user on hearing this could have attempted to travel to another town and enter into the home (circumventing security) and this was the health and safety issue. The Tribunal found the claimant's explanation far-fetched, and he had not raised any health and safety complaints as now described.

The "Whistle Blowing Investigation"

29. On the 17 October 2017 Anthony McCarthy investigated the claimant's female colleague in response to the claimant's disclosure. It took place during a supervision meeting and he accepted her explanation that she had discussed the service user with another staff member outside on her mobile phone and not in the kitchen, and she had not been overheard by a male service user. Anthony McCarthy checked out her story with a colleague who provided corroboration. He also spoke with the young person about whether staff used their mobile phones whilst with them, and was told they used phones in the office or outside. As a result of his investigation Anthony McCarthy issued a written warning for the female employee's use of the mobile phone as staff were not allowed to use their personal phones at work, and the female employee was renowned for it. As far as Anthony McCarthy was concerned that was the end of the matter, and he did not think to report to claimant with any feedback and the claimant never asked for it.

Detriment 1 referred to as 20(a) in the amended Particulars of Claim that regular fortnightly supervisions did not occur despite several requests and these "ceased after…the protected disclosure to Mr McCarthy."

30. The claimant's evidence was that he had supervision meetings every two to three weeks when he started work, and the Tribunal accepted on balance that this was the case given the fact the claimant was new to the role. The claimant satisfied the respondent of his ability, and he was promoted at the same time Anthony McCarthy became manager in late August 2017. The claimant remained on probation and supervisions took place as and when he and Anthony McCarthy had the time. Both were very busy due to understaffing, and this affected the number of supervisions, as did the claimant's promotion.

31. After the disclosures on the 12 and 17 October 2017, the evidence before the Tribunal was that a supervision had taken place on the 27 October 2017 and arranged for the 10 November which did not go ahead due to the claimant's suspension. The evidence given by Julie Collins and Anthony McCarthy was that supervisions took place every 4 to 6 weeks unless you were new, and OFSTED required "regular supervisions." There was no evidence of the claimant asking for supervision other than the 10 November 2017 date which was to take place two weeks after the 27 October 2017. It appears to the Tribunal the claimant was not being denied supervisions as he now alleges, the claimant did not request any additional supervision and there is no evidence supervisions ceased after the 17 October 2017 disclosure as alleged by the claimant, to the contrary a supervision took place some 10 days after. There is no evidence of detriment and so the Tribunal finds on the balance of probabilities.

Detriment 2 referred to as 20(b) in the amended Particulars of Claim that the claimant had not been paid overtime.

32. The claimant was not paid 4 hours overtime, and as the evidence progressed, it appears that he was not paid all of his holiday entitlement despite the confusing reference on the November 2017 final payslip. The holiday figure given on the payslip related to the period when the claimant was suspended, and thus there was

no issue the claimant was not paid in full during suspension. The claimant completed a timesheet, which Anthony McCarthy sent to Louse Tierney, she authorised the payment which went to an external payroll company and it appears the mistake lay with payroll. The parties have agreed a figure of £1052.00 for the unpaid holiday and overtime to be paid within 7 days providing the claimant supplied his bank account details.

33. The Tribunal found there was no causal connection between the non-payment of overtime and the protected disclosure, acknowledging that non-payment of wages can amount to a detriment. There was no causal connection on the basis that the non-payment was a result of incompetence, party evidenced by the confusing payslip.

Alleged detriment 3 referred to as 20 (c) in the amended Particulars of Claim that the claimant had "suffered a loss of hours to less than what he believed were his contractual hours."

34. The Tribunal found on the balance of probabilities the claimant was contractually entitled to work 44 hours per week, the information before the Tribunal was after making the protected disclosure this did not reduce. In August 2017 the claimant worked a total of 201 hours, September a total of 245 hours, October a total of 195 hours plus overtime and in November a total of 49 hours from 3 to 8 November 2017 prior to the claimant's suspension on 10 November 2017. The claimant was to have worked a further 72 hours between the 10 and 16 November 2017 totalling 121 hours half way through the month. The Tribunal was not shown the hours for the rest of the month; the undisputed evidence was that because of the loss of one young person (leaving two in the home) everybody would have lost some hours. However, it appears the claimant up the first half of the month had not lost any hours. On the balance of probabilities, the Tribunal found there was no detriment to the claimant up to the date of suspension on 10 November 2017, thereafter the number of hours to be worked were not relevant. There was no satisfactory evidence the claimant was shown his shift for November 2017 that showed a reduction in hours, and the Tribunal did not accept the claimant's evidence on this point without any supporting contemporaneous evidence.

Alleged detriment 4 referred to as 20 (d) in the amended Particulars of Claim that the respondent had failed to investigate the first, second and third protected disclosure, and had not asked the claimant for a witness statement or attend an investigatory meeting and the claimant heard nothing more.

35. The Tribunal did not accept there was no investigation relating to the third protected disclosure; the claimant was not informed on the outcome at any stage. There was nothing to investigation in relation to the second disclosure. The Tribunal has dealt with this allegation in full below in its conclusion.

36. The respondent has a Whistleblowing Policy, the Tribunal has not seen it and nor has it been referred to any of the provisions set out. However, it is aware from its industrial knowledge that under a whistleblowing policy an employee raising a protected disclosure generally does not have the right to be kept informed, and nor do they have the right to be informed if a member of staff is issued with a disciplinary

sanction because of their whistleblowing, information which could be perceived a breach of confidentiality

Alleged detriment 5 referred to as 20 (e) in the amended Particulars of Claim that the claimant lost his status as a key worker whereas the member of staff who had been subjected to the third disclosure (and related allegation) had been made a key worker.

37. The evidence before the Tribunal was the claimant was the key worker for the male client who was removed and transferred out of the home on 10 October 2017, and thereafter he was no longer a key worker responsibility pending another young person entering the home. The Tribunal accepted that loss of key worker role could amount to a detriment, however, the claimant's loss of his role had no connection with whistleblowing. Julie Collings denied any knowledge of the claimant's female colleague being given keyworker status, and given the claimant's lack of particularity on this issue, the Tribunal preferred her evidence to that given by the claimant.

38. The claimant does not deal with this detriment in his witness statement, and there was no information before the Tribunal concerning how the respondent chose a key worker and whether it was matching an individual with the client's specific needs or in open competition. The burden of proof lies with the claimant and he had failed to discharge it on the balance of probabilities.

39. Alleged detriment 6 referred to as 20 (f) in the amended Particular of Claim the respondent failed to keep the claimant updated in respect of the disclosures…and in addition any subsequent investigation.

40. The alleged detriment is very similar to detriment 4 and the Tribunal repeats its findings in this regard. Namely, there was no requirement to keep the claimant updated, he did not ask for updates, there was no need for any subsequent investigations and none took place.

Alleged detriment 7 referred to as 20 (g) in the amended Particular of Claim the respondent "including its workers fabricated or were coerced into making allegations against Mr Browne that ultimately insulted the very aspect of his work that he was proud of."

41. As indicated above, the Tribunal found Pam Throup and Dagmar Hunt did not fabricate and nor were they coerced into making allegations against the claimant in connection with the incident that took place on 27 October 2017.

42. Pam Throup and Dagmar Hunt reported the claimant's behaviour to Anthony McCarthy and Suzie Gruber, the occupational therapist employed by the respondent. Anthony McCarthy spoke with Julie Collins and at her request asked Pam Throup and Dagmar Hunt if they would prepare a statement, which they did by independently handwriting one, individually giving their own truthful account of what had transpired. The statements were dated 9 November 2017 and prepared in the office. The Tribunal accepted Pam Throup and Dagmar Hunt's evidence that they did not discuss the statement with each other, and they had handwritten them separately as confirmed by Anthony McCarthy who was aware of them writing their

statements at the time. There was no satisfactory evidence that the written statements had been processed after the typed statements as alleged by the claimant, and the Tribunal found this was not the case.

43. The allegations against the claimant were serious. Dagmar Hunt's statement dated 9 November 2017 and signed by her recorded the following: "On the morning of 27.10.17, I came into work at approximately 7.25am. Pam was in the kitchen and Darren was still upstairs. Around 5 minutes later Darren came into the kitchen he presented as very angry he said "that fucking Chantelle had kept him a fucking [a]wake since 2.30am playing her fucking music he was calling her a fucking twat, cunt and bastard. He said he was going to take her reward money off her. Pam said she had closed the logs from last night. Darren then came up to the office and wrote over the closed log. Darren was angry throughout this and presented aggressive…I was shocked by his behaviour. Darren then left the building still presenting as angry."

44. Pam Throup provided a handwritten witness statement dated 9 November 2017 which she signed. The statement recorded the following; "On the morning of the 27 October 2017 I went up to Darren's sleep room and gave him a knock as he had slept in. shortly after Darren came down to the kitchen when myself and Dagmar where, he appeared angry and frustrated. I said good morning and he said that fucking twat has kept me up all fucking night with her fucking music. I told Darren that I had closed the logs and written no issues in the night as I didn't know about what had happened. Darren said its fine I will sort it out…Darren spoke in an angry manner and due to that and being shocked by his comments I did not feel I could say anything to him at the time.

45. The records show Dagmar Hunt and Pam Throup's written statements were typed up and edited on 17 November 2017. The typed versions are identical to the handwritten statements, and there is no contemporaneous or cogent evidence before the Tribunal that Anthony McCarthy or Julie Collins had either coerced Pam Throup or Dagmar Hunt into making the statements, or fabricated them as alleged by the claimant and the Tribunal found that this was not the case.

46. On the 27 October 2017 the claimant handwrote information in the closed log concerning the service user playing music in the night and keeping staff awake.

<u>Alleged detriment 8, 9, 10 & 11 referred to as 20 (n), (o), (p) & (q) in the amended Particular of Claim: the respondent had suspended the claimant on full pay, this was not a neutral act, the respondent would not tell the claimant why he was suspended.</u>

<u>The claimant's suspension</u>

47. On 10 November 2017 the claimant was suspended by Anthony McCarthy on the instruction of Julie Collins who was following legal advice she had received from Mentor. According to that advice communicated to Anthony McCarthy it is undisputed the claimant was not given the details of any allegations on the basis that Mentor had advised the respondent not to tell the claimant why. No reason for the suspension was given other than two members of staff had made a complaint, the claimant was informed he would be sent a letter and the matter would be dealt with quickly by the directors.

48. The Tribunal finds on the balance of probabilities, Mentor advised Julie Collins not to inform the claimant of the reasons for his suspension, and she reiterated that advice to the Anthony McCarthy. The Tribunal has some sympathy with the claimant, it must have been a worrying time for him, especially since the letter dated 10 November 2017 as promised was sent to the incorrect postcode and not received by the claimant until later. On the facts before it, and considering the motivation of Anthony McCarthy and Julie Collins, the decision not to inform the claimant of the allegations or the complaints was causally unconnected with the protected disclosure and arose solely as a result of the legal advice given on which Julie Collins, who was not experienced in disciplinary matters, relied heavily. Anthony McCarthy was also inexperienced and he had never suspended an employee before, thus relying on the information given to him by Julie Collins.

49. The respondent's procedures, which the claimant had read prior to his suspension, confirmed suspension was a neutral act and the Tribunal accepts in these circumstances that it was, although it may not have felt neutral by the claimant. The Tribunal looked objectively at the seriousness of the allegations and they did require investigation; it as not a breach of the implied term of trust and confidence to suspend the claimant on full pay without providing him with details of the allegations to be investigated. In arriving at this decision, the Tribunal factored in the letter of 10 November 2017 signed by David Collins, who took no part in the process, other than in name only.

50. The Tribunal, whilst it had some sympathy for the claimant, is aware that there is no legal requirement for employees to be informed of any allegations at suspension stage and prior to the investigation hearing. The claimant alleges that the other employee investigated for the alleged telephone breach of confidentiality was not suspended, and this was not disputed as set out in the finding of facts above. The circumstances were not the same. The insurmountable problem for the claimant was that Julie Collins followed legal advice regarding the suspension and the respondent's decision to suspend on full pay was in compliance with its policies and procedures and had no causal connection to any protected disclosures.

51. The claimant was told how long he was likely to be suspended for, he was informed he would be sent a letter and the matter would be dealt with quickly by the directors.

52. Julie Collins with the benefit of legal advice produced a letter to the claimant dated 10 November 2017 and signed by David Collins in his capacity as director. David Collins played no part in writing the letter, which he had left to his wife. The letter confirmed the claimant had been suspended from work on "normal pay" with effect from 10 November 2017 and the respondent was "currently investigating allegations of poor professional conduct, it has been alleged that you have been verbally abusive regarding a young person…Please be assured that your suspension from work is not a form of disciplinary action against you, nor does it mean that disciplinary action will be taken." Unfortunately, the letter was inadvertently addressed to an incorrect postcode and the claimant did not receive it until the day before the investigation hearing referred to below.

53. Following his suspension, the claimant took legal advice that resulted in a letter dated 10 November 2017 being sent by HR Legal Partners. The content of the letter is instructive. It confirms the claimant was informed he would be sent a letter and the claimant's belief that the suspension was "directly linked to him bringing to management's attention and conveying information about a serious breach of confidentiality…this falls under S.43B employment rights Act 1996…our client has considering his position in respect of potential claims of constructive (automatically) unfair dismissal and unlawful detriment." There was reference to one protected disclosure only, namely disclosure number 3.

54. On 14 November 2017 the claimant rang Julie Collins and informed her he had not received the letter and referred to whistleblowing. This was the first time Julie Collins was aware of any whistleblowing allegations, and she remained unaware of the detail until she received the correspondence from HR Legal Partners. Anthony McCarthy had not forwarded the HR Legal Partner letters to her as he had been absent from work.

55. A second letter was sent by HR Legal Partners to the respondent dated 13 November 2017 also referred to a protected disclosure having been made on 12 October 2017 conveying the information to you "that there was a serious breach of client confidentiality and data protection…" involving the claimant's female colleague on her mobile phone and a number of alleged detriments were set out that have bene included within these proceedings. Employment Tribunal proceedings were threatened for detriment and constructive unfair dismissal. The letter was silent on disclosures 1 and 2.

56. A further email was sent to the respondent by HR Legal Partners dated 15 November 2017 complaining that the claimant "runs the risk of attending an investigation completely blind" and giving a deadline date for the respondent to provide documents.

57. Julie Collings informed Louise Tierney of the correspondence received from HR Lega Partners and it was at that point she became aware for the first time that Louise Tierney had been made aware of a concern raised by the claimant of an alleged breach of confidentiality by a female member of staff, which had been investigated and dealt with.

58. On the 15 November 2017 the claimant was emailed the 10 November 2017 letter referred to above and told the "purpose of the meeting was to get a better understanding of what happened, this is not a disciplinary meeting."

59. On 15 November 2017 Julie Collings also emailed HR Legal Partners informing them that at the investigation meeting "we will make the employee aware of the allegations and he will…have the opportunity to respond…thereafter, a full and thorough investigation will be carried out, and once completed, a decision will be made as to whether or not the employee will be invited to a formal disciplinary hearing…at that stage he will be given adequate notice and the right to be accompanied…he will also be provided with copies of all relevant documentation." With reference to the protected disclosure the claimant was informed the issue he

had raised had been "fully investigated at the time and addressed appropriately through our company procedures.

Alleged detriment 12, 13, 14, 15, 16, 17 & 18 referred to as 20 (r), (s), (t), (u), (v), (w) and (x) in the amended Particular of Claim: the claimant was invited to an investigation hearing despite being provided with "scant" information about the allegation 24-hours before, the respondent refused to provide the claimant with copies of evidence or witness statements, in advance of the investigation meeting it would not provide him with a copy of the disciplinary policy and procedure and would not allow the claimant access to it or the Whistleblowing Policy. At the investigation meeting the claimant was not allowed ask questions about the allegations and was only told to answer the questions asked of him.

The investigation meeting held 16 November 2017

60. Prior to the claimant attending the investigation meeting the claimant was not provided with any additional information other than that set out in the 10 November 2017 emailed to the claimant the day before the meeting. The Tribunal found there was no required for the claimant to be provided any statements or other information in advance of the investigation meeting under the respondent's procedures or the ACAS Code. There was no evidence before the Tribunal that the respondent's the disciplinary procedure provided for this. It is not unusual for employees to come into an investigation with little or no knowledge of the allegations in order that an investigating officer can assess the evidence before a decision is made whether or not to proceed to a disciplinary hearing.

61. The respondent did not provide the claimant with any procedures previously requested, which is unfortunate and for this the respondent can be criticised. Julie Collins missed his request and the Tribunal accepts on balance, that this was down to incompetence on her part and there was no connection with the protected disclosures. She understood that the claimant was entitled to be provided with copies of relevant documentation if the matter proceeded to formal disciplinary. The Tribunal is of the view it would have been helpful had the claimant been provided with the policies and procedures requested. He was not at any stage of the process provided with the grievance and whistleblowing policy, but there was no detriment given the fact that he was invited to raise a grievance, which he did as he was aware of the process in any event.

62. Julie Collings held an investigation meeting with the claimant on 16 November 2017. Notes were taken by Anthony McCarthy only, and the Tribunal accepted their content was a true reflection of what had transpired. From the outset the claimant, who did not take notes, made it clear he denied the allegations and "will only be giving a witness statement regarding the allegations written by himself."

63. The claimant challenged the notes of the investigation at the liability hearing only. It is notable he did not taken notes himself, and it is clear from the contemporaneous documentation which followed, the claimant did not engage in the process, apart from making a blanket denial. The Tribunal preferred Julie Collings' evidence that she had read out the witness statements of Dagmar Hunt and Pam Throup aloud, which were on her knee as she was sitting in an easy chair. Her

evidence that she found it uncomfortable to say out the words reportedly used by the claimant was compelling.

64. At the end of the investigation meeting the claimant said he did not have any faith, setting a marker down and thereafter the claimant did not engage with the disciplinary process. In cross-examination the claimant maintained after he denied the allegation he was "shot down when tried to ask questions." This was not reflected in the notes of the investigation meeting, and the Tribunal found there was no attempt by the claimant to ask questions about the allegations, and when he was asked to comment his blanket response was to promise a witness statement that never materialised.

65. It is notable that the claimant having stated he would respond via witness statement, never provided a witness statement (despite referring to the fact that he was intending to provide one numerous times during the investigation meeting as and when he was asked a question) supporting the conclusion taken by the Tribunal that he was prevaricating and had disengaged. In oral evidence the claimant explained he did not he did not have the time, an explanation the Tribunal did not find credible given the fact that he was not working having been suspended. The Tribunal accepts the evidence before it that respondent confirmed to the claimant he could provide a witness statement, had it been otherwise, given the tenor of the claimant's legal advisors correspondence, they could have prepared and sent in a witness statement and did not. In short, had the respondent told the claimant he could not send in a witness statement that would not have estopped him or his legal advisors; he chose not to send in a statement because he did not want to appear at a disciplinary hearing. The Tribunal found at no stage had the respondent informed the claimant, or even suggested the possibility, that his witness statement would be rejected and the Tribunal found the claimant's evidence in this regard inaccurate and less than credible. It took the view that the claimant had decided early one he could not take the risk of being disciplined and have a finding of gross misconduct being made against him as this would future job prospects. Further, an unfair dismissal claim in the Employment Tribunal would be difficult to win given the possibility of the Employment Tribunal finding the dismissing officer held a genuine belief based on a reasonable investigation in the allegation of miscount, and he was aware any disciplinary sanction or dismissal would adversely affect his future in the sector. The claimant did not ask questions at the investigation meeting; he did not engage with the process despite the purpose of the investigation was for the respondent ask questions as made clear to him in earlier correspondence.

66. Finally, the notes of the meeting refer to the claimant being provided with a copy of his contract of employment at the end of the investigation meeting. The Tribunal accepted Julie Collings' evidence that she had not fraudulently signed the contract by using the name of Louise Tierney, and it accepted Louse Tierney's evidence that she had signed the contract earlier. The claimant alleges it was fraudulently signed by Julie Collings, the Tribunal did not accept this to be the case. There was no rational explanation why Julie Collings would not sign it on her own behalf, and there was no benefit to the respondent for it to have been signed as alleged by the claimant, who was not found to be a credible witness. It is undisputed the claimant saw Julie Collings go into the corner and take the contract out of a file; the Tribunal was not satisfied the claimant had witnessed her signing the contract in

the name of Louise Tierney in front of him; she had no reason to do so. The real relevance of the contract is whether the claimant had signed it or not, not necessarily the respondent's signature, and as indicated above, the Tribunal found the terms set out in the employment contract produced had not bene agreed with the claimant.

Alleged detriment 19, 20, referred to as 20 (y), (z), (aa), (bb), (cc), and (dd) in the amended Particular of Claim, namely, that the respondent would not let the claimant provide a witness statement, the respondent had failed to investigate the claimant's protected disclosures, Julie Collings at the investigation meeting had fraudulently signed the contract of employment, the claimant was invited to a disciplinary hearing and the respondent was "cynically attempting to hide behind reasonable belief to dismiss/discipline the claimant."

67. The claimant was invited to a disciplinary hearing in a letter dated 17 November 2017 ostensibly written by David Collings., which had been prepared by Julie Collings with the benefit of legal advice. The letter referred to the allegation in detail, that "using foul language in relation to a young person, is viewed by this company to be gross misconduct. Therefore, the outcome of this meeting may be your summary dismissal." Continuation of the suspension was confirmed and notes from the investigation meeting, witness statements and the respondent's disciplinary procedure was enclosed. The respondent had complied with the ACAS Code in respect of its content. The claimant, had he read the Disciplinary Procedure, would have realised it did not provide him with the right to any information prior to an investigation meeting.

68. As a direct result of the disciplinary invite letter the claimant resigned with immediate effect. His letter is marked "Resignation – Constructive Unfair Dismissal" and he referred to "the fact that I have raised protected disclosures…more recently a protected disclosure on 12 October 2017." This was the first reference to their being any possibility of more than one disclosure allegedly having been made. The Tribunal took the view the claimant resigned too early, and it was for him at the disciplinary hearing to put forward his defence, for example, in the terms of allegation (aa) that the disciplinary allegations had arisen as a result of the protected disclosure. As this was the claimant's defence, which he never set out in a witness statement despite a number of indications made to the respondent, at the disciplinary hearing the person chairing it would need to decide who they believed and why, which may have required exploring the alleged disclosures. It was not a matter for a separate investigation, and the claimant was not served well by his failure to put forward his statement or response to the allegations at any stage other than through solicitor's letters.

69. The claimant, following an invite, raised a "formal grievance" on the 17 November 2017 alleging his "poor treatment" was on the grounds of his raising protected disclosures and "I believe there are a catalogue of failures in respect of my treatment ultimately resulting in my resignation and considering myself dismissed. I believe the company to be in breach of contract." It is notable there was no reference to any details concerning the alleged detriments arising out of the alleged protected disclosures. The claimant, at the liability hearing, explained this was because he was going to raise them at the grievance meeting itself, which he never did. The Tribunal accepts an employee can be too unwell to deal with a grievance and carry out shift

hours on a bank, the explanation given by the claimant. However, there was no request for the grievance to have been dealt with in writing, and the claimant did not provide grounds of his grievance, particularly in respect of the specific disclosures and detriments that flowed from them.

70. The effective date of termination was 17 November 2017.

Public Interest Act Disclosure

S47B Employment Rights Act 1996

71. S.47B(1) Employment Rights Act 1996 ("the ERA") provides- "(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.

72. S.47B(1B) Where A is subjected to detriment by anything done or mentioned in subsection 1(A) that thing is treated as also done by the worker's employer.

73. S47B(1C) for the purpose of subsection 1(B) it is immaterial whether the thing done is with the knowledge or approval of the worker's employer.

Qualifying disclosures

74. S43A and B sets out the meaning of qualifying disclosures as defined by S.43B ERA.

75. . S.43B(1) provides in this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure; tends to show one or more of the following: (a) criminal offence, (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) miscarriage of justice, (d) that the health and safety of any individual has been, is being or is likely to be endangered, (e) environmental damage, and (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed. The claimant is relying on (a) and (b).

76. It is not sufficient for a worker to have made the qualifying disclosure in order to gain protection; the disclosure must fall within one of the six the requirements set out under ss.43C-43H ERA.

77. S43(C) provides for the disclosure to his (a) employer or other responsible person. The Enterprise and Regulatory Reform Act 2013 s 18 ("the 2013 Act") removed good faith as a formal requirement in Ss 43C and Ss. 43E-43G with effect from 25 June 2013, although under S.s 49(6A) and 123(6)(A) ERA the Tribunal has the power to reduce damages arising out a detriment where the disclosure was not made in good faith. Providing a worker has met the public interest test it is possible he or she may have ulterior motives but still hold a reasonable belief that the disclosure is made in the public interest.

78. Disclosures to employers have the least stringent conditions, disclosures to any other person whom the worker reasonably believes to be responsible for the relevant failure have “intermediate” conditions and the most stringent conditions cover disclosures to any other person or body including those of “exceptionally serious” failures which the Tribunal will refer to as “external disclosures.”

Detriment S.48 ERA

79. In a claim for detriment the claimant must prove that she has made a protected disclosure and that there has been detrimental treatment on the balance of probabilities, the burden is then on the respondent to prove the reason for the treatment. S.48 ERA sets out the burden of proof, s48(2) provides that on a complaint of detriment in contravention of S.47B it is for the employer to show the ground on which any act, or deliberate act, was done — S.48(2). Once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. The Tribunal has applied the burden of proof in respect of the individual detriments alleged by the claimant and the burden did not shift with the exception of detriment 2.

80. If the Tribunal find that the worker was subjected to a detriment it is necessary for the claimant to establish that the detriment arises from an act, or a deliberate act, by the employer. In the well-known EAT decision in London Borough of Harrow v Knight [2002] EAT/0790/2001 it clearly established that the question of the “ground” on which the employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him so to act. The Tribunal considered the mental process of the second, third, fourth and fifth respondent, Pam Throup, Dagmar Hunt and Anthony McCarthy.

81. In accordance with the well-knowns cases of Aspinall v MSI Mech Forge Ltd UKEAT/891/01 and NHS Manchester v Fecitt [2012] IRLR 64, in the case of a detriment, the Tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure" (section 47B(1), ERA 1996). The EAT has held that the detriment must be more than "just related" to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment, and this was not made out in respect of detriment 2, or in the alternative, any other detriments had they been made out, which they were not.

82. In Fecitt the Court of Appeal held where an employer satisfies the Tribunal that it acted for a legitimate reason, then that necessarily means that it has shown that it did not act for the unlawful reason being alleged. One of the main issues before the Court of Appeal concerned the causal link between making the protected disclosures and suffering detriment, and it was held that 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. “Where a 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 to genuine explanation…if the reason for the adverse treatment is the fact that the employee has made the protected disclosure, that is unlawful." Lord Justice Elias at paragraph 41 set out the following: "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." This test is particularly relevant to the present case and was applied by the Tribunal when considering the evidence, particularly that of the third and fifth respondent's explanations. Taking into account the test, the Tribunal found in the alternative, had the claimant established detriment (which it found he had not) it would have gone onto find there was no causal connection, the real or core reason for the claimant's treatment and his responses to it, was the legitimate allegation of misconduct that resulted in an invitation to a disciplinary hearing and protected disclosures numbered 2 and 3 were not the causal link as they had not influenced (or materially influenced) the allegation, investigation and disciplinary process.

Detriment Section 44 ERA

83. Section 44(c) of the Employment Rights Act 1996 provides as follows: "(1) An employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that –(c) being an employee at a place where (i) there was no such representative or safety committee, or there was such a representative or safety committee but it was not reasonably practicable to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. The remaining section is not relevant as it is not the claimant's case that he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert.

84. The test posed by section 44(1)(c) is significantly different from that posed by section 44(1)(d) and (e) . The requirement is a belief in circumstances which were harmful or even potentially harmful to health or safety. Section 44(1)(c) is to do with drawing safety matters to the attention of an employer, and as indicated above the Tribunal concluded on the balance of probabilities the claimant had not drawn any health and safety matters to the respondent.

The law – constructive dismissal

85. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the 1996 Act") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

86. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust

between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or to put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland –v- Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test applied by the Tribunal below in its conclusion, satisfied on the balance of probabilities the claimant could not have properly concluded the respondents were repudiating the contract by breaching the implied term of trust and confidence.

87. The House of Lords in Malik –v- Bank of Credit; Mahmud –v- Bank of Credit [1997] UKHL 23, held that the breach occurs when the prescribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited", and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

88. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The Court of Appeal held that an employee can either leave at the instant without giving notice, or may give notice and say that he is leaving at the end of the notice providing the conduct is sufficiently serious to entitle him to leave at once. "Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract". The issues to be decided upon in this respect were: -

89.1 Was there a fundamental breach on the part of the employer?

89.2 Did the claimant terminate the contract by resigning?

89.3 Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation?

89.4 Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end?

90 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis –v- Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term".

91 In Omilaju –v- Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer. The claimant Mr Browne, is not relying on any last straw argument, however, for the avoidance of doubt the Tribunal found there was no act taken on the part of the respondent that contributed, even slightly, to a breach of the implied term of trust and confidence.

Automatic unfair dismissal – S.103A ERA

92 S.103A of the Employment Rights Act 1996 (ERA): renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure.

93 S.103A ERA indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal — Lord Denning MR in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*. Lord Justice Elias confirmed in Feccitt cited above, the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal.

Conclusion – applying the law to the facts

PIDA and Health & Safety Detriment s.47B ERA and S.44

94 With reference to the first issue, namely, has the claimant made qualifying disclosures of information accordance with S.43B of the 1996 Act, and it's so, what where they, to whom and when where they made, the Tribunal refers to its finding above.

Disclosure 1

95 In relation to the first disclosure, namely, in the August/September 2017 oral conversation with Miss C Cook and Mr A McCarthy about sleeping arrangements at Wood Edge and whether conversations with Mrs Collins in October 2017 were an extension of this disclosure, the Tribunal did not find the disclosures had been made as described by the claimant, on the balance of probabilities.

96 It is notable that the claimant's alleged disclosure allegation was amended. The ET1 in one paragraph referred to him conveying information in September 2017 to Anthony McCarthy information relating to the standard of the sleeping accommodation which had an "inflatable bed within a room that had no lock and key." The Tribunal are aware from the evidence before it the only room with no lock and key was the downstairs lounge, which was also the only room with a working television.

97 In the amended grounds of claim the protected disclosure covers not one paragraph but four paragraphs relating to the August 2017 disclosure, and the allegation related to the "staff bedroom" as being not secure as it was lockable. He also referred to the relative's room upstairs with an ensuite bathroom used by a female client and was therefore unsuitable. There was no reference to the female client having a key to the bathroom, or to the fact that the bedroom could be locked when used which was the evidence before the Tribunal.

98 In oral evidence the claimant said the family room had a key and it was unsecured in the sense that a young person had a key and used the bathroom in the family room. Anthony McCarthy gave oral evidence that he did not remember the female client having a key. The evidence as to whether or not the female client had a key was uncertain, but nothing hangs on this. The Tribunal preferred Anthony McCarthy's evidence that the claimant did complain but it was about the inflatable bed and nothing else. The Tribunal formed this view partly as a result of the credibility of Anthony McCarthy's evidence and also the amendments made to the claimant's pleadings. The Tribunal would expect the claimant to know what protected disclosure he had made and for it to have been referenced properly in his claim form from the outset. It is notable the unamended complaint referred to the inflatable bed and the downstairs lounge with no reference to the family room upstairs. It is also notable the claimant's solicitor's letters did not refer to this alleged disclosure in any way, despite detailing disclosure number 3. Finally, the Tribunal was persuaded the claimant was not telling the truth by his evidence that he had barricaded the lounge door which could not physically have happened due to the layout of the premises. You cannot barricade a room where the door swings outwards and it has two steps down into it.

99 In oral submissions Mr Armstrong submitted that claimant had conveyed information about the standard of the sleeping accommodation, that it was not a safe standard, the upstairs room was insecure because a service user had a key, and had the claimant slept in the room it would be a safeguarding issue and a health and safety risk in terms of the service user, who could have acted violently towards the claimant whilst he was sleeping. The Tribunal did not find the claimant had conveyed this information, and it did not accept there were facts in existence that reflected the

argument put forward by Mr Armstrong. The claimant complaining about the standard of the sleeping accommodation in respect of an inflatable bed was in the public interest. Contrary to Mr Armstrong's submission, the claimant's evidence was far from clear, and it preferred the evidence given on behalf of the respondent that the allegation concerning the service user and the room upstairs was fabricated after the event to strengthen his claim. The claimant was not a credible witness, and on the conflicts in the evidence the Tribunal preferred on balance evidence given on behalf of the respondent.

Disclosure two

100 With reference to the second disclosure, namely, in the September 2017 oral conversation with Anthony McCarthy about breach of confidentiality regarding memory-stick/pen drive in the singular and not plural, the Tribunal found a protected disclosure had been made, and it did not accept the respondent's argument that there was no personal information on the pen drive relating to clients.

101 The claimant pleaded that he brought to Anthony McCarthy's attention there were "numerous aspects of personal information…pen drives were left in machinery that were unencrypted and open to anyone to gain access to". In the amended complaint the claimant added "this was a breach of the Data Protection Act," but there was no issue that he had used these words. The undisputed evidence before the Tribunal is that only one pen drive had been left in the laptop, the claimant informed Anthony McCarthy by telephone of this pointing out it was a breach of confidentiality. This disclosure did not appear in the solicitor's letters. The Tribunal found on the balance of probabilities when the claimant informed Anthony McCarthy he had left his pen drive in a laptop and this was a breach of confidentiality, after the claimant had locked it away at Andrew McCarthy's request the latter thought that was the end of the matter and it did not cross his mind the claimant had whistleblown. The interaction was one that ordinarily took place between working colleagues on a day-to-day basis. The Tribunal took the view even if whistleblowing had not crossed Anthony McCarthy's mind, the information provided was capable of amounting to a protected disclosure.

102 On the balance of probabilities, the Tribunal did not find the claimant had complained about personal information regarding service users being left in the office, and preferred Anthony McCarthy's evidence on this point that this had not been said. It made no sense that Anthony McCarthy would admit to the conversation about the pen but not to the personal information.

Disclosure 3

103 With reference to the third disclosure, namely the October 2017 oral conversation with Mr McCarthy concerning a breach of confidentiality involving a work colleague about a service user, the Tribunal found the claimant had conveyed this information and this was a protected disclosure. It is irrelevant for this exercise whether the claimant's female colleague was discussing a client with another person or not; the Tribunal accepted the claimant's evidence and found that he reasonably believed his colleague had breached the legal obligation of client confidentiality in the way described, and reported this as whistleblowing in the public interest.

104 With reference to disclosure 2 and 3 but not disclosure 1, the Tribunal found the disclosures did contain information that tended to show that a criminal offence had been committed, was being committed or was likely to be committed; that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject. It did not accept that the disclosures contained information that tended to show that the health and safety of any individual have been, was being or was likely to be endangered or that any of the above information have been or was likely to be deliberately concealed. It accepted the claimant reasonably believe that the information disclosed was substantially true, in each case was the alleged disclosure made in the public interest and in accordance with sections 43C, 43F or 43G ERA.

The 21 detriments

105 With reference to the 21 individual alleged detriments relied upon by the claimant as set out at paragraphs 20(a) to (dd) of his particulars of claim referred to above, on the balance of probabilities the Tribunal did not find the respondent had subjected the claimant to any such detriment as alleged, except for detriment 2. In the alternative, had it found the claimant suffered a detriment it would have gone on to find that it was not on the grounds that he had made such disclosures in contravention of his right under S.47B ERA, or on the grounds of health and safety. It was legitimate for the respondent to suspend and take the claimant through a disciplinary process in the circumstances.

Alleged detriment 1 referred to as 20(a) in the amended Particulars of Claim that regular fortnightly supervisions did not occur despite several requests and these "ceased after…the protected disclosure to Mr McCarthy."

106 With reference to the first detriment relating to regular supervisions and motivation, Mr Armstrong submitted Anthony McCarthy was not prepared to invest time in the claimant on the basis that he was, in the words of Mr McCarthy, "a regular complainer." The Tribunal did not accept this argument, there is a difference between causally linking any detriment with regularly making complaints about client related matters, and causally linking detriments to protected disclosures. There was no satisfactory evidence before the Tribunal in any event that Anthony McCarthy had taken the conscious decision "not to invest time" in the claimant and stop supervisions, the evidence is to the contrary as supervisions did take place on 27 October 2017 and were booked to take place on 10 November 2017 and this was cancelled as a result of the claimant's suspension and did not take place as a result of his resignation. The Tribunal found the claimant was not denied supervisions, the claimant did not request any additional supervision and there are no evidence supervisions ceased after the protected disclosures had been made. There was no detriment and so the Tribunal finds, dismissing the claimant's claim.

Detriment 2 referred to as 20(b) in the amended Particulars of Claim that the claimant had not been paid overtime.

107 As a general proposition non-payment of wages can amount to a detriment, and the Tribunal accepts the claimant suffered a detriment when he was not paid 4-

hours overtime. It transpired at the liability hearing in addition to not being paid 4-hours overtime, some holiday entitlement was also outstanding despite the reference on the November 2017 final payslip. Having considered the motivation of Louse Tierney who authorised pay before details were sent to the external payroll company, who made the mistake, the Tribunal found there was no causal connection between the non-payment of overtime and the protected disclosure. There was no causal connection on the basis that the non-payment was a result of incompetence party evidenced by the confusing payslip.

108 Mr Armstrong submitted that Anthony McCarthy was responsible for providing Louise Tierney with the claimant's rota and he did not care less about the claimant and his pay. The Tribunal did not accept there was evidence to this effect, and this allegation was not put to Anthony McCarthy during cross-examination.

Alleged detriment 3 referred to as 20 (c) in the amended Particulars of Claim that the claimant had "suffered a loss of hours to less than what he believed were his contractual hours."

109 The claimant was contractually entitled to work 44 hours per week, the evidence before the Tribunal was that after making the protected disclosure this did not reduce and so the Tribunal found as set out above, taking into the undisputed evidence that as a result of one client leaving the home, employees lost some hours as there was less work to share around. However, it appears from the contemporaneous documentation the claimant up the first half of November had not lost any hours, and he had not suffered any detriment to the the date of suspension on 10 November 2017, thereafter the number of hours to be worked were not relevant as the claimant was not working and did not return. The Tribunal did not find the claimant was shown his shift for November 2017 that showed a reduction in hours as alleged, and his claim that he had suffered a detriment is not well-founded and dismissed.

Alleged detriment 4 referred to as 20 (d) in the amended Particulars of Claim that the respondent had failed to investigate the first, second and third protected disclosure, and had not asked the claimant for a witness statement or attend an investigatory meeting and the claimant heard nothing more.

110 The Tribunal found the third protected disclosure had been investigated, and the fact Anthony McCarthy did not set in hand an investigation into his own failure to remove a pen drive on one occasion cannot be a detriment to the claimant, who did not raise any complaint with higher level management particularly Louise Tierney. As indicated above, the communication between the claimant and Anthony Tierney was not an unusual one in the workplace; one colleague telling another a memory stick had been left in the computer and on request, taking it out and keeping it safe.

111 The term "detriment" is not defined in the ERA, but it has been construed in discrimination law which is applicable to S.47B detriment claims. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them in all the circumstances had been to their detriment. The Tribunal applied this objective test concluding the claimant a reasonable worker would not have taken the view failing to investigate the safe keeping of a pen drive by securing

its confidentiality, would objectively have bene to their detriment. With reference to this test, rather than repeating itself the Tribunal found the claimant had not been subjected to the remaining 20 individual detriments as alleged.

112 Mr Armstrong submitted the fact the claimant had not been involved in any investigation and outcomes was distressing and "destabilising." Anthony McCarthy had not thought deeply about how he could make the claimant feel less distressed and concerned. The Tribunal took the view that Mr Armstrong's description of the claimant was an exaggeration, he gave no indication at the time that he wanted to be part of any investigation or be informed of the outcome, and the Tribunal took the view the investigation and disciplinary steps taken against the claimant's colleague were confidential to her, and the claimant objectively could not have suffered any detriment from his lack of involvement after the disclosure had been made. Employees do not have the right to any information following a protected disclosure; although it may be good industrial practice to keep the channels of communication open without breaching confidentiality.

113 Mr Armstrong further submitted in relation to this allegation that if formed part of the breach of contract claim in that the claimant was suspended without being informed of the reason in contrast to his female colleague, who was not suspended despite the seriousness of the allegations made against her by the claimant, which could have affected OFSTED, and those allegations were "whitewashed" by Anthony McCarthy in his investigation. The Tribunal did not agree. The claimant's female colleague was investigated, the suspension of the claimant arose as a result of legal advice that had not been sought or received in respect of the female colleague who was not suspended. Unlike the claimant who did not take part in the investigation process, the female colleague did, provided an explanation that was then subsequently tested to the satisfaction of Mr McCarthy who spoke with two other witnesses. The cases are incomparable, and the Tribunal found it was not a breach of the implied term of trust and confidence for the respondent to have suspended the claimant in the specific circumstances taking into account the seriousness of the allegations.

<u>Alleged detriment 5 referred to as 20 (e) in the amended Particulars of Claim that the claimant lost his status as a key worker whereas the member of staff who had been subjected to the third disclosure (and related allegation) had been made a key worker.</u>

114 The Tribunal did not find this allegation well-founded for the reasons stated above, accepting as a general proposition that loss of key worker role could amount to a detriment. The claimant loss of his key worker role had no connection with whistleblowing; in short, the client had left the home and there was thus no requirement for a third keyworker.

115 Mr Armstrong submitted the claimant was overlooked by Anthony McCarthy and senior management because the claimant was a "regular complainer". The Tribunal makes two observations, the first being that the claimant's case is he made three protected disclosures and not that he was perceived to be a regular complainer; this would not get the claimant over the hurdles required to establish the causal link between the alleged detriment and protected disclosure. Secondly, there

was no evidence the claimant was "overlooked" as alleged, he had key manged a client, the client had moved and only two clients remained who had allocated key mangers.

116 The only witnessed asked about the claimant's colleague taking on a key worker role was Julie Collings, who denied any knowledge. The claimant does not deal with this detriment in his witness statement, and there was no information before the Tribunal concerning how the respondent chose a key worker and whether it was matching an individual with the client's specific needs or in open competition. The burden of proof lies with the claimant and he had failed to discharge it on the balance of probabilities; the Tribunal is not convinced his colleague was given the key worker role when only two clients remained in the home. There is no contemporaneous documentary evidence regarding this allegation, and the position is far from clear. On the balance of probabilities, the Tribunal preferred evidence given on behalf of the respondent that the claimant's colleague was not given key worker status. The sole reason for key worker status being removed from the claimant lay with the fact that the client to whom he had acted as key worker had left, leaving only two clients, there was no causal connection with the protected disclosures and this claim is dismissed.

Alleged detriment 6 referred to as 20 (f) in the amended Particular of Claim the respondent failed to keep the claimant updated in respect of the disclosures…and in addition any subsequent investigation.

117 The alleged detriment is very similar to detriment 4 and the Tribunal repeats its findings in this regard. Namely, there was no requirement to keep the claimant updated, he did not ask for updates, there was no need for any subsequent investigations and none took place. Objectively, the claimant has not suffered a detriment and this claim is dismissed.

Alleged detriment 7 referred to as 20 (g) in the amended Particular of Claim the respondent "including its workers fabricated or were coerced into making allegations against Mr Browne that ultimately insulted the very aspect of his work that he was proud of."

118 Mr Armstrong described this detriment the nub of the claimant's case. The Tribunal has dealt with his submissions and conflicts in the evidence as set out above. It found Pam Throup and Dagmar Hunt did not fabricate and nor were they coerced into making allegations against the claimant about the incident that took place on 27 October 2017. They did not discuss the statements with each other, and had handwritten them separately as confirmed by Anthony McCarthy. The written statements had not been processed after the typed statements as alleged by the claimant. The records show Dagmar Hunt and Pam Throup's written statements were typed up and edited on 17 November 2017. The typed versions are identical to the handwritten statements, and there exists no evidence Anthony McCarthy or Julie Collins had either coerced Pam Throup or Dagmar Hunt into making the statements, or fabricated them as alleged by the claimant. It is notable on the same date the claimant completed a log setting out how the service user had kept him awake that night, he had overslept and written over a closed log, all contemporaneous evidence supporting the version of events given by Dagmar Hunt and Pam Throup.

119 The Tribunal did not find there was anything in Mr Armstrong's submission that had the respondent genuinely believed the allegations made by Dagmar Hunt and Pam Throup the decision to suspend would have been made earlier and further, the claimant worked his normal shifts after the incident. The Tribunal observed that the issue concerning a late suspension had not been put to the respondent's witnesses on cross-examination, and the reference to the claimant working his normal shift thereafter undermines the allegation that his hours were reduced the Tribunal having found this was unsubstantiated by any evidence. The claimant was suspended immediately legal advice had been received to that effect., he had not objectively suffered any detriment and his claim is dismissed.

Alleged detriment 8, 9, 10 & 11 referred to as 20 (n), (o), (p) & (q) in the amended Particular of Claim: the respondent had suspended the claimant on full pay, this was not a neutral act, the respondent would not tell the claimant why he was suspended.

120 It was submitted by Mr Armstrong the suspension was carried out in such a manner which did not suggest a neutral act, given the claimant's level of seniority and stigma caused to him it was career damaging. The Tribunal did not agree; the suspension was for good reason and in accordance with the policy. The reference to career damaging was a consideration in the claimant's mind when he came to understand the allegations against him, and it is this that resulted in the claimant's decision to resign because he did not want a dismissal on the grounds of misconduct to blemish his employment record early on in his career. It is less than credible for the claimant to suggest the suspension pending investigation was career damaging, especially given the contents of the respondent's procedures, which the claimant had read prior to his suspension, coupled with the letter of 10 November 2017 that assured the claimant "your suspension from work is not a form of disciplinary action against you, nor does it mean that disciplinary action will be taken." Unfortunately, the letter was addressed to an incorrect postcode and the claimant did not receive it until the day before the investigation hearing.

121 The claimant was not told how long he was likely to be suspended for, and the objectively Tribunal did not accept this amounted to a detriment or fundamental breach of the claimant's employment contract. The claimant was informed he would be sent a letter and the matter would be dealt with quickly by the directors. Employees cannot always be told how long the suspension would last, it depends on the extent of the investigation carried out, and the claimant was not caused a detriment because he was made aware that it would be dealt with quickly, and it was.

122 Mr Armstrong submitted the claimant had a reasonable expectation that the respondent would provide him with information concerning the allegations, he had only been given a "brief idea" and had he not been a "regular complainer" a decision would not have been made to suspend. The basis of Mr Armstrong's submission appears to be that the claimant was not provided details of the allegation because the respondent knew the claimant would defend himself and it did not want him to be in a position to defend himself, the reason being the protected disclosure and bringing to its attention health and safety issues. Mr Armstrong does not appear to have considered the contents of the 10 November 2017 that set out some

information relating to the allegation as promised to the claimant during his suspension meeting.

123 The 10 November 2017 letter referred to the allegation under investigation to be poor professional conduct, it has been alleged that you have been verbally abusive regarding a young person…" and the claimant, who was involved in the incident on 27 October 2018 regarding a young person, is being disingenuous when he complains the respondent did not give reasons for the suspension. There is no suggestion the 10 November 2017 letter was purposefully sent to the incorrect postcode the motivation being the protected disclosure or on the grounds of health and safety, and the Tribunal as indicated previously, a reasonable worker would not take the view that the treatment accorded to them in all the circumstances had been to their detriment and this claim is dismissed.

Alleged detriment 12, 13, 14, 15, 16, 17 & 18 referred to as 20 (r), (s), (t), (u), (v), (w) and (x) in the amended Particular of Claim: the claimant was invited to an investigation hearing despite being provided with "scant" information about the allegation 24-hours before, the respondent refused to provide the claimant with copies of evidence or witness statements, in advance of the investigation meeting it would not provide him with a copy of the disciplinary policy and procedure and would not allow the claimant access to it or the Whistleblowing Policy. At the investigation meeting the claimant was not allowed ask questions about the allegations and was only told to answer the questions asked of him.

124 Mr Armstrong submitted the respondent failed to provide the claimant with documents, such as the shift log, with the intention of "blind-siding him" and he was not asked to provide answers at the investigation meeting. Contrary to the claimant's case, at the meeting the written statements setting out the precise allegations were read out to him, and thus he became aware of the precise nature of the allegations. The Tribunal finds there was no requirement on the respondent to provide this information prior to the investigation meeting, and the fact it chose not to was causally unconnected with the protected disclosures or health and safety. The claimant was given the opportunity to comment on the allegations, and he chose not to do so. It is irrelevant for the purpose of the investigation whether he had access to the respondent's policies and procedures at the time. The allegations were put to him, he responded with a blanket denial promising to provide a witness statement dealing with the allegations, that never materialised at any stage of the process. Contrary to Mr Armstrong's submission, there was no evidence whatsoever the respondent wanted the claimant "out of the business" at interview stage, it was following the practice set out in its procedures and the ACAS Code, and a decision was yet to be made on whether disciplinary action would follow.

125 The Tribunal preferred the submission put forward by Mr Bansai that there was no obligation on the respondent to provide the claimant with witness statements or any evidence in advance of the investigation meeting, which was concerned with fact finding only. With reference to the claimant's complaint concerning the respondent failing to provide a copy of the Disciplinary Procedure a the investigation meeting and Whistleblowing Procedure, the Tribunal as dealt with this. It notes Mr Bansai's submission that the claimant was aware of the disciplinary procedures beforehand, he had taken legal advice and there was no detriment.

Alleged detriment 19, 20, referred to as 20 (y), (z), (aa), (bb), (cc), and (dd) in the amended Particular of Claim, namely, that the respondent would not let the claimant provide a witness statement, the respondent had failed to investigate the claimant's protected disclosures, Julie Collings at the investigation meeting had fraudulently signed the contract of employment, the claimant was invited to a disciplinary hearing and the respondent was "cynically attempting to hide behind reasonable belief to dismiss/discipline the claimant."

126 Mr Armstrong argued the claimant had been disadvantaged because the disciplinary hearing panel would be able to rely on their reasonable belief as the basis of defending any claim the claimant may have had, without allowing him to deal properly with the allegations. The Tribunal did not agree, and this argument reflected the claimant's motivation for his resignation, a decision taken to strengthen his claim before the respondent had, in his belief, the opportunity to dismiss at a disciplinary hearing. The Tribunal accepts Mr Armstrong's submission that the claimant was entitled to be protected against false allegations; the problem for the claimant was that he chose not to defend himself the inference being that the incident had occurred and there was no arguable defence that was likely to succeed. In contrast to Mr Armstrong's submission, the claimant did not have a short window of opportunity in which to provide a witness statement, he could have done so at any time before and indeed after his resignation and this failure was unconnected with the respondent, the protected disclosures and any health and safety complaints.

127 On behalf of Mr Bansai it was submitted that there was no evidence to show the claimant had suffered any detriment on the ground he had made protected diclosures, and on the balance of probabilities the Tribunal agreed. Further, the evidence before the Tribunal was that the respondents were unaware the disclosures had been made at the time, until the claimant's telephone call and Mr Armstrong's first letter that followed the claimant's suspension. It follows that the decision to suspend cannot be causally linked with the disclosures, Anthony McCarthy having merely carried out the suspension following instruction.

128 AS set out in its findings of facts the Tribunal did not find Julie Collins at the investigation hearing had fraudulently signed the contract, or that there was any failure on the part of the respondent to investigate the disclosures.

Health and safety detriment

129 With reference to the issue did the claimant at any time bring to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed was harmful or potentially harmful to health and safety, the Tribunal found on the balance of probabilities that he did not for the reasons set out above. He brought to the respondent's attention the fact that the inflatable bed was uncomfortable and the Tribunal did not accept this was a communication of circumstances harmful to health and safety, or a potential health and safety risk.

130 Had the claimant established he had been caused detriment under S.44 of the ERA, which he did not for reasons already stated, the Tribunal would have gone on to find there was no causal connection between health and safety and the events

that transpired which resulted in the claimant resigning when invited to a disciplinary hearing.

PIDA dismissal S.103 A and S.44(C) ERA.

131 With reference to the claimant for automatic unfair dismissal, namely, was the reason (or principal reason) for the dismissal of the claimant the fact that he had made such disclosures, the Tribunal found it was not. The claimant had resigned because he did not want to take the risk of being dismissed for gross misconduct. There was no fundamental breach of contract that precipitated his resignation, and in reaching this conclusion the Tribunal considered the factual matrix set out above agreeing with Mr Bansai that during the entire process the claimant evidenced an aggressive and uncooperative stance, made worse by the unnecessarily threatening legal correspondence. All that was needed was for the claimant to put forward his side of the story, by way of a statement if he so chose, or in a meeting, and for the investigative process to take its course.

132 With reference to the health and safety issue, namely, was the reason (or principal reason) for the dismissal of the claimant's the fact that he had raised health and safety concerns in the manner stated above, the Tribunal found that it was not and there was no causal connection between the claimant's resignation and any alleged health and safety complaint which the Tribunal found had not taken place.

Constructive dismissal

133 Turning to the claimant's complaint of constructive dismissal, namely, was the respondent responsible for conduct which was without reasonable or proper course and calculated or likely to destroy and or undermine the relationship of trust and confidence, the Tribunal finds that it was not, and further, there was no fundamental breach of the claimant's contract of employment. For the avoidance of doubt, the alleged detriments claimed by the claimant did not amount to a fundamental breach of contract either in respect of an express clause or the implied contractual term of trust and confidence.

134 When faced with a case in which the claimant alleges he has made multiple protected disclosures, a Tribunal should ask itself whether the disclosures were the principal reason for the dismissal. However, as the claimant lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he has the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason — *Smith v Hayle Town Council 1978 ICR 996, CA* (another trade union case), and *Tedeschi v Hosiden Besson Ltd EAT 959/95* (automatically unfair dismissal for health and safety reasons). The EAT in *Ross v Eddie Stobart Ltd EAT 0068/13* confirmed that the same approach applies in whistleblowing claims. The Tribunal finds the claimant has failed to discharge this burden in respect of his whistleblowing claims and the alleged constructive unfair dismissal for health and safety reasons, which are not well-founded and dismissed.

135 With reference to the issue, did the claimant leave in response to the above and for no other reason, the Tribunal found the sole reason for the claimant's resignation was the gross misconduct allegation and the prospect of his career being

damaged if he were to be dismissed on the grounds of gross misconduct, a high probability given the fact that two experienced and well-established employees who ordinarily got on well with the claimant, had brought such strong evidence against him. There is no requirement for the Tribunal to consider whether he claimant affirmed the contract by delaying his departure, it is having found there was no breach of contract and the claimant resigned prior to a disciplinary hearing at which he could have been dismissed, and more likely than not, would have been.

136 There is no requirement for the Tribunal to proceed and deal with the issues on remedy having found against the claimant.

137 In conclusion, the claimant made a protected disclosure on or around August 2017 and on 12 October 2017 concerning a breach of confidentiality. The claimant was not caused a detriment except for detriment numbered 2 that was not causally linked to the protected disclosure or health and safety complaints, and his complaints brought under Section 47B and 44(c) of the Employment Rights Act 1996 as amended is not well-founded and is dismissed. The claimant was not unfairly dismissed and his claim of automatic unfair dismissal brought under Section 103A of the Employment Rights Act 1996 is not well-founded and is dismissed. By consent the first respondent is ordered to pay to the claimant the sum of £1052.00 in full settlement of his claims for unlawful deduction of wages and accrued holiday pay

18.1.19 Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

25 January 2019

FOR THE SECRETARY OF THE TRIBUNALS