EMPLOYMENT TRIBUNALS

Claimant:	**Miss C Barron**		
Respondent:	**Methodist Homes for the Aged**		
Heard at:	**Leeds**	**On:**	**28 to 31 January 2019**
	Deliberations:		**12 March 2019**
Before:	**Employment Judge J M Wade** **Mr Q Shah** **Mr M Taj**		

Representation

Claimant:	By lay representative, and then in person
Respondent:	Mr C Crow

RESERVED JUDGMENT

1. The Claimant's complaints of detriment on the grounds of protected disclosure are dismissed for the reasons set out below, save for the allegation: being told she would be investigated for calling the fire brigade.
2. The Claimant's complaint of constructive unfair dismissal is well founded.

REASONS

Introduction, hearing and issues

1. The Claimant is a care worker with a clear vocation and unblemished track record in the sector, having delivered care to the elderly and others in need for over 20 years. The Respondent is a registered charity and provides care support to older people, employing approximately 7,000 employees, and working with approximately 16,000 service users. The Claimant worked at a scheme of 50 flats in Leeds, which provided care packages to some 17 of the residents. One such resident ("X") had a close connection to the Claimant's representative. The representative raised concerns to the local authority and others about his care and was also a witness for the Claimant in this case.
2. The Claimant's claim form, drafted by her representative, presented a constructive unfair dismissal complaint. The narrative described the Claimant's feelings of unhappiness about the period September 2017 to March 2018, when

she resigned her post. The narrative appeared also to assert detriment for having made protected disclosures.

3. After an attempt to clarify the particular disclosures relied upon during case management, a document on the claimant's behalf suggested over 30 such disclosures during the period October 2017 to March 2018. The Respondent conceded five protected disclosures had been made on the following dates: 12 October 2017, 14 January 2018, 22 January 2018, 9 February 2018 and 12 February 2018. These communications were either by email or note, and they appropriately reported information which the Claimant reasonably believed tended to show matters concerning residents falling within section 43B(b) or (d) of the 1996 Act, and it was accepted she made these reports in the public interest.

4. In light of the respondent's concession it was not in the interests of justice, nor plausible within the time estimate for the hearing, nor necessary, to analyse and decide whether others of the Claimant's communications amounted to protected disclosures. The issues were largely factual: was the Claimant subjected to the treatment she described as a matter of fact, and if so, the reason: was conduct of the Respondent on grounds of the Claimant having made protected disclosures? Was it with reasonable and proper cause? The Tribunal might then come on to decide whether or not the Respondent's alleged conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent, such that she was entitled to resign in response to it, and whether she did so. There was also an issue of limitation in relation to the detriment complaints.

5. In a record of the case management hearing on 8 October 2018 the Employment Judge said this: "*The complaints of unfair constructive dismissal are based upon an alleged breach of the implied term of trust and confidence, constituting the history of events as set out in the claim form, many of which are* ***also*** *alleged to be reactions of the respondent to the protected disclosures made by the claimant, which also constitute the detriment complaints*." The record then set out the following alleged detriments (albeit as six rather than seven matters):

   (1) Hostility and demeaning conduct from Mr Thornton, Ms [L] and Ms [A];

   (2) Suspension from administration of medicines on 16 February 2018;

   (3) A requirement to attend investigations into her grievance after her shifts had concluded…

   (4) ..being contacted during her annual leave for the same purpose;

   (5) Being told that the claimant would be re-investigated after she had contacted the Fire Brigade;

   (6) Changing the claimant's night shifts to day shifts; and

   (7) Leaving her personnel file in the office with access to others.

6. The claimant was then ordered to provide further particulars of the allegation of "hostile and demeaning conduct by three colleagues", and the allegation that items from her personal file were left out in a busy office.

7. The Claimant's response to that order set out far more extensive information, which expanded matters contained in the claim form narrative considerably. At the start of this hearing the Respondent provided a list of the alleged detriments and breaches it considered to be within the original claim and ordered particulars, and those it did not. The Employment Tribunal gave a direction that it was not in the interests of justice to permit an amendment to allow the following to be pursued as detriment complaints (albeit as the Claimant gave evidence about them, they might properly such form background to other complaints and allegations). The Respondent was permitted to lead evidence to address them as background matters:

    i. Generalised allegation of micromanagement/set up to fail;

    ii. Referring to the claimant's work (Mr Thornton in a meeting with Ms A);

    iii. Mr Thornton offering coffee during the Claimant's meeting with Ms M;

    iv. Mr Thornton and others ignoring the Claimant's request for help during a fire alarm incident;

    v. The provision of untrained/insufficient night staff.

8. As much of the allegations of detriment depend upon our factual findings, they appear as headings in the findings below.

9. The Claimant's representative, who has a number of chronic health conditions, became fatigued on the final day of the hearing and the Tribunal gave the Claimant the opportunity to decide whether to apply for a postponement, or whether to continue on the basis that the Tribunal would seek to put the parties on an equal footing, and if necessary ask questions on her behalf of the Respondent's witnesses. The Claimant chose the latter option, but her representative continued to be present as a companion. The delays inevitably meant it was necessary to reserve our decision in this case.

Evidence

10. An order had been made that statements would stand as the evidence in chief and that the parties would not be allowed to adduce further evidence without the permission of the Tribunal. The parties exchanged witness statements, including supplemental statements. The Tribunal read those in advance of the hearing commencing. There were statements from the Claimant (both principal and supplementary statement) and a statement from her representative. The Claimant's representative raised with the Tribunal that the statements provided by the Respondent for the Tribunal's use were not the final versions with the page numbers of the bundle included. There was no explanation as to how this had arisen and the Tribunal indicated we would work with what we had unless copies could be provided. On 5 March 2019, before the deliberations in this case, the Claimant provided the statements with the page numbers included, and there was no objection from the respondent to their use in deliberations.

11. On behalf of the Respondent there were statements from Mr Thornton, the Leeds Scheme manager at the material time, Ms Hughes, the area manager, Ms Murphy her area support manager, and Ms Webber the Respondent's director of quality.

12. The Tribunal had a bundle of less than six hundred pages, to which there were various additions and substitutions during the course of the hearing. The Respondent had reserved the right to adduce additional evidence if its understanding of the matters being relied upon were to change during the course of the hearing, and in relation to a number of matters, the Tribunal gave permission for that supplementary evidence.

Scope of the hearing

13. It was apparent from the evidence of the Claimant's representative that issue was taken with the standard of care provided to X in the material period. It was not in dispute that the arrangement by which the Respondent provided care to X ended around the time of the Claimant's resignation. The Tribunal confirmed that there were no proceedings between the respective parties (that is the Claimant's representative, X, and the Respondent) such that any application for a stay was being sought in this case and the parties confirmed there were not. It was not in the interests of justice, not least because of the time allocated, for the proceedings be conducted as a proxy to decide issues which had resulted in X's care contract coming to an end. It was unnecessary, and would have been unjust, to determine those matters in this complaint of constructive dismissal, with associated protected disclosure allegations. The Tribunal was clear that it would not make findings or comment on the standards of care provided to residents at the Leeds scheme.

The Law

14. The Tribunal directed itself as to the relevant provisions and principles as follows.

15. Section 47 B of the Employment Rights Act 1996 relevantly provides at 47b (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".

16. The relevant provisions concerning constructive dismissal are:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -

…

(b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

17. Section 103A provides: "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"*.

18. The following relevant principles establishing constructive dismissal at common law can be derived from the following authorities:

Western Excavating (ECC) Limited v Sharp [1978] IRLR 27

1. If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be 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.

Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84

2. A term is to be implied into all contracts of employment that the employer will not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

Woods v WM Carr Services (Peterborough) Limited [1981] ICR 666

3. To constitute a breach of the implied term of trust and confidence, it is not necessary 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, was such that the employee cannot be expected to put up with it.

19. The principles of affirmation were examined in **Cockram v Air Products** EAT 0038/14/LA and were helpfully summarised. Mrs Justice Silber said this (paragraph 25): "The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright lines or rigid rules." At paragraph 15 she says: "It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in **Bournemouth University Corporation v Buckland** [2011] QB 323 at para. 54 as follows:

> **"..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."**

20. The relationship of affirmation to the last straw doctrine is not straightforward. In Dr I Gibson and Partners v Mrs SA Hughes UKEAT 0371/06 His Honour Judge McMullen QC said this at paragraphs 19 and 20:

"First this is not a last straw case. The difficultly in using metaphors, as Lord Hoffmann warned recently in **Lawson v Serco** [2006] ICR 250 para 19, is there is a great danger in spending too long on a metaphor and a striking metaphor may lead to distraction. The last straw indicates that a very substantial weight be

placed upon the back of a camel which it will bear with fortitude. But there comes a stage when any addition to the load will cause the camel's back to be broken, even if the addition is of something as trivial as a straw. That is the language used throughout the cases from **Lewis v Motorworld** to **Omilaju**. What is plain is that for this doctrine to be engaged there must be more than one event. True it is that none of them needs to be serious and none needs to be a breach of contract, provided cumulatively they amount to a fundamental breach.

21. **Omilaju** confirmed that a last straw cannot be an entirely innocuous act, even if the claimant interprets it as destructive of trust and confidence.

22. As so much of this case depended on the facts found, which were not straightforward and of great importance to the parties, the Tribunal gave itself the following direction derived from well established principles of fact finding:

    a. Is the account consistent with contemporaneous material, including increasingly, social media, smart phone and meta data based evidence?

    b. Is the account consistent with subsequent investigations or witness statements given?

    c. What evidence is there from others about the witnesses' conduct and demeanour at the time**,** both before and after any allegations?

    d. What other evidence is there about the way the witnesses behaved on other occasions, perhaps not in dispute?

    e. What was the Tribunal's impression of the witnesses when questioned: was the impression that they were telling the truth?

    f. What was the Tribunal's assessment of the witnesses' reliability on relevant matters: were they generally consistent with other material and good historians or were they mistaken in their recollections or beliefs?

    g. What does the totality of the chronology or circumstances tell the Tribunal about the inherent likelihood of the accounts?

    h. An initial impression or assessment of a witness has to be checked against all the other factors;

    i. Placing too much significance on demeanour can be unsafe: a confident witness is not necessarily a truthful witness and a nervous one is not necessarily lying;

    j. A genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable;

    k. People often deny unlawful acts ("well he would, wouldn't he");

    l. Generally good historians still tell untruths; people do, on occasions, behave in unexpected ways, whatever the overarching likelihood;

    m. Skilled cross examination can demolish an otherwise cogent case;

    n. The Tribunal has a duty to put the parties on an equal footing during a hearing as part of the overriding objective;

    o. The formal rules of evidence do not apply to the Tribunal;

    p. Justice requires witnesses to have the opportunity to comment on disputed matters in, what is still, an adversarial process.

Findings

The contract of employment

23. The Claimant joined the Respondent on 19 March 2014. She described her post as a "night care assistant", contracted for 35 hours per week. Her written contract of employment signed in June 2016 recorded her title as "care and support worker" with hours of work of 32, according to a rota and shift pattern which could change from time to time. It provided: "any changes are at the discretion of the manager"….. "*you will not be required to work in excess of 48 hours in any seven day period except with your express consent*".

24. In practice the Claimant had always worked nightshifts, typically of twelve hours or thereabouts, three nights one week and then four the next. Originally she had been a lone night shift worker, but by 2017 two staff were deployed to work the nightshift. She was paid for all hours she worked, save that one hour was deducted in respect of breaks expected to be taken.

25. At the material times her pay was around £8.50 per hour. The previous year was around £8.25 per hour.

26. The Claimant was paid on or around the 9th of each month for hours the previous month. From March to July of 2017 her hours varied between 140 hours in May, when she also took some holiday, to 221 hours in March. Her pay over these months varied from around £1200 net to around £1600 net. This was at a time when she described herself as happy in her post.

Hours of work in practice

27. The Respondent has an electronic clocking in and clocking out system at the Scheme and the Claimant's presence on site was accurately recorded for the material period from September 2017 to her last recorded attendance on 12 March 2018. She was almost universally rostered to work the 9pm to 9am shift or occasionally 9.30pm to 9.30am.

28. The Claimant routinely worked time in addition to her shift length, staying on in the morning to complete her duties; how long she would remain, and for which she was paid, varied typically between half an hour and an hour. Exceptionally she was on site more than 14 hours and on one occasion on 28 October 2017, over 17 hours.

29. The Claimant does not drive and her journey to work takes over an hour, involving two buses, (with a taxi costing £11.30).

The claimant's record and knowledge

30. From the start of her employment the Claimant was trained and inducted in the Respondent's comprehensive written policies and procedures, including in relation to whistle blowing, medication errors, disciplinary and grievance procedures, and safeguarding. She was diligent and competent and a reliable care worker with no disciplinary or other record of note. She regularly reported concerns about residents and occasionally other matters to "her senior". She had received praise in supervision meetings in the past for her communication, particularly in relation to medication concerns.

Management

31. In the material period, September 2017 to March 2018, the Respondent employed two seniors, Ms D, whom the Claimant had known for some years, and

Ms L who had re-joined the Respondent in or around June 2017. They were managed directly by Mr Thornton, a new manager in place from June 2017. Prior to his joining, there had been a short period under an alternative manager and cover managers. Prior to that there had been some stability with a manager liked by the Claimant, Ms G.

Reporting

32. The Claimant's reporting of concerns included completion of the red "Medications" book, and separately both longer and shorter notes or letters, which she put in the senior's locked drawer. Each senior had a set of drawers in the office which were secure and confidential. Depending upon which senior was on duty, she placed the reports accordingly. She also made entries in appropriate resident and other documentation.

33. Shortly after his appointment in June 2017, Mr Thornton introduced daily handover sheets, on which any care and support workers could write information which their colleagues would need to know on a change of shift. He was also present around that time at a one to one meeting with the Claimant and Ms Hughes, when they had discussed the need for the Claimant to speak to a relevant manager, as well as documenting concerns to her senior: Ms Hughes had explained that matters could be missed if there was not also verbal communication to alert the relevant manager to the written concern or error.

34. There was discussion in that meeting of the Respondent's "mascot" system, which was a 24 hour means of reporting concerns and seeking support via a confidential line. That system was also explained in the Respondent's whistleblowing policy.

Provisions of the respondent's policies

35. The respondent's "Medication – Retirement Communities" policy ("MRCP") at the material time included the following provisions: a definition of a medication error/incident; that where an error and possible harm to the individual has been identified the resident's GP/111 must be called; that at the earliest opportunity the Senior on duty and Area Manager must be informed; that an internal report form must be completed; and that various regulatory reports may need to be reported.

36. The respondent's "Whistleblowing Policy" ("WBP") at the material time included the following provisions: that a Director to whom the disclosure is made should assess what investigation is required and inform the discloser of the timescales; the Director must inform the complainant of the outcome of the investigation and any corrective measures and timescales; feedback cannot be given for reasons of confidentiality if disciplinary action may be taken against another employee; "if necessary a further meeting must be held within an agreed time frame to discuss progress in remedying the situation and also to establish that the individual making the disclosure is satisfied that their concerns have been dealt with and redressed."

37. The WBP further also provided that employees raising disclosures will not be disciplined, dismissed or subjected to any other detriment as a result of making a disclosure and designated reprisals against whistleblowers as a disciplinary matter.

General

38. By early October of 2017 the Claimant's feelings about her work had deteriorated: she reported in supervision with Ms D that she felt nothing was going well, that some staff do not care about residents, and that she felt exhausted and drained. Ms D praised her for her work with X, who required the most care on the nightshift.

The October medication error

39. On a nightshift of 12/13 October 2017, an occasion when the Claimant was on site from 9pm to 9 am, her shift hours, she completed a note reporting medication errors. She said "I, CB will inform senior at the soonest opportunity of this medication error"; she then properly set out medication errors in relation to a resident. She put that note into the drawer of her senior colleague Ms D, who said, when asked why she had only actioned the matter on 26 October: "*I did not put it in my drawer, it is Catherine who put it after she reported to [Ms L] and nothing was done. I got it yesterday when sorting out my drawer* .."

40. Immediate action was then taken by senior Ms D, to suspend the colleague who had been responsible for the medication error, Ms S, from administering medication (or dealing with it in any way), and to complete time critical ("TCRs") and CQC reports in respect of the error (all in an effort to meet the requirements of the respondent's MRCP). The matter was not ultimately pursued by safeguarding following medical advice. Following investigation, no disciplinary action was imposed on Ms S, implicitly it was accepted as a genuine mistake.

41. The Respondent's investigation was undertaken by Ms Hughes. She interviewed both seniors (Ms D and Ms L), Ms S and the Claimant. The Claimant had included in her statement that she had reported errors to Ms L prior to this, and again there had been no action. That was her explanation for also copying a report to the other senior, Ms D.

42. A disciplinary charge was made against Ms L, the senior to whom the Claimant had said she had reported the error in the red book, and there was also evidence from Ms S that Ms L had tackled her shortly afterwards, but said not to worry about the mistake. Ms L was subsequently subject to a first written warning in relation to her failure to action the error properly at the time.

43. The investigation report into that matter was concluded by 17 November 2017 and in all likelihood a disciplinary hearing in relation to Ms L was complete by Christmas. It was confirmed to Ms S by 21 December that no further action was to be taken in relation to her mistake.

44. In December 2017 Ms L wrote in the "red book", that it was no longer to be used for communications between staff or for any other purpose; this reflected a need to insist that colleagues speak to a senior or manager where there were serious matters, as well as making the appropriate report in the daily handover sheet; it was not hostile and demeaning conduct by Ms L. The claimant suffered no retaliatory action for her reporting of these errors, which was the subject of a thorough investigation and her concerns were born out. In fact, despite the allegations made of hostile and demeaning conduct by Ms L, there was very little evidence given by the claimant of this, save in relation to an allegation that Ms L did not pass on information to her (see below).

45. There was no meeting to feedback to the claimant that her concerns had been redressed.

The alleged bin store incident

46. This allegation resulted in the Tribunal giving itself the following direction concerning findings of fact: in general terms contemporaneous documents, those closer to an event, were more likely to be a reliable account of what happened, than those made subsequently or much further on in the chronology. We also bear in mind that the Claimant's witness statements were also drafted by her representative.

47. There were three versions of an allegation concerning contact with Mr Thornton near the "bin store". We also note that a specific allegation was not made in either the Claimant's original claim form, nor in her resignation letter. In her witness statement the Claimant said: "*around this time [21 December 2017] "Dale followed me into the outside bin store. He came very close to me and made me very uncomfortable and shaky. He forcefully asked me if "[Ms D] was aware of the notes I had been leaving about medication errors. I was so afraid for what Dale would do to [Ms D] but had to confirm she was aware because I had left everything in her drawer".*

48. In a communication to Ms Webber dated 16 February 2018 the Claimant said this: "*On 30 October 17 Dale followed me to the bin store. He stood by the bin store door and asked me the same thing he had asked me on the phone. (Did [Ms D] know you put the copies in her drawer?)… if [Ms D] phones you don't say anything]. [Page 287] He then asked me to "write a few lines to explain". I did not understand why, if it was an investigation, he was not following the correct procedure and conducting it professionally".*

49. The allegation in the witness statement was put to Mr Thornton, and he denied it. When the denial was put to her, the Claimant said it was not professional for Mr Thornton to speak to her in the bin store. When it was put to her that he was not in close proximity, her response was, "but it was intimidating". His request was "somehow excessive".

50. When the account above was discussed with Mr Thornton, he had no recollection of visiting the bin store. Mr Thornton was also adamant that when he subsequently needed to suspend the Claimant from administering medication, approaching her in the bin store "just did not happen".

51. We bear in mind that addressing allegations from more than a year ago puts a strain on memory. We also know the Claimant's email to Ms Webber is in the form of a detailed contemporaneous account, with dates, and that Ms Webber had encouraged her to keep a diary.

52. We are also clear that at the time the October medication error allegation was identified by the Respondent, Ms Hughes did not have need to interview the claimant personally, but a statement signed by the Claimant on that day, 30 October, clarified which members of staff had known of the error and when she had made Ms L and Ms D aware. In those circumstances it was entirely likely that her 30 October statement was given to, and asked to be given, by Mr Thornton, and it is of no significance (nor did the Claimant find it of significance) that he did so by the bin store, having previously telephoned her. Had his conduct been frightening or troubling at that time, the claimant would almost certainly have reported it; the highest she put it months later and in her evidence, was "unprofessional".

53. That conduct, of itself, cannot be said to be conduct without reasonable and proper cause on his part, nor detrimental conduct, nor hostile and demeaning

conduct. Mr Thornton was assisting in the investigation which resulted in action by the Respondent to fully find facts.

54. We also find that it was on that day (30 October) or thereabouts, that Mr Thornton said to the Claimant, "go home, you are here more than the residents". On that day the Claimant did not leave until 10.30am and in all likelihood by approaching the Claimant before she left, he was seeking to avoid the need for the Claimant then to have to meet Ms Hughes, as that would simply intrude into her time further.

55. In passing, we also observe that a further matter raised by the Claimant in her February '18 email to Ms Webber, that Mr Thornton's telephone calls to her on 27 October were "coercive and harassing", is indicative of her tendency to perceive innocuous matters as sinister, and that her resilience to such contact was low. The medication error came to light when she was on rest days, between shifts on 24 October and on 28 October. Mr Thornton was no doubt seeking to assist Ms Hughes by checking matters with the Claimant while she was absent. The Claimant may have found that intrusion unhelpful, and being told not to discuss matters with Ms D sinister, but at that time an investigation was underway and no criticism of Mr Thornton can reasonably be made for that. We accept that the Claimant genuinely found calls to home on a rest day unwelcome.

<u>The 19 December gift allegation</u>

56. The Claimant alleged that on 19 December at the start of her shift three colleagues, including Ms M, had engaged in a conversation in the kitchen/staff room which was "mocking", and "accusing her of breaking company policy". In fact the discussion involved colleagues pointing out that there was a gift for the Claimant in the staff room and the Claimant saying that it was probably from Mr Thornton. The colleagues then observed it was probably from resident X, while laughing. The Claimant, who was a strict observer of the Respondent's procedures, said that the gift could not be from a resident because that would be against policy, or words to that effect. The colleagues then laughed again and there was further discussion about opening the gift and the Claimant wishing to wait until Ms D was there. In her words: "she did not accept gifts from bullies".

57. This incident occurred at a time when the Claimant was pleased because she had received feedback that the family of X to the effect that she did an excellent job. In all the circumstances the colleagues were not acting in a manner calculated or likely to destroy or seriously damage trust and confidence, nor objectively could it be seen as such. It was a single incident of humour at a colleague's expense, well within the resilience of the ordinary colleague. This had nothing to do with protected disclosures: the staff concerned had no direct knowledge of the disclosures made.

<u>The filing incident with Ms A</u>

58. On 9 January 2018 the Claimant made a note that on the morning of 8 January 2018 she had attended the office towards the conclusion of her nightshift. Ms A, the administrator, had asked why she had not done the filing (there had been a message from Mr Thornton for nightshift staff to do filing).

59. A discussion then took place about a lack of space in care plans for filing, the Claimant remaining calm and Ms A becoming upset. Ms A said "Mr Thornton and Ms Hughes will be at me now" (because Ms Hughes was due to be on site in relation to a medication audit). And the Claimant said, "no they won't". The

Claimant reported that Ms A, upset, said to the Claimant that, "you are going in there", gesturing towards Mr Thornton's office and the Claimant said that she was being unprofessional. The Claimant left the office to clock off and go home. The Claimant described Ms A and a maintenance colleague, following her up the stairs and she expressed her discomfort and perception of this conduct as bullying.

60. The claimant, as usual, left this report in Ms D's drawer together with a letter about Ms L (allegedly telling Mr Thornton and Ms Hughes that all relevant medication documentation had been filed (when it had not). Ms D gave those reports to Mr Thornton, who rang the claimant at home on 19 January during the day, and before she was due to come in for a night shift. He indicated he would have to investigate the matter the following week and asked her why she had not put the notes under his door, rather than in Ms D's drawer. Again, she found that call difficult and disruptive of her sleep, but Mr Thornton was seeking to progress that grievance, rather than ignore it; he had reasonable cause for the call.

61. There was subsequently an investigation by Ms Murphy, who interviewed both the Claimant and Ms A. A hearing took place on 21 February 2018. At the hearing Ms Murphy also asked the Claimant about the allegation about Ms L. When this matter was discussed with the Claimant she confirmed to Ms Murphy that she did not consider she had raised a grievance against Ms L. (The Claimant was also, at this time, working with Ms Murphy in connection with separate medication error complaints). Ms Murphy arranged for a different administrator to take notes at the grievance hearing with the Claimant, and confirmed in that meeting that the Claimant had a right to be represented. The Claimant confirmed that since 7/8 January the parties (that is she, Ms A and the maintenance colleague) had been fine working together. In confirming that she would be happy to have a meeting with Ms A, she said this, "I can honestly say that from that day onwards we have all been fine with each other and chatty and helping each other and I am happy at the moment".

62. Ms Murphy then met with Ms A who explained that she had become upset in January because Mr Thornton would shout at her if she had not completed her work, which on prompting she then clarified as feeling "he would tell her off". That was really the end of the matter as between the Claimant and Ms A. The incident was self-explanatory and spontaneous. It had nothing to do with the Claimant's protected disclosures. It arose from the reaction of Ms A to filing not being done and feeling under pressure over that. It was not a matter either calculated or likely by Ms Murphy or the maintenance colleague to destroy or seriously damage trust and confidence. It was investigated and addressed appropriately, contrary to the Claimant's assertions in her claim form.

<u>The service user equipment allegation</u>

63. On or around 12 January 2018 resident X had returned to the scheme from hospital. When his care was to resume, his family communicated by email to the scheme email address an instruction, "please do not [use] blue leg supports overnight", together with other instructions. That email was addressed to both seniors Ms L and Ms D, said to be with immediate effect. The Claimant was on duty on the night shifts of both 12, 13 and 14 January 2018. At this time Mr Thornton was on annual leave. The resident's family had sent an email to say the resident would be home from 2.30pm on January 12, and that his discharge notes would be provided. Ms L, the senior on duty had confirmed that his care

would resume 10.30pm that evening. The Claimant was not informed by Ms L of the resumption of care for X, nor of the particular care needs which had been alerted by his family. When this became apparent the family member was not pleased, but as the family member was present when the Claimant resumed care, and could advise her of his needs, this incident was in the character of a "near miss". The Claimant appropriately then made a note entitled "safeguarding alert", recording her concern that the information had not been passed on.

64. Mr Thornton investigated the matter and addressed it with X and his family and the seniors – he acknowledged it should not have happened. There was no evidence to suggest that Ms L deliberately failed to pass on information to make the Claimant appear inadequate. There was little evidence of prejudicial conduct by Ms L generally towards the Claimant, rather than simply the Claimant's preference for Ms D as her senior, such that in all likelihood Ms L made a simple error on or around 12 January. This was not detriment on the grounds of having made disclosures; it was conduct without reasonable and proper cause by Ms L; it was not calculated to seriously damage or destroy trust and confidence, in our judgment, but it was likely to contribute to trust and confidence being seriously damaged in all the circumstances of this case.

<u>December/January Medication Errors (Mr Thornton and others) investigation</u>

65. On Sunday 14 January 2018 the claimant emailed Ms Hughes reporting medication errors by a care worker colleague Ms M, and Mr Thornton; the medication errors by Mr Thornton were from December 2017. Ms Hughes immediately sought to obtain the relevant documents relating to those errors and to ask the claimant further questions. In collaboration with HR she also arranged for Ms Murphy to be in contact with the claimant and they arranged to meet on Monday 22 January. The matters were then investigated. Ms Murphy took statements of all those involved between 22 January and 2 February and care worker, Ms M was suspended from the administration of medications.

66. The claimant had said she reported the December errors to her senior Ms D at the time. Care worker Ms M, Ms D and Mr Thornton were all later subject to disciplinary action in February, with Ms D resigning shortly before a hearing took place. Only Ms M was subject to suspension from administering medicines. During the investigation phase those at fault were not told who had reported the errors, but they were provided with the Claimant's statements in February in advance of disciplinary hearings as part of an investigation report.

67. The claimant was not told that disciplinary action towards her colleagues was underway, nor even that matters had been investigated and were being redressed. She was not told at the time, nor at any stage until the response in this case was presented. Her belief that "nothing was done", as contained in her particulars of claim, was reasonable at the time and reasonably informed her state of mind at the time.

<u>Other complaints</u>

68. While at work on 19, 20 and 21 January the claimant wrote accounts of issues with colleagues, and alleging neglect on their part (Mr Thornton, Ms L, and Ms F, a care worker). She included a complaint about Mr Thornton's telephone call to her on 19 January about her grievance against Ms A. These notes were again put in Ms D's secure drawer but were not drawn to wider management attention at the time by the Claimant. On 22 January 2019, when he met the Claimant, Mr

Thornton had no knowledge of them, not least because she expressed in one such note her reluctance to provide him with them in case "he would then potentially destroy" [the reports].

69. To the extent the Claimant relies on conduct by Ms F, a fellow care worker towards her, Ms F had no knowledge of the disclosures the Claimant had made. This incident was an operational disagreement about resident care while a resident was present (and to that extent we accept the Claimant's contemporaneous note). It seems to us that Ms F was seeking to direct the Claimant and the Claimant was unhappy about that. It appears ordinary colleague interaction and not an incident which could objectively be "emotional bullying" by Ms F of the Claimant, because Ms F was allegedly argumentative in tone. We consider this event another example of the Claimant's perception of events as more than they were, and a lack of resilience to ordinary workplace interaction with peers. We have addressed the complaint about Mr Thornton's telephone call to her on 19 January.

The ambulance incident

70. As an allegation of hostile and demeaning conduct from Mr Thornton, the Claimant alleged that on an unspecified date towards the end of January when a resident appeared unwell, "there was a "refusal/decision by DT not to call an ambulance".

71. We consider that on or around 15 January 2018 the Claimant had asked a care worker colleague to ask Mr Thornton about a resident's need for medical assistance. Mr Thornton's response was to advise the colleague to ask the Claimant to call the resident's family, because the family member had a health and care power of attorney, and had previously requested to be contacted prior to any such calls. The Claimant did so and the family member authorised care. Mr Thornton later reported this matter to the family member and there was no complaint about it.

72. This conduct by Mr Thornton may have been unwelcome to the Claimant, however it was his good faith reaction to the circumstances in accordance with the previously expressed family wishes. It was certainly not conduct on the grounds of the Claimant having made protected disclosures, nor was it without reasonable and proper cause.

73. In reaching these conclusions we note that this incident was neither included by the Claimant in her emails to Ms Webber of 16 February or earlier, nor in her resignation letter, nor was it criticised in other reports she made at the time concerning allegations of neglect and abuse by Ms L and Mr Thornton. This was an event which the Claimant perceived as unhelpful to her and poor care, but in fact Mr Thornton was doing as the family had directed.

Mr Thornton's meeting with the Claimant on 22 January 2018

74. When the Claimant presented her grievance about Ms A and Ms L, there was discussion between Mr Thornton, Ms Hughes and Ms Murphy and the Respondent's HR department about whether Mr Thornton should conduct that grievance as line manager. The reality was that Ms L and Ms D, the two seniors reporting to Mr Thornton, did not get on with each other, and management was to that extent dysfunctional; that was mirrored by the staff who had formed allegiances to them. There was concern that Mr Thornton would be perceived to be biased to one or the other senior. The four managers decided it was

appropriate for Ms Murphy to conduct the grievance investigation to enable Mr Thornton to remain impartial and focused on the considerable operational issues he had to address. There was some resistance from Mr Thornton to that initially, but Ms Hughes view prevailed.

75. On the other hand, when the Claimant emailed Ms Hughes on 21 January with fresh allegations with a subject heading "bad practice", Ms Hughes told the Claimant that these were operational concerns that needed to be addressed by the manager, Mr Thornton, replying, "hi Catherine the issues in your email are for you to raise with Dale. Can you please speak to Dale". The content of the email had concerned "job cards" or organisational issues for three residents, and the absence of a care plan for one resident approaching the end of her life. Ms Hughes then emailed Mr Thornton asking him to deal.

76. Rather than seeking to disadvantage the Claimant, or subject her to detriment because she had made protected disclosures, Ms Hughes was seeking to distinguish between (1) operational issues that were properly for Mr Thornton to resolve, (2) reportable issues of safeguarding or medication errors, for which investigation support might be required by her or Ms Murphy, and (3) grievances about colleagues, which similarly might require support because of a perception of bias or workload capacity of Mr Thornton.

77. Against this background, the claimant started her night shift on 21 January at 9pm as usual. She had arranged to meet Ms Murphy at 11am on 22 January to discuss the December/January medication errors. In the lull between her care work ending (between 9 am and 10am) and her 11am meeting, Mr Thornton called the Claimant into his office to discuss the operational issues she had raised to Ms Hughes. He had asked Ms A, administrator, to sit in on the meeting. Mr Thornton had a copy of the email and he made it clear the matters were inappropriate to raise to Ms Hughes. He also had a copy of the Claimant's report concerning the resident approaching the end of her life, being cared for at home, and he was clear that the Claimant needed to report such things directly to him. On the Claimant's account to Ms Webber, he also asked her how things were and whether she knew of the Employee Assistance Programme. The Claimant was unhappy about that meeting because she had no notice of it, she was tired and exhausted from a night shift, she did not welcome having Ms A present, and she considered Mr Thornton must know of the medication errors she had reported concerning him and was somehow thereby singling her out.

78. In contrast to her belief, the reason for this meeting was simply to let the Claimant know that Mr Thornton was addressing the operational issues she had raised and to advise her to come to him about them. It was not hostile and demeaning conduct without reasonable and proper cause by Mr Thornton; it was his attempt to address matters. The presence of Ms A (with whom the Claimant later described she had worked fine, after the 8 January incident) ought to have reassured the Claimant, rather than made her fearful, objectively. Subjectively, given the number of complaints being made by the Claimant and her clear distrust of Mr Thornton by this stage, and the proximity of the meeting with Ms Murphy, it is understandable why they Claimant saw this meeting as sinister.

79. Sinister was also the Claimant's perception of Mr Thornton popping his head around the door to offer coffee during her meeting with Ms Murphy. The Claimant had, by this stage, alleged significant abuse and neglect by Mr Thornton, albeit those matters had not yet come to the attention of management, and she

assumed that he would have known of those allegations and was seeking to intimidate her. In our judgment he was doing nothing of the kind. There was no detriment, much less on grounds of protected disclosures having been made, and there was no conduct without reasonable and proper cause in these two events.

Further disclosures and being required to attend grievance investigations after her shift had concluded

80. For the next two weeks the Claimant worked her shifts as usual, working over her hours on occasions; on 9 February 2018 she used the whistleblowing policy to report to Ms Webber directly by email that on her last shift there had been short staffing with considerable impact on residents. The Claimant said to Ms Webber she could not raise these matters with the area manager or scheme manager as Ms Hughes had passed her back to the manager Mr Thornton, when she had complained.

81. Ms Webber promptly summarised the Claimant's concerns and then had a long telephone call where she reassured the Claimant that she had done the right thing and Ms Webber would address matters. Ms Webber then investigated with Ms Hughes who confirmed there had been short staffing and that medication errors and so forth were being investigated. The respondent's case was that the CQC later reported staffing was adequate, but it is clear from the contemporaneous emails at the time that Ms Hughes acknowledged the Scheme was short staffed because of absence, albeit recruitment was underway.

82. The Claimant worked over that weekend. She had been invited to attend a grievance meeting after her shift ended on Monday 12 February at 11am. She postponed that meeting by email on the evening of 11 February because she was exhausted from working over her shifts, and she further objected to Mr Thornton being present as note taker. Ms Murphy postponed that grievance hearing to Wednesday 21 February at 9am, a day when the claimant was similarly due to have worked a 12 hour night shift.

83. The Claimant is right then, that her grievance meeting was twice arranged on a day when she would be due to have finished a twelve hour night shift. The first time she postponed it, and the second she did not. On the first occasion (12 February at 12.46pm), when she returned home she emailed Ms Webber including the following: "I have just arrived home from a nightshift I finished again after 11am due to being short staffed. I have not been getting enough rest/sleep, costing me Taxis additionally yesterday and last week as a result." Ms Webber replied with supportive advice.

84. In January and February to this point 80% of the Claimant's shifts on site exceeded her 11 hour working time and these hours were approved and paid by the Respondent, albeit she was encouraged to try and finish on time. She worked longer hours to complete her tasks, which was indicative of her care for residents.

85. Given the Claimant's reporting of exhaustion, that she was consistently working over her hours, and that Ms Webber knew that the Scheme was experiencing short staffing, inviting her to meetings at the end of extending 12 hour shifts, be that on 22 January, 21 February or earlier, is conduct without reasonable and proper cause, likely to seriously damage trust and confidence, or certainly to contribute to its destruction. We reach that conclusion deploying our industrial knowledge of what is reasonable in such circumstances. The reason why she was invited to meetings in this way is that the respondent wanted to deal with the

various matters at a convenient time for its managers, who predominantly worked day shifts, and may well have had to travel for such meetings. It was not to penalise her for having made disclosures. When she sought re-arrangement or postponement it was granted, but not to a time when she had not just finished a twelve hour shift. The respondent appeared blind to the difficulties faced by a night worker in such circumstances.

Further disclosures to Ms Webber

86. The Claimant provided further disclosures on 12 February to Ms Webber concerning additional medication errors and other conduct by Mr Thornton, including in his communications with residents, which she considered contained lies. She also complained that a staff member previously reported was still doing medication. The same day the Claimant provided her consent to Ms Webber, who was also liasing with the head of HR and others at the respondent, to reveal her identity if required, to help investigate the disclosures she had made. On 14 February she told Ms Webber she had visited her doctor and was still exhausted and stressed and had alleged further bullying by Mr Thornton with the details to be provided.

87. By this stage Mr Thornton's probationary period had been extended for two months due to staff grievances. His disciplinary hearing in connection with the medication errors was notified to him on 14 February to take place on 27 February 2018, as was disciplinary action for others involved. Mr Thornton was told the allegations, if upheld, could result in dismissal.

88. By lunchtime on 16 February 2018 the Claimant had provided to Ms Webber a chronological account of alleged bullying, intimidation and harassment of her by Mr Thornton, commencing in October 2017. Ms Webber copied that document to the Respondent's Head of HR and told the Claimant it would have to be addressed by line management (Mr Thornton's boss). The Claimant received no acknowledgment of that complaint from HR or anyone else.

The suspension of the Claimant from administering medicines on the evening of 16 February

89. Mr Thornton could not remember how an allegation concerning potential medication error/falsifying documents by the Claimant came to light, nor whether he had discussed it with the seniors Ms L and Ms D. He said a member of staff reported it on or around Friday 16 February and such reports were happening on an almost weekly basis. The findings below are made having considered the relevant documentation, in the light of all our other findings concerning practices and reporting, and on the basis of what is more likely than not.

90. Documents provided to Mr Thornton, we cannot be certain when, showed that at 8 am or thereabouts on 17 January 2018 the Claimant had recorded preparing to administer three types of medication to a resident, by placing a "dot" in ink on the relevant sheet, but had not then initialled to record that she had administered the medication, as was the medication practice standard. We can reach this conclusion because the practice was that a "dot" was marked when the medication was checked and prepared, and then initials were signed over it to indicate administration of the medication to the resident. This had occurred towards the end of the Claimant's shift in the morning. The "Medication Administration Record" is kept with the resident.

91. The next care assistant on duty with that resident, from the record Ms M, who was on shift at 9pm that day, completed her record of evening medication, and then photocopied the sheet that day and kept it, as a record of potential error, without any further reporting or raising of it at the time with the claimant to see if, in fact, she had administered the medication. It is of course possible that Ms M indeed reported the error and the person to whom she reported it made the photocopy and did not take further action.

92. At the end of the month, it was the respondent's practice to collect each resident's monthly record and file them in the office. The end of month record displayed the claimant's initials in the 8am, 17 January entry, over the dot. This was as second document which Mr Thornton said had come into his possession, but from where he could not remember.

93. On Friday 16 February Mr Thornton said he took advice from HR (there was no disclosure of documents relating to such advice or the circumstances in which the error came to light), and with Ms Hughes and HR, decided to suspend the Claimant from administering medicines immediately. She was due at work for her 9pm shift that night and there was a note in the handover book to call him. He said by telephone that she was to hand over medication duties to the second member of staff and not to go in the medication cabinets or hold such keys because of an allegation of falsifying documents.

94. The Claimant reasonably perceived this to be retaliatory, having that day sent her evidence of bullying by Mr Thornton to Ms Webber. She was not provided with written confirmation of her suspension from administering medications until she received it by post on 20 February. She found this treatment humiliating and ridiculous (because in her experience she did not make errors) and she reported it to Ms Webber, who informed her that she must contact HR, because if there were grounds to investigate, Ms Webber could not intervene and suspension from administration of medication was routine in such circumstances (or words to that effect). The Claimant said she would contact HR but did not do so until after her upcoming holiday.

95. The respondent's submissions about this matter included that "two wrongs do not make a right": it may be that the respondent subsequently failed to investigate why the person who spotted the original apparent error had not acted for the benefit of the resident at the time, and addressed it at the time; that does not sustain a conclusion that Mr Thornton was acting against the Claimant because she had made protected disclosures. He was simply treating her in the same way as other staff where evidence existed they had been engaged in medication error. Similarly it was not his decision and the decision was in fact made by Ms Hughes and HR.

96. These are powerful submissions: the documents raise a clear case to answer of potential medication error: the medication may not have been administered that night; the allegation was also correcting the record, which may have been falsification, and that is not a simple error but something worse. Suspension from administrating medicines (rather than from work) was the normal course of events for such errors. The respondent's case on this succeeds. The Claimant was suspended from administering medications because of the evidence of error and potential falsification, and it was not on grounds of her having made disclosures, and was with reasonable and proper cause.

97. There are however a number of matters arising from this chain of events which are relevant to Mr Thornton's credibility and background. The Tribunal found it incredible in the circumstances of this case that Mr Thornton could not remember who had presented the evidence to him; we consider it surprising that there was no documentation of the discussion with Ms Hughes and HR; Ms Murphy described the error as having been reported on the afternoon of 17 January in her questions to the Claimant but there was no evidence before us that it had been so reported; we consider it surprising that nobody sought to show the two documents to the Claimant or to Ms M at an early stage, when it was a matter of resident welfare and when there had been so many medication errors already highlighted.

98. There was not time in the hearing to explore the possibility that others may have falsified documents, or not acted promptly in January for ulterior motives, but instead retained evidence to later use against the Claimant, or where that may take matters. The Claimant did not suggest that Ms M, who received a final written warning for medication errors, was the most likely person to have photocopied the first sheet on 17 January, but that appears likely to this Tribunal. The claimant's position, when the documents were eventually disclosed to her in March 2018, and she answered Ms Murphy's questions, was that she had been trained to indicate checking and administration by use of a dot ("in case one forgot to sign"), that she did not remember not signing, that she could not explain why she had "gone back and signed" (which was how the question was put to her), and she did not agree that was what she had done (ie gone back and signed). In short a denial of misconduct.

99. These matters, including the Claimant's position concerning the documents, do inform our conclusion that her belief in persecution was genuine, and informs our conclusion about the reason for her resignation.

<u>The proposed change to the Claimant's hours from night shifts to day shifts and confidential documents being unsecure</u>

100. The respondent was considering returning to a lone night shift worker because it had re-arranged the limited care it was required to give during that shift at the Leeds Scheme. Ms Murphy mentioned this to the Claimant at the end of their grievance meeting on 21 February and the Claimant said she would think about changing from nights to days, or words to that effect. Also on or around 21 February, Ms D, the Claimant's preferred senior, resigned. Mr Thornton had his disciplinary meeting in connection with the December/January medication errors and he expressed frustration with Ms D and the difficult environment in which he was working.

101. On a nightshift in February the Claimant was looking in the confidential documents tray underneath Ms A's desk and saw her documents there (bank statements, a council tax invoice and so on). She took photographs and forwarded them to Ms D. The claimant alleged in her claim form and resignation letter that Mr Thornton had allowed her private information to be left in a tray. Mr Thornton's position was he knew nothing about it and had not seen the Claimant's information and we accepted this evidence. The Claimant did not suggest he had done so, but considered he, as manager, was responsible.

102. The tray was next to the safe under the desk and in all likelihood the documents had been accessed for some reason, perhaps audit, and simply not been filed away securely. This was not conduct on the grounds of the Claimant

having made disclosures. It was conduct, by omission, by this employer, without reasonable and proper cause, which was likely to contribute objectively to the destruction of trust and confidence.

103. The Claimant was working with agency staff on night shifts at this time, because of short staffing caused by five staff being off sick (as Ms Hughes' explained in an email to Ms Webber) and the Claimant considered they did not provide proper care. There was also an incident concerning the administration of creams to X by other care workers (which the Claimant could no longer do because she was suspended from medications) about which there was a complaint. Mr Thornton reported that, as required, and was in touch with the Claimant about it at home, by telephone, to assist him.

104. Ms D, having resigned, talked to the Claimant about whether she would be prepared to work directly for X to assist with his morning care because he would no longer be buying care from the Respondent. The Claimant was prepared to consider it at this stage but made no firm decisions.

105. On 26 February, the first day of the Claimant's holiday, Ms Murphy was in touch with her by email concerning the new investigation – she had been asked to investigate the Claimant's alleged falsification of medication documents. She offered the Claimant a meeting on 7 March concerning that investigation, and also enquired whether she would consider moving to days? The Claimant replied promptly to say she could not do days; she also said she would be happy to meet on 7 March if not rostered to work that night. The Claimant was then on holiday, returning on 7 March.

106. During her holiday she emailed a contact she had made at the Care Quality Commission and reported her concerns about errors and care plans. She said this: "I have reported serious medication errors and now I am being harassed. I have worked there for almost 4 years and have never made a mistake of which because of my values my duty of care has been consistent". She urged the CQC to inspect, which they did on 23 March 2018, finding the Scheme "required improvement" against three criteria including leadership, with breaches of the relevant regulations identified and relevant action advised. The Scheme was graded "good" against two criteria.

107. On 6 March Ms Murphy informed the Claimant of a consultation with current night staff about the reduction in shifts and asked her by email to fill out a form expressing her reasons for wishing to stay on nights. There had been a staff meeting on 2 March where the changes were discussed. The Claimant did not fill out the form and had not contacted HR at this stage, as advised by Ms Webber, about her concerns that she was being victimised.

108. The Claimant then told Ms Murphy she was rostered to work the night shift of 7 March, and could not therefore meet, having had a call from Ms L, the supervisor to confirm she was rostered. She emailed Mr Thornton to say she thought the degree of contact during her holidays was bullying and harassing because she had reported medication errors and she now copied that email to Human Resources. Mr Thornton responded to say he knew the Claimant was meeting Ms Murphy on Monday 12 March and that he would expect all staff to report errors. Ms Murphy also wrote to the Claimant on 7 March with the outcome of her grievance against Ms A (which she did not uphold but offered mediation and a right of appeal).

109. On 8 March Mr Thornton completed his investigation report into the misapplication of creams for X.

110. The Claimant said to Mr Thornton and HR by email that suspending her without good reason was just not right. She had still not seen the documentary evidence (or any evidence) justifying her being suspended from administering medication by this point, 9 March. That day the Claimant postponed her investigation meeting scheduled for 12 March with Ms Murphy, again, because of the hours she was rostered to work in that period (sixty in six days she said) and that the meeting came after the end of a night shift; again we considered such conduct, in terms of the scheduling of meetings after a night shift, to be conduct without reasonable and proper cause likely to damage trust and confidence.

111. The paper rota displayed at the Scheme for the following week recorded the Claimant as due to work the nightshifts on Monday (12), Friday(16), Saturday(17) and Sunday (18 March 2018). A notice was put up by Mr Thornton saying the new rotas would take effect from 1 April 2019, and asking staff to check the new rotas on "Careblox", the online rota system to see if there were any issues. The Claimant looked on line and saw a rota which allocated her to days (mostly 1pm to 9pm but also an earlier day shift) in March. This was a dummy rota reflecting a decision to move the Claimant to days, but for staff to consider generally, and about which they could raise any concerns with Mr Thornton.

112. The allocation of day shifts to the Claimant on the new rota was not done by Mr Thornton on grounds of the Claimant making protected disclosures. It was for operational reasons and it impacted others. Nor was it conduct without reasonable and proper cause likely to damage trust and confidence; the respondent attempted to consult about it and provided the Claimant with a means of explaining why she wished to remain on nights. She had not taken that opportunity by the time the rota was put up. She was not required to work a day shift at any time prior to her resignation.

<u>The Fire Alarm incident</u>

113. At around 11.30pm during the Claimant's Sunday 11 March night shift, there was a full fire alarm, caused by flooding in one of the flats. The Claimant could not raise help from the maintenance colleague and called Mr Thornton from her own mobile phone, who did not initially pick up the call (we derive this from his call to voicemail at 11.27 on his call record and his subsequent three outgoing calls to the land line of the Scheme). She then called the Fire Brigade, who attended within minutes. The Claimant then spoke to Mr Thornton who asked why she had called the Fire Brigade and then spoke with the attending fire officer. Mr Thornton did not personally attend, living some distance away. The Claimant wrote a four page report about that evening, including within it that: "*colleague [Ms F] continued with her job card or was in staff room and did not attend fire alarm event*" …"*My NB colleague remained sat in the staff room throughout the entire event therefore leaving Flat 18 client alone sat in reception"…* and "*I kept my NB colleague informed of relevant event information as multiple client priority calls booked calls continued to buzz as she ate her supper sat with her feet up*".

<u>Was the report provided to Mr Thornton?</u>

114. It was not accepted by Mr Thornton that the Claimant had put the point by point report of the incident under his office door that night or in the morning. On balance we accept the Claimant's account that she did so. We explain our reasons for this finding, which is a significant finding, in some detail.

115. Ms Hughes and Mr Thornton had clearly spoken about the need for an investigation, in all likelihood, the next day, concluding the need to "open an investigation", and before Mr Thornton had spoken to the Claimant. That is the earliest that conversation could have happened, in all likelihood. It is possible, as Mr Crow submitted, that the Claimant told Mr Thornton about Ms F's alleged indolence (and the details of that), during their short calls on Sunday night, but he could not recall it having been mentioned in his evidence.

116. Mr Thornton made three phone calls that night to the Scheme; one of seven seconds, one of around 2 minutes; and one of around 11 minutes, and in the latter he recalled speaking to the fire service, and he also recalled speaking to the resident. The opportunity for the Claimant to complain about her colleague was therefore limited.

117. In her resignation letter on 16 March the Claimant said: "he went on to tell me I was to be investigated – now – about calling the fire brigade….I had been given no notice and **had already provided full details in writing**". Neither Ms Hughes nor Mr Thornton disputed that she had done so in their same day responses to the resignation letter (and where they did take issue with many other matters she raised).

118. In Ms Hughes' account on 16 March responding to the resignation letter, was this: "I know we had discussions re CB acting in appropriate manner dialling 999 **and I highlighted the issue to be investigated was: CB allegation of FS sitting with her feet up eating food when alarm was sounding, what training staff have received re fire panel.** That Ms Hughes would recall such a similar account to that in the written report is suggestive of the contents of the document having been seen, or perhaps read out or relayed to her by Mr Thornton, rather than simply the allegation having been relayed orally by the Claimant.

119. Against the Claimant's evidence was Mr Thornton's evidence to the Tribunal that the Claimant never gave him a copy of the report and he had never seen it before these proceedings; his subsequent wish to investigate matters generally (supportive of having little information); his wish to investigate why the Fire Brigade had been called; the submission that the Claimant's allegation against Ms F was reported to him orally by the claimant; and the fact that Mr Thornton on 26 March said in a report concerning Ms F's conduct: "I have not been able to gain investigation notes from [the Claimant] regarding this alleged incident [because she had by then resigned]". The respondent's case was put on the basis that neither the respondent nor Mr Thornton had the Fire Incident report from the Claimant at the time.

120. Certainly the Claimant had expressed reservations about providing Mr Thornton with a report under his door a few weeks earlier, "lest he destroy them", and it was therefore possible that she had not delivered the Fire Incident report. On the other hand Mr Thornton had given instructions for documents from the nightshift to be put under his door on occasions.

121. We also noted that the Claimant had started her report on the prescribed daily handover sheet for that nightshift, but unsurprisingly given the volume of matters to be documented, she reached "no reply from BG [the maintenance colleague]" in the chronology and ran out of space on that single sheet. She just had space to write: "Flat 18 incident report" and her initials; the incident report then followed over four full continuation pages. It then becomes highly unlikely, the Claimant's practice to date having been to complete detailed reports and pass them on to management, that on this occasion she did not do so: she had not ceased her practice of writing reports despite being encouraged to raise matters orally.

122. In all these circumstances and on the balance of probabilities, we find Mr Thornton had received the report in the morning, had relayed some contents to Ms Hughes, had criticised the Claimant for calling the Fire Brigade to Ms Hughes (and had also asked the Claimant why she had done so the previous night), and Ms Hughes had steered him towards an investigation of the real issues: the allegation of negligence/indolence by a colleague and whether the right training was in place. There was no instruction from Ms Hughes to investigate the Claimant or her calling the Fire Brigade.

The Claimant working with agency staff

123. The Claimant then attended work on Monday night for the nightshift, when she was again accompanied by agency staff, who were late. She was unhappy with their conduct towards her, whether they had DBS clearance, and their conduct and care towards residents. She made appropriate notes in the daily records raising some of these concerns, and completed her shift.

Mr Thornton telling the Claimant she was to be investigated

124. The Claimant's claim form asserted: I was told I was now to be "investigated" again which I found threatening as the reason given was that I called the fire brigade…". Our findings are this. Mr Thornton asked the Claimant into his office that Tuesday morning. He asked Ms A to be present to take minutes. No minutes were before the Tribunal. Ms Hughes' scope for the investigation was not communicated to the Claimant by Mr Thornton. Even on his own account he opened matters by referring to "doing an investigation into the incidents the night the Fire Brigade was called". The Claimant's evidence was that he said she was to be investigated for calling the Fire Brigade. These accounts are so similar that we do not need to resolve the difference, in view of the actual scope for investigation identified by Ms Hughes. Mr Thornton did not identify the Hughes' scope in a subsequent letter or email, but said in an email he wished to "discuss the events of Sunday night". Nor did he ask Ms F to stay back for an investigation. His focus was the Claimant. Mr Thornton did not conduct an investigation into the allegations against Ms F until after the Claimant had resigned. No further action was taken against Ms F.

125. The Claimant 's evidence was that she observed, in the office that morning on Mr Thornton's notice board, in black marker pen, the words "CB Investigation". There was a conflict about this allegation. The most contemporaneous report of it was contained in the Claimant's resignation letter some four days later on 16 March, in which she also recorded that she had been told she would be investigated for calling the fire brigade. The same day (16 March) Mr Thornton denied the presence of the words on the board, saying this was "categorically not true and a total lie". He had Ms A with him in the meeting, but there was no evidence about these events from Ms A. We consider, against the background

of all the other findings we have made, that Mr Thornton **had** written an aide memoire to himself on his notice board, "CB investigation". He had not written, for example, investigation Ms F/fire panel training.

126. That morning the clocking records suggest that the Claimant had concluded working nightshifts on Wednesday, Thursday, Friday, Saturday, Sunday and Monday (77 hours or so), and her evidence was that she had worked five of those six shifts, and more than sixty hours. Instructing her to take part in an investigation meeting in those circumstances was conduct without reasonable and proper cause likely to finally destroy trust and confidence, in our judgment, given the conclusions above about the timing of such meetings and the respondent's disregard for the fatigue being experienced by the Claimant, that fatigue and strain being well known to Ms Webber.

127. The Claimant said she was simply too tired and that she had had no invitation to the meeting, and Mr Thornton agreed to find a template letter in order to invite her to attend at a later date. He set a date two days' later, Thursday 15 March at 10am, a date when the Claimant was scheduled to be on a rest day, and the first time a meeting had been scheduled on a non working day, giving her only one day, the Wednesday, to rest entirely from work. That email and letter were sent the same day (13 March) at around 6pm and the letter referred to a "hearing" that she was required to attend. The Claimant's sense that she was being singled out and punished for having made disclosures was acute. She already had a draft resignation letter by this stage, drafted by her representative.

128. The Claimant then emailed a reply to Mr Thornton at around 11pm on 14 March, that she would not be attending the meeting, and two hours later emailed a report about her concerns of working with agency workers that week, including reports of poor care. Mr Thornton did not acknowledge that report. On 15 March Mr Thornton then rescheduled the investigation meeting to Monday 19 March, and the letter he emailed to the Claimant said any failure to attend could be seen as a separate disciplinary matter, or words to that effect.

<u>Why then did Mr Thornton seek to conduct an investigation with the Claimant?</u>

129. It is convenient here to pause and reflect on our overall findings and their coherence and our assessment of the witnesses. We considered Ms Hughes and Ms Webber straightforward and generally reliable in their evidence. Ms Murphy was equally straightforward, notwithstanding she made an unfortunate remark about the Claimant after her resignation, and had clearly taken the medications documentation concerning the Claimant at face value and failed to identify there could be other interpretations to consider, and investigations to undertake, not least with Ms M and Mr Thornton.

130. We considered the Claimant's interpretation of events sometimes showed a lack of resilience; and as a historian she was sometimes inaccurate. We bear in mind that a lot of the paperwork in the case has been drafted by her representative, whose education and background enables her to offer that kind of support to the Claimant, but whose direct knowledge of the events is affected by the interests of X, and in that sense she had her own axe to grind. That may explain why we are against the Claimant in relation to a good deal of her case. It was also put to the Claimant a number of times that she maintained aspects of her claim which were simply wrong, particularly that the Respondent had taken no appropriate action in response to her disclosures. The fair explanation for that, of course, is that until the disclosure of documents in these proceedings,

the Claimant was not informed of what was taking place in the background and she could only assess matters on the basis of her experience and knowledge at the time, and that was the gist of her responses in evidence.

131. Further, when cross checking the Claimant's contemporaneous documentation in her diligent and neat handwriting, she was frequently right about events, and she is undoubtedly a conscientious and committed carer with a true vocation. She is insistent on care being given correctly and her record keeping reflects this, and her knowledge of policies and procedures. Virtually all of her practice or medication concerns proved to be valid, and indeed her concerns about an agency worker being unverified, also proved correct. On the other hand her widespread characterisation of Mr Thornton and others as exhibiting bullying conduct, and her interpretation of motivations, has not, in the majority, been supported by the evidence before the Tribunal, but in some cases, given her knowledge at the time, it was a fair impression.

132. The Claimant did not exhibit great self awareness in her evidence concerning her perceptions of events, when other colleagues had become upset (for example Ms A), and she was not a confident witness and was at times reluctant. We drew no adverse inference from that because it was clear she was generally a quiet person for whom these proceedings were not at all a comfortable experience, and she was cross examined by an accomplished advocate who sought to press home the implausibility of her detriment case.

133. Our assessment of Mr Thornton, as a witness, was that overall he came across as straightforward and unhesitant, with notable exceptions, including in relation to the medication error evidence against the Claimant, and the fire incident issue. His background in the armed forces may have helped him with the strain posed by a Tribunal setting. He could not recall the detail of some events. Generally this not surprising, but for some matters it was.

134. We also note that it was not put to the Claimant at any stage in the hearing that she was lying, the highest matters were put was that she was mistaken or wrong or that she had misinterpreted matters. On the two factual conflicts above, the notice board and lodging the fire incident report, we have had to identify who is more reliable and having considered matters fully in the round, we consider it is the Claimant, and not Mr Thornton. Contrary to his assertion, she was not telling lies.

135. His characterisation of the Claimant in his response to her resignation was, at times, strident and he said this about the allegation that he had threatened investigations: "*Catherine has reported medication errors and bad practice since the day I started on a regular basis. I have at no time threatened Catherine with investigations. I have had to recently asked [sic] her to attend a couple of investigation meetings as she has been involved in two recent events which required an investigation to be carried out involving her.1, medication error made by Catherine. 2 The incident on Sunday night* ***and the actions Catherine took.*** *In regards to the second investigation the truth is that whilst I needed to ascertain some information from Catherine about her actions and potential training needs, it had already been discussed with Debbie [Hughes] and whilst she had not followed procedure she had done the right thing in a way. The main part of the investigation was her accusations Catherine had made about the second member of staff sitting with her feet up eating tea whilst Catherine was dealing with the incident and the alarms going off."*

136. As to the training needs it was clear from a review of her one to one supervision sessions in April 2017 and October 2017 that the Claimant had asked for emergencies training and said that she felt all staff needed emergencies training. We were told that "Fire Panel" training, when the alarm could not be disarmed at the panel, involved calling a private contractor. Such training should have been an annual occurrence; that could have been established from training records no doubt. Finally, on our findings, Mr Thornton had a full report from the Claimant about what she did when, during that evening, including when she called for maintenance help, when she called him (which had he responded when she first called he could have instructed on disablement of the panel and private contractors, and when she called the Fire Brigade, and all other relevant matters in careful detail.

137. In all these circumstances we have to consider what is more likely: that Mr Thornton's seeking of the Fire Incident investigation was a wish by him to understand fire panel training and more about the allegation against Ms F, in short, to gather information, as was his case, or was it to penalise or put pressure on the Claimant on the ground that she had made protected disclosures. By this stage he knew he had been disciplined because of that reporting.

138. We bear in mind that Mr Thornton did not display antipathy towards the Claimant in his disciplinary hearing (although he did towards Ms D), who had by then left. We also bear in mind that he is human. We deploy our industrial knowledge of such situations and the way people often feel and sometimes react.

139. Mr Thornton had a full report setting out in great detail the events of that night, of which he also had direct knowledge having been telephoned, and he had discussed his concern about the call to the Fire Brigade with Ms Hughes and had been advised to investigate the Ms F allegation and fire panel training. We also know that on at least two prior occasions a meeting has not been insisted upon (in October, when the Claimant provided a written statement, and in March when Ms Murphy set out the allegations and asked her to answer questions in writing). The fact that he ploughed on indicating to the Claimant, on any reasonable interpretation of his action, that her conduct was being investigated, when he was in possession of full information from her is surprising. Equally surprising and, in our judgment such as to generate an inference that he was acting malevolently, was his failure to put her mind at rest, or to think again, or to set out the scope, when the real focus of the investigation should have been Ms F.

140. In Mr Thornton's witness statement he said "This was not an investigation into the Claimant's conduct…the meeting was an informal fact find…no blame or allegations were made against [her] and at no point was she informed she was being investigated. This is not quite his position in the resignation letter response. We note that he had four opportunities to point out to the Claimant that the investigation was not into her conduct and to reassure her: in his office; in his cover email; in his letter; in the subsequent letter indicating that her non attendance could be considered a separate disciplinary matter. He did not at any stage say to the Claimant that the matters to be looked at were the conduct of Ms F and fire panel training.

141. The fair interpretation of all his communications to the Claimant on the matter was that she was told she was being investigated for, or having, called the Fire

Brigade. We consider that against all the background of this case and the challenges faced by Mr Thornton and the precariousness of his position by this point, he did so on the ground that she had made protected disclosures and to put pressure on her. We also bear in mind that Mr Thornton, and the Respondent, are best served by a denial that he so acted, but our conclusion is that he did so act.

142. If we are wrong about this, it is nevertheless clear that his conduct was without reasonable and proper cause and objectively likely to destroy trust and confidence in all the circumstances we identify. They include: the fact that the Claimant had been given no feedback at all that her medication disclosures, and the concerns escalated to Ms Webber, had been redressed; the timing of his requirement that she attend a meeting/hearing given the Claimant's hours and notified stress and fatigue; the failure to point out that the matters to be investigated were Ms F' conduct and fire panel training; the threat of disciplinary action should she not attend a meeting; all when he already had her account of events in her report, and his failure to seek to interview Ms F.

The Claimant's resignation

143. On 16 March the Claimant provided a lengthy letter of resignation drafted by her representative, mentioning many of the matters addressed above. The resignation was with immediate effect. She identified the investigation for calling the Fire Brigade as the last straw, after a shift with an agency worker the Claimant said, "did not know what to do nor how to care for clients". She also said "I have not felt safe with my colleagues overnight and felt blamed for every unavoidable incident eg fire alarm sounding".

Discussion and conclusions

Dismissal

144. It follows from our factual conclusions above that the Respondent breached the implied term of trust and confidence by the following conduct, both cumulatively and in some instances, singly over several months: failing to pass on care information about X after he returned from hospital; failing to keep the Claimant's documents securely; calling the Claimant to meetings directly after lengthy night shifts on 22 January, 21 February and 13 March; commencing the Fire Brigade incident investigating into her conduct (and because that was retaliation by Mr Thornton for her having made protected disclosures). These matters took place against a background of the Claimant becoming increasingly concerned about the Leeds Scheme, having raised protected disclosures, having made allegations of bullying to a senior member of management, having pointed out strain and fatigue and valid short staffing, and without anyone explaining to her face to face that her concerns were being redressed, albeit in a way which respected confidentiality to the extent appropriate.

145. Did the Claimant resign at least in part in response to the respondent's conduct; or did she, as was submitted by the respondent resign to avoid the imminent investigation of a serious allegation of falsification of documents, having taken up employment as a direct personal assistant to X.

146. For the reasons we explain above, the Claimant's perception that nothing was being done about her disclosures was a fair one at the time; her perception that she was being targeted was, in our judgment, towards the end of this

chronology and by Mr Thornton, equally fair and accurate. She did not consider she had done anything wrong concerning the January medication issue, and in our judgment, it would be surprising if she had. The matter had yet to be fully investigated. She was fatigued and had visited her GP with concern for the stress she was under but could not afford to take sickness absence. She had the prospect of work for X, but not the replacement of her full time earnings. In all these circumstances we find that the Claimant indeed resigned because of the Respondent's breaches we have found, and some she considered to be breaches which we have found not to be so, against the background we have found, and in particular the last straw of the launch of the Fire Brigade Incident investigation into her conduct.

147. The Claimant has established a dismissal, pursuant to Section 95.

Detriment: the Respondent's defences

148. As to the detriment complaints, the Respondent advanced a statutory defence that it had taken all reasonable steps to prevent the Claimant being subjected to detriment on the ground of having made disclosures. Certainly the Claimant had been trained in its policy, as had Mr Thornton, and he expressed his adherence to that policy in an email to the Claimant on or around 9 March 2018.

149. The Tribunal has not found that other colleagues subjected the Claimant to such detriment; it has found that the Scheme manager, Mr Thornton, did so. The respondent's submission that an employer cannot eliminate all possibility of such treatment is as true for treatment by management, as it is for treatment by colleagues.

150. However, no steps were taken to investigate or guard against the Claimant being subjected to penalty on the ground, particularly later in the chronology when she notified Human Resources, as advised by Ms Webber, that she believed that this was happening. This was shortly before the 13 March detriment. Indeed Human Resources appeared to have continued supporting Mr Thornton's management of her without investigating matters known to the Respondent's senior HR practitioners.

151. The respondent did not take all reasonable steps in the circumstances of this case to prevent the Claimant being subject to detriment on the grounds of having made protected disclosures.

152. The Respondent also raised limitation; given our findings as to the date of the detriment, and that the Claimant contacted ACAS on 13 June 2018 (Day A), we can decide detriment complaints which arose no earlier than 14 March, applying the 1996 Act time limit. Section 48(3) provides: "*An Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or, where that act or failure is part of a series of similar acts or failures, the last of them"*; and Section 48 (4) (a) provides: "*where an act extends over a period, the "date of the act" means the last day of that period."*

153. In our judgment, the telling of the Claimant that she was to be investigated having called the Fire Brigade commenced on 13 March and extended through correspondence until 15 March. It is to be treated as done on 15 March and the claim is in time. This detriment complaint succeeds.

Unfair dismissal

154. The respondent asserted that if the Tribunal found a dismissal, the reason for it was the Claimant's conduct as follows. 1) She refused to engage with the respondent over the medication/falsification concern; she did not; she sought to postpone a meeting for good reason given her state of mind and when the evidence was provided to her she promptly answered questions. 2) She refused to engage in consultation over shift changes: she did not refuse to engage, she simple did not fill out a form. The Tribunal has not found that the respondent's conduct in this matter was a breach, and similarly, nor could the Claimant's have contributed in these circumstances. 3) She failed to use the appropriate means of reporting in accordance with her training and instructions: this was not the reason for the Claimant's resignation, and the conduct of the Respondent which we have found to be in breach, was not for this reason. 4) She delayed in reporting a medication error for a month: this allegation relates to the Claimant's reporting of an error by Mr Thornton on 16 December, which she reported to Ms Hughes on 14 January. The Claimant reported it to Ms L or Ms D at the time, and that was accepted by the Respondent. It was the senior's duty to report to the Area Manager, in accordance with the policy; when that did not happen (and the Claimant feared errors were still being made) she reported it to Ms Hughes herself. 5) the Claimant made unfounded allegations of bullying, intimidation and harassment. We have not found such treatment by colleagues generally, but it is not sustainable to suggest that this was the reason for the Claimant's dismissal. Her grievances were investigated and were not suggested to have been made in bad faith. We have found the last matter in the chronology to have amounted to detriment on the grounds of having made protected disclosures-her other complaints of bullying by Mr Thornton were not investigated by the Respondent; some have been determined by this Tribunal and not upheld.

155. That brings us to the final matter to decide: what was the principal reason for the Claimant's dismissal. In some sense the whole chain of events, including matters which we have not addressed, as the Claimant perceived them, are the matters causing this dismissal. We have identified matters we have found to have breached trust and confidence, and some which did not. There are often multiple facts which cause dismissal, but the Act requires us to stand back as an industrial panel and determine the principal reason. In the light of this chain of events, we consider the final matter, not a straw, but very significant, adverse and unlawful treatment of the Claimant against a very unfortunate chain of events, was the principal reason for her dismissal: Mr Thornton telling her over three days that she was to be investigated for, or having called, the Fire Brigade. That is not a permissible reason for dismissal with the 1996 Act and in all these circumstances, her complaint of unfair dismissal is also well founded.

Employment Judge JM Wade

Date 15 March 2019