



EMPLOYMENT TRIBUNALS

Claimants Mrs J Embley (1)
Mrs J A Hezsely (2)

Respondent Julie Rhodes trading as Agency Assistance

Heard at: Exeter **On:** 14, 15, 16 &17 January 2019 and
29 January 2019 in chambers

Before:
Employment Judge Goraj
Members Mrs S Richards
Mr I Ley

Representation

Claimant: Ms Stanley, Counsel
Respondent Mr Smith, Consultant

RESERVED JUDGMENT

The unanimous JUDGMENT of the Tribunal is that: -

Mrs Embley

1. Mrs Embley was constructively unfairly dismissed by the Respondent pursuant to sections 95 (1) (c) and 98 of the Employment Rights Act 1996 ("the Act").
2. Mrs Embley's complaint of unfair dismissal contrary to section 103 A of the Act is dismissed.
3. Mrs Embley's complaint of age discrimination contrary to sections 5 and 13 of the Equality Act 2010 ("the 2010 Act") is dismissed.

Mrs Hezsely

4. Mrs Hezsely was constructively unfairly dismissed by the Respondent pursuant to sections 95 (1) (c) and 98 of the Act.
5. Mrs Hezsely's complaint of age discrimination contrary to sections 5 and 13 of the 2010 Act is dismissed.
6. Mrs Hezsely's complaint of unlawful deductions from pay contrary to section 13 of the Act is dismissed upon withdrawal by Mrs Hezsely.

REASONS

BACKGROUND

1. The First Claimant ("Mrs Embley") was employed by the Respondent / its predecessors in title from 10 March 2008 to 23 February 2017. The Second Claimant ("Mrs Hezsely") was employed by the Respondent/ its predecessors in title from 14 March 2009 to 25 February 2017. Both Claimants were employed by the Respondent as care assistants.
2. By a claim form dated 11 March 2017, as subsequently amended, Mrs Embley alleged that (a) she had been constructively unfairly dismissed by the Respondent contrary to sections 95 (1) (c) and 98 and/or 103A of the Employment Rights Act 1996 ("the Act") and /or (b) that she had been unlawfully discriminated against by the Respondent because of her age contrary to sections 5 and 13 of the Equality Act 2010 ("the 2010 Act"). The allegations are denied by the Respondent.
3. By a claim form dated 14 March 2017, as subsequently amended, Mrs Hezsely alleged that (a) she had been constructively unfairly dismissed by the Respondent contrary to sections 95 (1) (c) and 98 of the Act and/or (b) that she had been unlawfully discriminated against by the Respondent because of her age contrary to sections 5 and 13 of the 2010 Act. Mrs Hezsely also brought a claim for alleged unlawful deductions from wages pursuant to section 13 of the Act which claim was, by consent, dismissed by the Tribunal during the course of the Hearing upon withdrawal by Mrs Hezsely.

Witnesses

4. The Tribunal received a written statement and heard oral evidence on behalf of the following witnesses on behalf of the Claimants: -
 - (1) Mrs Embley.
 - (2) Mrs Hezsely.
 - (3) Mr S Kingshotte, care assistant with the Respondent.

- (4) Miss Kelly – Jayne Lawson, former team leader with the Respondent. Miss Lawson attended to give evidence on behalf of the Claimants under a witness order.
5. The Tribunal also received a written statement and heard oral evidence on behalf of the Respondent from Mr Paul Rhodes, registered manager of the Respondent. The statement of Mr Rhodes, which was served prior to the Hearing, stated that that he had been involved in the initial discussions with staff following the TUPE transfer including the staff inductions which precipitated the suspension of the Claimants. Immediately prior to the giving of his oral evidence, Mr Rhodes however amended his statement to state that he did not have any direct involvement in the matter until after the decision to suspend the Claimants had been taken.

Documents and associated matters

6. The Tribunal received a bundle of agreed documents (“the bundle”). This case involves issues relating to the provision of personal care and associated services to a number of highly vulnerable adults at one of the Respondents’ supported living units. It was agreed that any reference to such adults, including in the bundle, would be by way of an agreed initial. It was further agreed that the supported living accommodation concerned would be referred to as Unit 1 in order to preserve the anonymity of the clients.

The issues

7. The parties agreed on 15 January 2019 a list of the issues to be determined by the Tribunal (“the List of Issues”). By the close of the Hearing the List of Issues was however amended further as follows: -
 - (1) Mrs Hezsely’s complaint of unauthorised deductions from wages was, by consent, dismissed upon withdrawal by her (paragraphs 31 – 33 of the List of Issues).
 - (2) If the Tribunal finds that the Claimants (or either of them) were constructively dismissed for the purposes of section 95 (1) (c) of the Act the Respondent does not contend that any such dismissal was fair for the purposes of section 98 of the Act (paragraphs 6& 7 of the List of Issues).
 - (3) The Respondent however contends, for the purposes only of Mrs Embley’s complaint of unfair dismissal contrary to section 103A of the Act, that the reason for her dismissal (if relevant) was the breakdown in the working relationships between the parties and further Mrs Embley’s refusal to accept the

Respondent's invitation to return to work (paragraph 15 of the List of Issues).

- (4) The Respondent does not rely on any defence of justification in respect of the complaints of age discrimination (paragraphs 19 and 30 of the List of Issues).
 - (5) The Respondent does not rely on section 123 (1) of the Act (any Polkey deductions) in respect of any award of compensation made to the Claimants (if their complaints of constructive unfair dismissal are successful) (paragraph 35 of the List of Issues). The Respondent does however rely on sections 122 (2) and 123 (6) of the Act (contribution) if relevant and relies for such purposes on the investigations of Mr Rhodes (paragraph 34 of the List of Issues).
8. It was agreed that any issues relating to remedy (if relevant) would be limited at this Hearing to the remaining matters identified at paragraphs 34 and 36 – 37 of the List of Issues.
 9. The alleged discriminators/ perpetrators in this case were identified by the Claimants, on the basis of the information available to them, as Ms Roadhouse and /or Mr Rhodes and /or Ms Julie Rhodes as set out at paragraphs 38 – 40 of the List of Issues.

Closing submissions

10. The Tribunal has had regard to the written and oral submissions of the parties (and accompanying authorities) which were provided during the course of the Hearing. The Tribunal has also had regard to the further written closing submissions of the parties which were submitted following the Hearing relating to the issue of whether any disclosures made by Mrs Embley in respect of her complaint pursuant to section 103A of the Act were, in her reasonable belief, made in the public interest.

Other matters

11. Mrs Hezsely is dyslexic. The Tribunal agreed adjustments with the parties to facilitate the giving of oral evidence by Mrs Hezsely.
12. The only witness on behalf of the Respondent was Mr Paul Rhodes the Registered Manager who is identified by the Claimants as one of the alleged perpetrators / discriminators in this case. The Tribunal did not however hear any evidence (or receive any explanation for the absence of such evidence) from Ms Julie Rhodes, the owner of the Respondent, or Ms Trish Roadhouse an on call manager of the Respondent (who issued the letter of suspension to the Claimants)

notwithstanding that (a) they were both identified as alleged perpetrators (b) the Respondent confirmed that Ms Roadhouse remained in the employment of the Respondent and (c) Ms J Rhodes was in attendance throughout the Hearing.

13. The Tribunal was informed that Ms Maureen Holdsworth (former field care supervisor with the Respondent) left the Respondent's employment during 2017. It is the Respondent's case that Ms Holdsworth conducted induction / appraisal meetings with various members of staff following the acquisition of the care provision services during which concerns were allegedly raised regarding the Claimants and Miss Lawson by other members of staff. The Respondent did not produce any such notes and informed the Tribunal that they had been unable to locate them.

FINDINGS OF FACT

The Respondent

14. The Respondent is the owner of a care agency which provides personal care and associated services to vulnerable adults by the provision of supported living units and domiciliary care services. The Respondent was contracted to take over three supported living units from Select Living Ltd ("Select") with effect from 4 November 2016. Approximately 38 members of staff (including the Claimants) transferred from Select to the Respondent's employment pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") at that time. By the date of the suspension of the Claimants the Respondent had taken on 7 additional members of staff which had increased by a further 77 by the date of the Tribunal Hearing.
15. The registered manager of the Respondent's care agency is, and was at all relevant times, Mr Paul Rhodes who is the brother of the Respondent. Other relevant staff at the time of the events in question included (a) Trish Roadhouse (on call manager) who remains in the employment of the Respondent (b) Ms Maureen Holdsworth, field care supervisor (date of birth 27 March 1954) who is no longer in the employment of the Respondent and (c) Miss Kelly Lawson, who was the Claimants' team leader at all relevant times (date of birth 28 August 1991). Miss Lawson was suspended and subjected to investigation by the Respondent at the same time as the Claimants. Miss Lawson returned to work in December 2016 but subsequently resigned her employment with the Respondent.

The Respondent's policies and procedures

16. The Tribunal has been provided with a copy of the following policies and procedures:- (a) the Respondent's disciplinary procedure at pages 119 – 121 of the bundle. This states that employees may be suspended without pay if an employee is deemed to be incapable of performing their duties or whilst investigations take place (b) the Respondent's grievance procedure at pages 121 (a) – 121 (b) of the bundle and (c) the Respondent's whistleblowing policy at page 121 (c) of the bundle.

The contractual arrangements relating to staff on transfer

17. Mr Rhodes contended that the Respondent was informed by Select as part of the arrangements for the transfer of the service that all members of staff apart from 3 employees (namely Miss Lawson and two other members of staff - not including the Claimants) were employed on zero-hour contracts. The Tribunal accepts the evidence of Mr Rhodes regarding this matter as it is consistent with the contents of the letters to the Claimants from Select dated 3 November 2016 (at pages 169 – 172 of the bundle).

Unit 1

18. With effect from 4 November 2016 the Respondent took on responsibility, as part of the TUPE transfer, for the provision of care services to Unit 1, at which the Claimants were both working as care assistants. At the time of the transfer there were 3 severely disabled clients (who are referred to as B, E, and L) living at Unit 1 who were very vulnerable with complex needs including with regard to feeding, manual handling and limited communication.

Safeguarding Issues

19. The services acquired by the Respondent from Select in November 2016 (including Unit 1) had been subject to safeguarding orders by Devon County Council in respect of concerns relating to care standards. The Tribunal is not however satisfied on the available evidence that (a) there were any safeguarding orders in place at Unit 1 at the time of the acquisition of the service by the Respondent in November 2016 or (b) subsequently, save to the limited extent identified below. When reaching this conclusion, the Tribunal has taken into account in particular the oral evidence of the parties together with the letter from Devon County Council to the Respondent dated July/ August 2017 at pages 267 – 268 of the bundle.

The Claimants

Mrs J Embley

20. Mrs Embley (date of birth 18 February 1954) was employed by the Respondent/its predecessors between 10 March 2008 and 23 February 2017. Mrs Embley worked as a care assistant at Unit 1 at all material times.
21. On 23 December 2015 Mrs Embley signed a contract of employment with her then employer Select Living (Devon) Limited which is at pages 110 – 118 of the bundle. The Tribunal has also had regard to the schedules/ addenda to such contract at pages 122 – 123 (a) of the bundle (including the unsigned addendum which states a start date of 15 August 2015, which appears to pre- date the contract, and the subsequent schedule/ addendum signed on 23 December 2015). The Tribunal has noted in particular, the provisions in the contract relating to the place of work (clause 4), hours of work (clause 5) and company's procedures (clause 14).
22. In summary, the contract (a) does not provide for any fixed place of work / reserved the right to transfer Mrs Embley to any other location in its absolute discretion on reasonable notice (b) does not provide any minimum hours of work / reserved the right to amend hours of working in accordance with the needs of the business and (c) states in the attached schedule (page 123 of the bundle) that Mrs Embley's hours of work would be on a sessional and rotational basis. The contract/ accompanying documents do not however contain any provision entitling the Respondent to operate the contract on a zero hour or bank basis. The contract also makes reference to Mrs Embley's normal hours of work and provides for any suspension arising from allegations of misconduct to be on full pay.
23. Mrs Embley was based at Unit 1 for approximately two and half years by the time of the events in question. Mrs Embley had undertaken domiciliary work prior to that time. Mrs Embley had worked at Unit 1 for 48 – 60 hours each week for about 12 months prior to her suspension by the Respondent. Mrs Embley and Mrs Hezsely worked together at Unit 1 on a regular basis.
24. Staff were subject to regular reviews/ spot checks with Select. The Tribunal has had regard to the records relating to Mrs Embley which have been provided for the period between 26 January 2016 and 21 October 2016 at pages 125 – 126, 129 -130, 131 – 132, 138 -139 and 154 of the bundle. In summary, although the records do contain a reference to conflict with a colleague the records also state that the

issue has been resolved and give an overall positive view of Mrs Embley and her standard of work.

The dispute in July 2016

25. In or around July 2016, Mrs Embley had a disagreement with 2 work colleagues Hannah Ashenden- Wadham (“HAW”) and Sophie Blackmore (“SB”) relating to a client trip to Torquay. The Tribunal accepts Mrs Embley’s evidence regarding this matter including (a) that HAW and SB arrived back at Unit 1 that day later than agreed and thereby caused difficulties regarding care for other clients and (b) that the consequential disagreement between Mrs Embley and HAW/ SB was resolved following intervention by management as a result of which Mrs Embley and HAW/ SB were not rostered to work together anymore.

Correspondence relating to the transfer

26. On 3 November 2016 the registered manager of Select Living (Devon) Limited wrote to the Claimants advising them of the proposed arrangements/ measures for the transfer of the service to the Respondent for the purposes of TUPE. The relevant letters are at pages 169 – 170 and 171- 172 of the bundle. The Claimants’ contracts of employment were described in the letters as zero hours contracts and their place of work was identified as field based (pages 170 and 172 of the bundle). The Claimants were invited in the letters to raise any concerns with Mr Rhodes of the Respondent. Neither of the Claimants raised any concerns with Mr Rhodes in response to such letters.

Mrs A Hezsely

27. Mrs Hezsely (date of birth 14 November 1952) was employed by the Respondent/ its predecessors in title from 14 March 2009 until the termination of her employment on 25 February 2017. Mrs Hezsely is dyslexic.

28. On 29 April 2009 Mrs Hezsely signed a contract of employment with her then employer NewCare (Devon) Limited. A copy of the contract and accompanying letter are at pages 89 – 92 b of the bundle. The Tribunal has noted in particular the provisions relating to place of work (clause 5), hours of work (clause 8), and schedule of hours. In summary (a) the contract/ accompanying schedule stated that Mrs Hezsely could be required to work in various locations (b) stated that Mrs Hezsely’s normal hours of work would be on a sessional and rotational basis and (c) did not guarantee any minimum hours of work. The contract does not however, contain any provision permitting the Respondent to operate the contract on a zero hour or bank basis.

29. Mrs Hezsely started working at Unit 1 in 2012. Throughout her period of work at Unit 1 Mrs Hezsely worked 48 hours and 36 hours alternative weeks and worked additional hours from time to time to cover sickness or other absences.

30. Mrs Hezsely was also subject to regular reviews/ spot checks with Select. The Tribunal has had regard to the records which have been provided for the period between 29 February 2016 and 17 October 2016 at pages 127 – 128, 135 – 135 a , 140 -141, 142- 143 and 152 – 153 of the bundle. The Tribunal has noted in particular that whilst issues were raised, including with regard to taking clients out (which was stated to have improved) and record keeping, the reviews were overall positive and recognised the effect of Mrs Hezsely's dyslexia.

THE EVENTS FOLLOWING THE TRANSFER ON 4 NOVEMBER 2016

31. On the afternoon of 4 November 2016, the Respondent, Ms Rhodes, met with staff on duty at Unit 1 following the TUPE transfer earlier that day. It is agreed between the parties that the meeting was conducted by Ms Rhodes who was accompanied by a colleague (Val Mc Cracken) and that Miss Lawson and the Claimants were in attendance at the meeting. There is a dispute between the parties regarding the contents of the meeting.

32. The Tribunal has heard oral evidence from Miss Lawson and the Claimants regarding the meeting. The Tribunal has not had any oral evidence from anyone from the Respondent regarding the meeting. The Tribunal has however had regard to the Document dated 25 April 2017 (at page 43 – 46 of the bundle) which was attached to the Respondent's response which is stated to have been prepared by Ms Rhodes. The Tribunal has however placed limited weight on this document as the Tribunal/ the Claimants have not had an opportunity to test the evidence as Ms Rhodes has not given any evidence to the Tribunal.

33. In summary, the Claimants and Miss Lawson contend that Ms Rhodes informed the staff during the meeting that (a) the Respondent had not been involved in a TUPE transfer before and (b) that the Respondent had transferred too many people across and that she had regretted doing so.

34. In summary, the Respondent denied that the Ms Rhodes had made such comments and contended that the meeting had been conducted for the purposes and in the manner referred to in the Document dated 25 April 2017 including in particular to reassure staff that there would be no immediate changes to the current working arrangements and that the Respondent wished to move forward in a positive manner (page 43 of the bundle).

35. Having weighed the available evidence, the Tribunal is satisfied that the purpose of the meeting was to introduce the Respondent and to seek to reassure staff regarding the transfer. The Tribunal is however satisfied, on the balance of probabilities that Ms Rhodes did raise concerns during the meeting regarding the number of staff who had transferred over pursuant to TUPE. When reaching this conclusion, the Tribunal has taken into account in particular that the Tribunal has received oral evidence from three witnesses to this effect whilst the Tribunal has had no oral evidence from the Respondent rebutting such contentions (or any explanation for its failure to provide such evidence).

Meetings with staff

36. Ms Mc Cracken/ Holdsworth conducted induction meetings with staff at Unit 1 during the week or so following the TUPE transfer. Staff were given an opportunity to raise any concerns, including about other members of staff, during such meetings. The Tribunal is satisfied that during such meetings members of staff at Unit 1 raised concerns regarding the care provided by the Claimants and the management by Miss Lowson. When reaching this finding the Tribunal has taken into account that (a) the Respondent has been unable/ has failed to provide to the Tribunal any notes of such meetings and (b) that the Respondent has not provided any direct evidence regarding the conduct of such meetings. The Tribunal has also taken into account however that (a) Mrs Embley and Miss Lowson both confirmed in their oral evidence that such meetings had taken place (including that Mrs Embley stated that she had had a meeting with Ms Holdsworth during which she was asked whether she had any concerns about any members of staff) and (b) the oral evidence of Mr Rhodes regarding his discussions with senior managers regarding such matters at the time that he was appointed as investigating officer and the subsequent information which was provided to Mr Rhodes during his investigation referred to below.

The Respondent's workforce

37. The Respondent's workforce as at 17 November 2016 consisted of staff of a wide range of ages as referred to in the document at pages 276- 280 of the bundle.

Change in residents

38. On 10 November 2016 Client B left Unit 1 and Client S arrived. Client S had greater / more complex care needs than the existing clients, particularly with regard to the administration of medication and food and in respect of which the staff required additional training (which was arranged for the morning of 15 November 2016).

The events of 14 and 15 November 2016

39. Mrs Embley contended that she telephoned Ms Roadhouse of the Respondent on 14 November 2016 to raise concerns that there were insufficient staff on the rota the following day to cover both the training for Client S and the required care needs of the remaining Clients (E and L). Mrs Embley further contended that she had such concerns because Client S had monopolised her time during the previous weekend because of his high/ complex care needs and that she had been unable to devote the required level of care to Clients E and L who were left alone for longer than normal. Mrs Hezsely contended in her oral evidence that she had overheard Mrs Embley on the telephone to the Respondent on 14 November 2016 raising concerns about the adequacy of the care cover for Clients E and L.
40. The Respondent accepted, after initially denying that any such conversation had taken place between Mrs Embley and Ms Roadhouse, that there had been a conversation between them on 14 November 2016. The Respondent contended however, that (a) Ms Roadhouse had subsequently spoken to Miss Lawson who had allegedly advised that no extra staff were required to cover the training for Client S the following day and (b) Ms Holdsworth was in any event in attendance at Unit 1 on 15 November 2016 to provide any required additional cover. The Respondent relied, in the absence of any oral evidence, on the extracts from the Manager's log for 14 November 2018 at page 176 of the bundle in which it is recorded that Ms Roadhouse had contacted Miss Lawson who had advised that no extra staff were required to cover the training as one of the clients did not get out of bed until 9.30am. Miss Lawson denied during her evidence that any such conversation had taken place.
41. Having weighed the evidence, the Tribunal is satisfied on the balance of probabilities that (a) there was a conversation between Mrs Embley and Ms Roadhouse on 14 November 2016 as contended by Mrs Embley including that she raised the concerns identified above and (b) that there was a subsequent conversation between Ms Roadhouse and Miss Lawson on 14 November 2016 during which the latter informed Ms Roadhouse that no extra staff were required as Client L did not get up until 9.30am and that the training for Client S would therefore be covered.
42. When reaching the above conclusions the Tribunal (a) accepted the evidence of Mrs Embley regarding her conversation with Ms Roadhouse, including the reasons for such contact having had regard in particular to the contents of Mrs Embley's account of the situation which was submitted by her following the meeting with Mr Rhodes on 8

December 2016 (referred to below), the fact that the Respondent accepted after its initial denial that the conversation had taken place, the evidence of Mrs Hezsely regarding such conversation, and the concerns also raised at that time by the District nurse, as referred to below, relating to client S (b) also accepted however the Respondent's contentions regarding the subsequent conversation between Ms Roadhouse and Miss Lawson in the light of the entry in the manager's log at page 176 of the bundle.

43. The district nurse also raised concerns on 14 November 2016 regarding the transfer of Client S to the Respondent including in respect of the lack of medication, that staff had not been adequately trained to deal with his needs and had indicated that she intended to raise the matter as a safeguarding issue. Miss Lawson spent her time on 14 November 2016 trying to secure the required medication for S. When reaching such conclusions, the Tribunal has taken into account the oral evidence of Miss Lawson together with the entry in the managers log at page 176 of the bundle.
44. Mrs Embley contended that she had had a further telephone conversation with Ms Roadhouse on 15 November 2016 during which she raised further concerns regarding the adequacy of care provision at Unit 1 for clients E and L in light of the complex needs of Client S. Mrs Hezsely confirmed that she was also in attendance when Mrs Embley made the telephone call. The Respondent denies any such conversation.
45. Having given the matter careful consideration, the Tribunal is not satisfied that there was a further discussion between Mrs Embley and Ms Roadhouse on 15 November 2016. When reaching this conclusion the Tribunal has taken into account that the Respondent has not produced any evidence from Ms Roadhouse to challenge Mrs Embley's contentions. The Tribunal has also taken into account however that (a) there is no reference to any such conversation in the witness statements of either of the Claimants (b) there is no reference to any further conversation with Ms Roadhouse on 15 November 2016 in Mrs Embley's detailed account of the situation which was submitted following Mrs Embley's meeting with Mr Rhodes on 8 December 2016 (page 237 of the bundle) and (c) Mrs Hezsely stated in her oral evidence that Ms Holdsworth was present at Unit 1 that day to deal with the safeguarding issues which had been raised by the district nurse in relation to Client S.

The meeting of on or around 16 November 2016

46. Mrs Embley contended that (a) she was informed by Miss Lowson that Miss Lowson had attended a meeting with Ms Rhodes and Ms Holdsworth on 16 November 2016 when Ms Rhodes had allegedly stated that there were four members of staff whom she needed “out of the building “namely the Claimants and SC (date of birth 28 October 1967) and JG (date of birth 18 October 1964) and (b) Ms Rhodes asked Miss Lowson whether any of the above staff were assigned to Client B and could be transferred with him.
47. Mrs Embley relied in support of her contentions on a note which she made of her discussions with Miss Lowson on or around 16 November 2016 which is at page 209 of the bundle. In summary, Mrs Embley has recorded in the note that Miss Lowson told her that Ms Rhodes had a list in front of her which included the above names, that Ms Rhodes talked about having too many staff at Unit 1 and that she wanted the above-named employees to be transferred out pursuant to TUPE as part of client B’s staff.
48. The contentions of Mrs Embley were supported by Miss Lowson. Miss Lowson further contended that (a) during her meeting with the Respondent Ms Holdsworth stated that the Claimants were likely to cause problems when the rotas were changed/ were unlikely to be cooperative during the transition period (b) she was asked at the meeting whether any incidents had occurred at Unit 1 involving the Claimants in response to which Miss Lowson informed them that any issues had already been resolved. Miss Lowson also contended in her evidence that the four staff identified during the meeting were the four oldest employees working at Unit 1 and that in her opinion it was not a coincidence that they had been picked out by Ms Rhodes. Miss Lowson did not however provide any evidence in support of such contention.
49. The Tribunal has not been provided with any oral evidence from Ms Rhodes regarding the meeting (or any explanation why Ms Rhodes has not given any evidence to the Tribunal). The Tribunal has however had regard to the document dated 25 April 2017 (which is attributed to Ms Rhodes) at pages 43-46 of the bundle which was submitted by the Respondent with its response to the proceedings. In summary, it is (a) accepted by the Respondent that there was a meeting between Ms Rhodes, Ms Holdsworth and Miss Lowson (b) contended by the Respondent that Ms Rhodes asked Miss Lowson as team leader, whether in the light of the issues which had been raised during the recent induction/appraisals, she had any concerns regarding any staff members and (c) further contended by the Respondent that Miss Lowson identified four members of staff in respect of whom she had

concerns including the Claimants and (d) there were further discussions regarding Client B during which Miss Lawson confirmed that there were no staff assigned to him who could be transferred out of the Unit 1 pursuant to TUPE.

50. Having weighed the available evidence (including Mrs Embley's note at page 209 of the bundle), the Tribunal is satisfied, on the balance of probabilities, that (a) there was a meeting between Ms Rhodes, Ms Holdsworth and Miss Lawson on or around 16 November 2016 during which Ms Rhodes raised concerns that there were too many staff at Unit 1 following the transfer out of Client B and explored with Miss Lawson whether any of the four individuals referred to above (including the Claimants) could be transferred with Client B pursuant to TUPE and (b) it was Ms Rhodes who identified the four individuals referred to above (including the Claimants) and who asked Miss Lawson whether she had any concerns regarding such members of staff in response to which Miss Lawson informed Ms Rhodes that any issues had been resolved. When reaching the above conclusions, the Tribunal has had regard in particular to the limited available documentary evidence and to the fact that Ms Rhodes has failed, without explanation, to give any evidence to the Tribunal regarding the matter.
51. The Tribunal is further satisfied that (a) a subsequent conversation took place between Miss Lawson and Mrs Embley on or around 16 November 2016 in the terms recorded in Mrs Embley's note which is at page 209 of the bundle and (b) the Respondent (Ms Holdsworth/ Ms Rhodes) subsequently became aware prior to Mrs Embley's suspension that she had raised concerns about the way in which staff had been treated following the TUPE transfer (paragraph 56 below).

The conversation between Mrs Embley and Client E's mother on 16 November 2016

52. There was a telephone conversation between Mrs Embley and the mother of Client E on 16 November 2016. In summary, Mrs Embley contended that (a) she had a conversation with Mrs Hezsely on 15 November 2016 whilst on shift during which Mrs Hezsely informed her that Client E's mother had found E eating alone and that Client L had been left in bed (b) she believed that Client S's care needs had been prioritised over those of the remaining clients whose health and safety was being neglected and (c) in the light of her concerns for the safety and wellbeing of Clients E and L and the failure of the Respondent to address the issues following her conversation with Ms Roadhouse she contacted E's mother and (d) she informed E's mother during their telephone conversation that she was concerned that Unit 1 was understaffed and she was concerned about E's health and wellbeing

for which E's mother thanked her and told Mrs Embley that she had already spoken to safeguarding.

53. The Respondent disputed that Mrs Embley had raised concerns regarding the health and safety of clients and contended that Mrs Embley had complained to Client E's mother about the way staff had been treated during the TUPE process including poor communication and lack of available hours. The Respondent did not however call any oral evidence in support of its contentions. The Respondent relied on an unsigned and undated note of Ms Holdsworth (at page 213 of the bundle) in which she referred to an alleged telephone conversation from a carer colleague of Mrs Embley during which Mrs Embley had allegedly told the carer that she had spoken to a client's family about the way in which she and other staff had been treated since the Respondent had taken over the service including poor communication and a reduction in hours since Client B had left Unit 1.
54. Having given the matter careful consideration the Tribunal is satisfied, on the balance of probabilities, that Mrs Embley contacted Client E's mother on 16 November 2016 to raise concerns regarding what she believed to be inadequate levels of care available in Unit 1 following the arrival of Client S including the consequential detrimental effect on the level of care provided to Clients E and L and their health and well-being as referred to at paragraph 52 above. The Tribunal is further satisfied however, that Mrs Embley also raised during her conversation with Client E's mother concerns about the way in which staff had been treated following the transfer of the service to the Respondent including with regard to poor communication and reduced available hours of work.
55. When reaching the above conclusions the Tribunal has taken into account on the one hand :- (a) the oral evidence of the Claimants (b) the contents of Mrs Embley's written account of the matter which was submitted to the Respondent following her meeting with Mr Rhodes on 8 December 2016 (pages 236-237 bundle) and (c) the contents of the Respondent's call log at page 176 of the bundle which records the difficulties experienced/ time taken by the Respondent in addressing Client S' care needs and (d) the lack of any oral evidence of behalf of the Respondent regarding such matters.
56. The Tribunal has also taken into account however (a) the contents of the note at page 213 of the bundle in which it is recorded that Ms Holdsworth had been told by MK a colleague of Mrs Embley's that Mrs Embley had raised concerns about the way in which staff had been treated since the TUPE transfer together with MK's note of her discussions with Mrs Embley at page 217 of the bundle and (b) Mrs

Embley's note of her discussion with Miss Lawson referred to at paragraph 51 above.

The suspension of the Claimants and Miss Lawson

57. The Claimants and Miss Lawson were suspended by Ms Roadhouse on 17 November 2016. The Claimants were suspended without pay. Miss Lawson was placed on paid suspension as the Respondent understood that she was contractually entitled to a minimum number of working hours.
58. Ms Roadhouse wrote to the Claimants by letter dated 18 November 2016 confirming their suspension. The letters of suspension (which are in similar form) are at pages 210 -211 of the bundle. Miss Lawson also received a letter in similar form. In summary, Ms Roadhouse stated that the Claimants had been suspended from duty, "pending an investigation into allegations that you may have breached client confidentiality and in relation to care provision". Ms Roadhouse advised the Claimants that (a) she had asked Mr Rhodes to investigate the allegations on behalf of the Respondent and would decide when she had received his report whether disciplinary action was required and (b) she had decided to suspend them given the nature and the seriousness of the allegations and to ensure that a fair and confidential investigation could take place. The letter of suspension did not provide any further details of any concerns or inform the Claimants that they would be suspended without pay.

Investigations by Mr Rhodes

59. Following his appointment as investigating officer Mr Rhodes reviewed service user records and met with staff who worked at Unit 1 to ascertain whether they had any concerns regarding the operation of Unit 1. The statements/notes (some of which are undated unsigned) are at pages 212- 218 bundle.

The report dated 28 November 2016

60. Mr Rhodes prepared a report dated 28 November 2016 summarising the principal complaints and evidence which he stated he had gathered during the course of his investigation which included a summary of the statements/notes taken of his meetings with staff members. This report is at pages 219-223 of the bundle. There is also an associated signed note dated 2 December 2016 (at page 224 of the bundle) in which Mr Rhodes summarised his conclusions following a review of client records for the two-month period prior to the Respondent taking over the service.
61. In summary, Mr Rhodes reported, by way of background, that three members of staff namely the Claimants and Miss Lawson had been

suspended following a number of concerns being raised against them regarding alleged bad practice and professional misconduct at Unit 1. Mr Rhodes stated that the main allegations related to clients been put to bed early/ left in bed late to allow staff to participate in come dine with me evening/coffee mornings. Mr Rhodes summarised the statements/notes of meetings which he stated had been taken following meetings with staff a number of which were critical of the conduct/attitude of the Claimants/ Miss Lowson including in particular the comments of HAW and SB. The comments recorded by Mr Rhodes included alleged comments by Mr Kingshotte who was a witness at the Tribunal. Mr Kingshotte challenged in evidence the accuracy of the comments attributed to him in the Report by Mr Rhodes including that he had described Mrs Hezsely as being very negative. However, Mr Kingshotte accepted in cross examination the overall nature of the concerns attributed to him.

The meetings on the 8 December 2016 and the letters of 9 December 2016

62. The Claimants were invited to meet with Mr Rhodes on an individual basis on 8 December 2016 to discuss his investigations. Miss Lowson was also invited to such a meeting. The Claimants continued to be suspended without pay. The Claimants were not provided with any information regarding the nature of the allegations in preparation for the meeting.
63. The Respondent's notes of the meetings with the Claimants on 8 December 2016 were incorporated into letters dated 9 December 2016 which were sent to the Claimants for signature. The letters dated 9 December 2016 as subsequently signed by the Claimants together with their comments/amendments are at pages 234-236 (Mrs Embley) and 238 – 239 (Mrs Hezsely) of the bundle. Mr Rhodes was accompanied at the meeting by an HR/ administrative adviser and the Claimants were supported by family/ friends. Mr Rhodes also conducted a similar investigation meeting with Miss Lowson on 8 December 2016 (the unsigned notes of that meeting which were also incorporated in a letter dated 9 December 2016 are at pages 240-to 242 of the bundle).
64. The allegations were put to the Claimants at the meeting on 8 December 2016 in general terms and they were not provided with any of the details contained in Mr Rhodes' investigatory report/the statements/notes which had been collated by him during his investigations or informed of the identity of any of the people who had raised concerns.

The meeting with Mrs Embley

65. In summary, Mrs Embley denied the allegations which Mr Rhodes put to her regarding client care including that clients had been put to bed early/woken up late to allow staff to participate in come dine with me evenings and coffee mornings. Mr Rhodes also raised with Mrs Embley an allegation that she had spoken to a client's family when the Respondent had taken over the service relating to access to a service user's vehicle and had breached confidentiality. Mrs Embley informed Mr Rhodes (including as set out in her subsequent written amendments to the notes of the meeting) of the circumstances in which she had contacted Ms Roadhouse and subsequently Client E's mother including (a) that she had been concerned that Client E and Client L were not receiving an appropriate level of care following Client S's arrival (who had complex care needs) (b) she had contacted Ms Roadhouse to explain her concerns that Clients E and L would be unattended whilst remaining staff were attending training for Client S and (c) she had subsequently contacted Client E's mother on 16 November 2016 as she had discovered that Client E had been eating alone notwithstanding that Client E was funded for 1 to 1 care (pages 236 - 237 of the bundle).

66. The Respondent's notes of the meeting record that Mr Rhodes informed Mrs Embley that there was a safeguarding umbrella over Unit 1 and that issues had been raised which they were duty-bound to investigate.

The meeting with Mrs Hezsely

67. In summary, Mr Rhodes put similar allegations to Mrs Hezsely regarding client care in response to which Mrs Hezsely either denied the allegations or gave an explanation for any such concerns. Mr Rhodes did not put to Mrs Hezsely any concerns regarding the alleged breach of confidentiality referred to in her letter of suspension dated 18 November 2016 (page 211 of the bundle). Mrs Hezsely subsequently returned and signed a copy of the Respondent's notes of the meeting on 8 December 2016 to which she added the following comment, "it is an accurate account of the meeting but I disagree with some of the accusations made". Mrs Hezsely contended that she had stated during the meeting with Mr Rhodes on 8 December 2016 that she believed that the allegations had been raised against her because of her age. This is denied by Mr Rhodes. The Tribunal is not satisfied, on the balance of probabilities, that Mrs Hezsely raised any such allegation during the meeting on 8 December 2016 (or at any time subsequently during her employment with the Respondent). When reaching this conclusion the Tribunal has taken into account in particular, that this is denied by the Respondent and further that there was no reference to any such contention in the notes of the meeting on 8 December 2016

(which Mrs Hezsely signed as indicated above) or in Mrs Hezsely's subsequent written grievance or letter of resignation.

68. The Respondent's notes of the meeting with Mrs Hezsely on 8 December 2016 record that Mr Rhodes informed her that Unit 1 had been the subject of a number of safeguarding issues and that the Respondent had a responsibility under CQC and safeguarding policies to aim to work towards closing those concerns down.

The meeting with Miss Lawson

69. Mr Rhodes raised similar allegations relating to the provision of client care in his meeting with Miss Lawson on 8 December 2016 which were denied by her. The Respondent's notes of the meeting also record that Mr Rhodes raised with Miss Lawson an allegation that she had telephoned staff and discussed the TUPE transfer which was a breach of confidentiality which was denied by Miss Lawson who contended that she had kept the information private but that she had received a telephone call/ texts from other members of staff raising concerns that their hours were going to be cut. These recorded comments were not challenged by Miss Lawson during her evidence to the Tribunal and the Tribunal is satisfied that the notes are a broadly accurate record of the exchange between Mr Rhodes and Miss Lawson. Mr Rhodes also raised during the meeting with Miss Lawson concerns relating to safeguarding issues.

Sickness absence

70. The Claimants were both signed off sick from work following the meeting on 8 December 2016. Mrs Embley was signed off sick by her GP on 8 December 2016 for one month from that date for work related stress. A copy of her GP's statement of fitness for work note is at page 225 of the bundle. Mrs Hezsely was signed off sick by her GP on 12 December 2016 from 6 December 2016 to 3 January 2017 by reason of "a stress reaction". A copy of her GP's statement of fitness for work note is at page 244A of the bundle. The Claimants subsequently submitted further sick notes for the remainder of their employment with the Respondent.

The summary of evidence document

71. There is an undated document at pages 226-233 of the bundle entitled, "Investigation into allegations of misconduct against Jayne Embley and a similar document relating to Mrs Hezsely at pages 231-233 of the bundle which were prepared by Mr Rhodes. In summary, Mr Rhodes summarised in the documents his view of the allegations, evidence and the responses of the Claimants following the meetings on 8 December 2016 and set out his recommendations for future action.

Mrs Embley

72. Mr Rhodes stated in his recommendations relating to Mrs Embley that a number of the allegations were potentially serious/ very serious and that they should be put to Mrs Embley in a formal disciplinary hearing including in respect of (a) putting clients to bed early/waking them late for her own convenience (b) bullying of staff (c) failing to take clients out and (d) contacting Client E's mother concerning the Respondent taking over and Client E not having one to one care.
73. Mr Rhodes recorded in the document in respect of allegation (d) above a conversation which Ms Holdsworth had allegedly received on the afternoon of 17 November 2016 from a concerned and distressed carer who had informed Ms Holdsworth that she had received a telephone call from Mrs Embley informing her that (1) Mrs Embley had been told by Miss Lawson that the Respondent had stated to Miss Lawson that she was intending to lose some members of staff from Unit 1 and (2) that Mrs Embley had complained to the carer about the way in which she and others had allegedly been treated by the Respondent throughout the TUPE process and had gossiped about things within Unit 1. Mr Rhodes also recorded in his recommendations Mrs Embley's statement that she had called Client E's mother to tell her that her daughter had not received the one-to-one care to which she was entitled including that he considered to it to be highly inappropriate for any concerns over care to have been raised with the parent rather than with the Respondent or relevant body and thereby seeking to worry a parent/ potentially call the service/organisation into disrepute. Mr Rhodes described this is a potentially very serious offence (page 227 of the bundle).

Mrs Hezsely

74. Mr Rhodes stated in his recommendations relating to Mrs Hezsely that a number of the allegations were potentially serious and that they should be put to Mrs Hezsely in a formal disciplinary hearing including in respect of (a) putting clients to bed early and waking them up late for her own convenience (b) failing to take clients out (c) failing to offer food and clothing choices (d) taking long coffee breaks and ignoring clients during breaks.

The meetings on 22 December 2016

75. Mr Rhodes conducted further individual meetings with the Claimants and Miss Lawson on 22 December 2016. The Tribunal has not been provided with a copy of any notes of those meetings. The Tribunal has however, had regard to Mr Rhodes' letters to the Claimants dated 22 December 2016 when making its findings of fact regarding the meeting that day.

76. It is agreed between the parties that the Claimants were invited by Mr Rhodes during the meeting on 22 December 2016 to return to work however that this was offered on the basis that the Claimants would work on the Respondent's staff bank and would not return to Unit 1. The Claimants also raised concerns during the meetings regarding their suspension without pay.
77. There is a dispute between the parties regarding what the Claimants were told at that meeting concerning any ongoing safeguarding investigation by Devon County Council including whether the Claimants were told that they were under investigation. In summary, the Claimants contended that they were told by Mr Rhodes at that meeting that they were under investigation by safeguarding at Devon County Council in respect of their alleged conduct. This is denied by Mr Rhodes. Mr Rhodes told the Tribunal in oral evidence that the Respondent had been informed by Devon County Council that they were conducting their own internal investigation at this time into the way in which safeguarding had dealt with the concerns relating to some of the issues identified in respect of the Claimants/ Miss Lawson. Mr Rhodes further contended that whilst he had informed the Claimants at the meeting on 22 December 2016 that Unit 1 would be the subject of a safeguarding investigation by Devon County Council and that the subject of the investigation was connected to some of the allegations raised against them he did not inform the Claimants that they were personally under investigation by the Council.
78. Having considered the available evidence (including the subsequent letter from Devon County Council dated 1 August 2017) the Tribunal is satisfied on the balance of probabilities that (a) neither Unit 1 (nor any individual) was subject to a safeguarding order by Devon County Council at the time that the Respondent took over the provision of the service from Select in November 2016 (b) safeguarding issues were raised by the District Nurse and Client E's mother following Client S's arrival at Unit 1 but they were not however the subject of a Safeguarding order (c) Mr Rhodes was told by Devon County Council in December 2016 that they were conducting an internal safeguarding investigation as referred to at paragraph 77 above and (d) however neither Unit 1 nor any employee at Unit 1, were under investigation by safeguarding at that time or at any time between December 2016 and August 2017.
79. The Tribunal is also satisfied that Mr Rhodes informed the Claimants at the meetings on 22 December 2016 that the Respondent had recently been notified that Unit 1 would be subject to a safeguarding investigation by Devon County Council and that the subject of the investigation was connected to some of the allegations against them.

The Tribunal is further satisfied that such comments reasonably led the Claimants to believe that they were personally under investigation by safeguarding.

80. When reaching such conclusions, the Tribunal has taken into account in particular (a) the oral evidence of the Claimants and (b) the contents of Mr Rhodes' letter to the Claimants dated 22 December 2016 (referred to below).

The Respondent's letters dated 22 December 2016

81. The Respondent's letters to the Claimants dated 22 December 2016 (which are in similar form) are at pages 245-248 of the bundle. In summary, the Claimants were informed that (a) the investigation into the allegations of misconduct against them remained ongoing (b) the Respondent had just been notified that Unit 1 would be subject to a safeguarding investigation by Devon County Council and that the subject of such investigation was connected to some of the allegations against the Claimants (c) that for this reason Mr Rhodes was unable to complete the investigation into their conduct at that time (d) once the safeguarding investigation by Devon County Council was concluded, which he anticipated would be in early January 2017, he hoped to be in a position to conclude the investigation into the Claimants' conduct and make recommendations accordingly (e) Mr Rhodes considered that it was suitable for the Claimants to return to work on their staff bank pending the outcome of the investigation albeit that in such circumstances their return to work would not include shifts at Unit 1 (e) in accordance with their contracts of employment the Respondent would offer them shifts at any other premises as when they became available and (f) Mr Rhodes stated that having investigated the position regarding the Claimants' entitlement to pay during suspension as raised by the Claimants at the meeting on 22 December 2016 he had concluded that they were not entitled to pay as they were employed on a contract which did not guarantee them a set/ minimum number of hours and that they were therefore only entitled to be paid for any hours for which they actually worked.
82. Mr Rhodes told the Tribunal in his oral evidence that by 22 December 2016 he had concluded, having spent more time on Unit 1 and having had no further feedback from safeguarding, that (a) the issues which had been raised by staff regarding the conduct of the Claimants/ Miss Lowson were part of a culture on Unit 1 which was not limited to them (b) there was insufficient evidence to take the matter forward as a disciplinary matter at that time and (c) that it was appropriate in all the circumstances to allow the Claimants to return to work at one of the Respondent's other units where they would be subject to supervision and would receive further training and support as required. Mr Rhodes further confirmed to the Tribunal that he did not undertake any further

investigations after 22 December 2016 into the conduct of the Claimants/ Miss Lawson.

83. Miss Lawson was also allowed to return to work by Mr Rhodes at this time. Miss Lawson agreed to return to work but subsequently terminated her employment with the Respondent following her return because of unrelated concerns regarding the Respondent's conduct towards her.

84. Neither of the Claimants returned to work at any time prior to the termination of their employment with the Respondent.

The Claimants' grievances

85. The Claimants submitted written grievances to the Respondent. The grievances are in broadly similar terms.

The grievance of Ms Embley

86. Mrs Embley's letter of grievance dated 11 January 2017 is at pages 250 – 251 of the bundle. In summary, Mrs Embley raised 5 issues including: - (a) loss of pay since 17 November 2016 (based on normal fortnightly hours of 48 and 60 per week). Mrs Embley put Mr Rhodes on notice that she believed that he had potentially breached the terms of the Act by failing to pay her such monies. Mrs Embley asked the Respondent to pay the outstanding monies forthwith as she stated that she had been forced to live on holiday pay to survive (b) failing to implement the grievance policy in a timely manner and in particular that there had been a delay of 3 weeks between the notification of her suspension and the first meeting notwithstanding that the procedure stated that it should have been dealt with within 7 days (c) the change/ inconsistency in position by the Respondent regarding the seriousness of the allegations against her / that the Respondent was now offering her work notwithstanding the allegations of misconduct. Mrs Embley sought clarification of when the seriousness of the allegations had changed and (d) the adverse effect of the unfounded allegations / delayed suspension/ lack of pay on her health. Mrs Embley requested that her grievance be dealt with within 14 days. Mrs Embley's grievance made no reference to any issues relating to the making of any protected public interest disclosures or age.

The grievance of Mrs Hezsely

87. The grievance letter of Mrs Hezsely dated 12 January 2017 is at pages 252- 253 of the bundle. Mrs Hezsely's letter of grievance is in similar terms and raised the issues identified above in respect of Mrs Embley.

The Respondent's responses dated 21 February 2017

88. Mr Rhodes responded to the Claimants' grievances by letters dated 21 February 2017. The responses are pages 256 – 257 (Mrs Embley) and 258 – 259 (Mrs Hezsely) of the bundle. Mr Rhodes did not invite the Claimants to meet with him to discuss their grievances.

89. In summary, Mr Rhodes responded to Mrs Embley's letter of grievance as follows:-

- (1) Payment during suspension – Mr Rhodes advised Mrs Embley that she had now been paid, without admission of any liability or fault, for the period during which she was suspended and fit for work. Mr Rhodes gave no explanation for the decision to make payment or apology for the previous non-payment.
- (2) Grievance and disciplinary procedures – Mr Rhodes denied that there had been any breach of the Respondent's grievance and disciplinary procedure including that there had been any delay in dealing with matter having regard to the number and severity of the allegations against Mrs Embley. Mr Rhodes further stated that, "As you are aware, the investigation is ongoing pending the result of a separate investigation by a third party in relation to your place of work and the allegations against you. We are aiming to conclude the investigation as soon as possible".
- (3) Return to work – Mr Rhodes advised Mrs Embley that although the seriousness of the allegations against her had not changed the Respondent considered that it was appropriate for Mrs Embley to return to work in another setting whilst the separate investigation by Devon County Council remained ongoing.
- (4) Mr Rhodes advised Mrs Embley of her right to appeal to Ms Rhodes within 7 days of the date of his letter in accordance with the Respondent's grievance procedure.

90. Mr Rhodes' response to Mrs Hezsely dated 21 February 2017 (at pages 258 – 259 of the bundle) was in similar terms.

91. Neither of the Claimants raised an appeal. The Tribunal accepts their explanations namely (a) Mrs Embley did not appeal because she did not consider that she could work for the Respondent any longer as she felt that the allegations were overstated/ unfounded and that her suspension was unjustified and (b) Mrs Hezsely did not appeal because she did not feel well enough to do so as she was depressed as a result of what had happened.

Mrs Embley's letter of resignation dated 23 February 2017

92. Mrs Embley wrote to Mr Rhodes by letter dated 23 February 2017 resigning her employment with the Respondent. (This letter is at pages 260 – 261 of the bundle). The agreed effective date of termination of Mrs Embley's employment with the Respondent was 23 February 2017.

93. Mrs Embley advised Mr Rhodes that she felt unable to continue to work for the Respondent because of the way in which she had been treated, in summary, in respect of the following matters: -

(1) Suspending her in a manner which had made her feel worthless at doing the job which she loved and failing subsequently to follow protocol regarding the suspension.

(2) Making unsubstantiated allegations against her which were still under investigation after 3 months. Mrs Embley stated that it had taken an unacceptable amount of time to complete an investigation into allegations which had been without foundation/ which had not been dealt with in accordance with the disciplinary procedure and during which she had not been paid.

(3) Lifting her suspension by offering her work at another establishment but only if any hours were available when she had previously been working 40 – 60 hours per week. Mrs Embley also questioned why the Respondent was offering her work if the allegations against her were so serious.

(4) Although Mrs Embley had been advised at the meeting with Mr Rhodes that she was under investigation by Safeguarding she had still heard nothing further from the Respondent or Safeguarding.

(5) The unsubstantiated and unidentified allegations of bullying were of real concern to her and had caused her immense stress as she had no idea of the details of the allegations. Further, the Respondent had ignored her request to meet with any parties concerned to resolve any problems.

94. There is no reference in Mrs Embley's letter of resignation to any alleged unfavourable treatment because of age or in respect of the making of any protected disclosures.

Mrs Hezsely's letter of resignation dated 25 February 2017

95. Mrs Hezsely's letter of resignation dated 25 February 2017 is at page 262 of the bundle.
96. In summary, Mrs Hezsely stated in her letter of resignation dated 25 February 2017 that (a) the Respondent had made it untenable for her to continue to work for them after they had suspended her (without even knowing her) for allegations that could have been discussed with her in accordance with the grievance and disciplinary manual (b) their actions after 30 years in the care industry without any blemish to her character had made her feel totally worthless and for which she was under her doctor for stress and depression (c) it had taken over 3 months to investigate the unsubstantiated allegations against her which was unacceptable particularly without pay (d) she had been told by the Respondent that she could not return to Unit 1 as she was under investigation with safeguarding but had heard nothing further (e) she could not understand why she would be offered hours elsewhere if the allegations were serious and (f) she believed that the allegations were unfounded and that the Respondent had failed to deal with them properly in accordance with the disciplinary procedure.
97. There was no reference in Mrs Hezsely's letter of resignation to any alleged unfavourable treatment because of age.
98. It is agreed that the effective date of Mrs Hezsely's employment with the Respondent was 25 February 2017.
99. The Respondent did not reply to or acknowledge the Claimants' letters of resignation.

The alleged comparators in respect of the age discrimination claim

100. The comparators upon whom the Claimants rely for the purposes of their age discrimination claims are identified at Paragraph 17 of the List of Issues. The alleged comparators, who all worked at Unit 1, have a wide range of dates of birth ranging from 1964 to 1992. The Claimants did not adduce any evidence to the Tribunal that any of the comparators had been the subject of any similar allegations to those raised against the Claimants/ Miss Lawson (whether relating to client care provision or confidentiality).

The claim forms

101. Mrs Embley's claim form was presented to the Tribunals on 11 March 2017 (pages 1- 13 of the bundle) which was subsequently amended (pages 47-64 of the bundle). Mrs Hezsley's claim form was presented to the Tribunals on 14 March 2017 (pages 14- 20 of the

bundle) which was subsequently amended (pages 65-79 of the bundle).

THE SUBMISSIONS

102. The Tribunal has had regard to the oral and written submissions of the parties together with the authorities relied upon by them.

THE LAW

103. The Tribunal has had regard in particular to the statutory and associated provisions and further authorities referred to below.

THE CLAIMANTS' CONSTRUCTIVE DISMISSAL CLAIMS (pursuant to Sections 95 (1) (c) and 98 of the Act).

104. The Tribunal has had regard, in particular, to following statutory and associated provisions namely, sections 95 (1) (c), 97, 98, 122(2) and 123 (6) of the Act and section 207 A (2) of the Trade Union & Labour Relations (Consolidation) Act 1992 ("the 1992 Act") and the ACAS Code of Practice 1: Disciplinary and grievance procedures 2015 ("the ACAS Code"). The Tribunal has also had regard in particular to the authorities referred to below.

105. As dismissal is not admitted, the burden of proof falls on the Claimants to show, on the balance of probabilities, that they (or either of them) were entitled to terminate their contracts of employment by reason of the conduct of the Respondent for the purposes of section 95 (1) (c) of the Act.

106. It is necessary for the Claimants to establish (a) a fundamental breach of an express and/or implied term of the contract of employment by the Respondent (b) that such breach / breaches caused them to resign and (c) that they did not delay too long before resigning thereby affirming the contract and losing the right to pursue such a claim.

107. The Claimants rely on the alleged breaches of contract identified at Paragraphs 2- 3 and 21- 22 of the List of Issues which include alleged breaches of the implied term of trust and confidence, namely, that the Respondent would not, "without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee". ("the implied term of trust and confidence") (**Malik v the Bank of Credit and Commerce and International [1998] AC 20**).

108. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract as the very essence of such a breach is that it is calculated or likely to destroy or seriously damage the relationship.

109. The test of whether there has been a breach of the implied term of trust and confidence is objective. In order to determine whether there has been a breach of the implied term of trust and confidence it is necessary to consider (a) the nature of the conduct complained of (b) whether the Respondent had reasonable and proper cause for that conduct and (c) if not, was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence.
110. Unreasonable conduct alone is not enough to amount to constructive dismissal. If an employee is relying on a series of acts the Tribunal must be satisfied that the series of acts taken together amounted to a breach of the implied term of trust and confidence.
111. A course of conduct may cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive unfair dismissal following a, “last straw” incident. The last straw need not of itself amount to a breach of contract, be of the same character as earlier acts or constitute unreasonable or blameworthy conduct. The last straw must however contribute to the breach. An innocuous act on the part of employer cannot be a final straw, even if the employee genuinely, but mistaken interprets the act as harmful and destructive of his or her confidence in the employer (**Lewis v Motor World Garages Limited [1986] ICR 157, CA**) and **Omiliaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.
112. The Tribunal is required to consider whether any repudiatory breach played “ a part in the dismissal” and was “an” effective cause of the resignation rather than being “the” effective cause” accordingly it need not be the predominant, principal, major or main cause for the resignation (**Nottingham City council v Meikle [2005] ICR 1 CA** and **Wright v North Ayrshire Council [2014] IRLR4 EAT**).
113. If the Tribunal finds that the Claimants (or either of them) has been unfairly dismissed, the Tribunal is also required to determine whether there should be any reduction in any basic and/or compensatory award pursuant to sections 122 (2) and/or 123 (6) of the Act by reason of the Claimants’ contributory fault. The Tribunal has reminded itself that contributory fault covers a wide range of conduct and can include culpable, blameworthy, foolish or otherwise unreasonable behaviour. The Tribunal has also reminded itself however, that for the purposes of determining any contributory fault for the purposes of section 123 (6) of the Act it has to be satisfied that the Claimants (or either of them) was, on the balance of probabilities, guilty of any such conduct, that it caused or contributed to “the dismissal” and that it is just and equitable to reduce any award.

Mrs Embley's protected public interest disclosure claim pursuant to Section 103 A of the Act.

114. Mrs Embley is also pursuing a claim of constructive unfair dismissal pursuant to section 103A of the Act (paragraph 15 of the List of Issues) on the grounds that the reason/principal reason for her alleged constructive dismissal was that she made protected interest disclosures as identified at Paragraphs 8 – 14 of the List of Issues.

115. The Tribunal has had regard in particular to the following statutory and associated provisions: - sections 43 A, 43B (1) (b) and (d), 43 C, G & H and 103 A of the Act, 207A and schedule A2 of the 1992 Act and the provisions of the ACAS Code.

116. The Tribunal has also had regard in particular to the authorities referred to below.

**Abernethy v Mott, Hay and Anderson [1974] ICR 323 CA,
Maud v Penwith District Council 1984 ICR 143 CA
Kuzel v Roche Products Limited [2008] ICR, 799, CA
Cavendish Munro Professional Risks Management Ltd v Geduld [2010]
Blackbay Ventures Limited t/a Chemistree v Gahir [2014] IRLR EAT 416.
Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.
Chesterton Global Limited (trading as Chestertons) v Nurmohamed
[2018] ICR 920 CA.**

117. The Tribunal has reminded itself in particular, in respect of Mrs Embley's protected public interest claims that: -

- (1) It is necessary for Mrs Embley to establish the factual basis for her claims including that (a) she made qualifying disclosures which in her reasonable belief were in the public interest and tended to show one of the relevant failures listed in section 43 B (1) of the Act and (b) such qualifying disclosures were made in accordance with the provisions of section 43C- H of the Act and (c) that she has been constructively dismissed by reason of such protected disclosures.
- (2) In cases of alleged constructive dismissal the Tribunal has to consider (a) whether, viewed objectively, the Respondent acted in repudiatory breach of Mrs Embley's contract of employment (including any breach of the implied term of trust and confidence) entitling Mrs Embley to terminate her employment with the Respondent and (b) if so, whether the reason or principal reason for any such breach/ breaches by the Respondent which precipitated Mrs Embley's resignation was that she had made (individually or cumulatively) the alleged protected interest disclosures.

118. When determining the reason for any repudiatory breaches for such purposes (a) Mrs Embley is required to show that there is a real issue as to whether the reason put forward by the Respondent was not the real reason and if so, (b) whether the Respondent has proved its reason or if not, (c) whether the Respondent has disproved the section 103A reason advanced by Mrs Embley or (d) whether the Tribunal is, in any event satisfied that it was for another reason.

The Claimants' age discrimination claim

119. The Tribunal has had regard in particular to sections 5, 13, 23, 39 and 136 of the 2010 Act in respect of the Claimants' age discrimination claims including in respect of their alleged constructive dismissal (paragraphs 16 – 19 and 27- 29 of the List of Issues).

120. The Tribunal has also reminded itself in particular of the following matters: -

- (1) It is necessary for the Claimants to establish the factual basis for their claims including such facts from which the Tribunal could conclude, in the absence of another explanation from the Respondent, that they have been treated less favourably in similar circumstances than their named comparators / hypothetical comparator because of age.
- (2) If the Claimants are able to establish such facts the burden passes to the Respondent to satisfy the Tribunal, on the balance of probabilities, that the alleged protected characteristic of age played no part whatsoever including in respect of any repudiatory breaches of contract which precipitated their constructive dismissal.
- (3) The protected characteristic does not have to be the only or principal reason for any less favourable treatment it is sufficient if it is a significant influence on the alleged treatment. Further, significant for such purposes means more than minor or trivial.
- (4) It is possible in complaints of direct age discrimination to justify less favourable treatment on such grounds if the Respondent is able to show that any such treatment was a proportionate means of achieving a legitimate aim. The Respondent did not however seek to rely on such defence.

OUR CONCLUSIONS

121. The Tribunal has considered the matters in issue in the order set out in the List of Issues (as amended pursuant to paragraphs 7-9 above) unless otherwise indicated below.

MRS EMBLEY

122. The Tribunal has considered first the claims of Mrs Embley as set out in the List of Issues. The references to paragraph numbers are to the numbers contained in the List of Issues.

THE COMPLAINT OF UNFAIR DISMISSAL -pursuant to sections 95(1) (c) and 98 of the Act (paragraphs 1- 7 of the List of Issues).

123. **Paragraph 1 of the List of Issues** - It is agreed that Mrs Embley resigned her employment with the Respondent on 23 February 2017 (paragraph 92 above).

124. **Paragraph 2 (a) of the List of Issues** - Did the Respondent bring allegations of gross misconduct against Mrs Embley and/or subject her to an investigatory/ disciplinary process and if so, did such allegations constitute a fundamental breach of contract for the reasons alleged by Mrs Embley at paragraphs 2 (a) (i) – (iv) of the List of Issues (the Tribunal has considered the alleged breach at paragraph (v) separately as explained further below).

125. In brief summary, it is contended on behalf of Mrs Embley (and also Mrs Hezsely) that (a) the Respondent acted in bad faith in the bringing and pursuing of the allegations against the Claimants including that the Respondent contrived and/ or exaggerated some or all of the allegations and/or for the purpose of getting them “out of the building” (and /or in Mrs Embley’s case because of her whistleblowing) and (b) further the actions of the Respondent constituted a breach of the implied term of trust and confidence. Neither Claimant relies upon any identified alleged breach of any express term of their contracts in respect of the above mentioned alleged breaches.

126. The Respondent accepts that it conducted an investigatory process against Mrs Embley (and also Mrs Hezsely) for alleged potential misconduct. The Respondent contends however that it had reasonable and proper cause for such action in the light of the allegations relating to client care which were brought to its attention against Mrs Embley (and also Mrs Hezsely and Miss Lawson) following its acquisition of the service.

127. The Respondent further denies in summary, (a) that Mrs Embley (or Mrs Hezsely) were subjected to a disciplinary process (b) that the allegations were labelled as gross misconduct and (c) that it acted in bad faith including that the allegations were contrived or exaggerated / or brought to get Mrs Embley/ Mrs Hezsely or Miss Lawson out of the building and/or (d) that it, in any event, breached the implied term of trust and confidence.

Allegation 2 (a) of the List of Issues

128. The Tribunal is satisfied on the facts that the Respondent conducted an investigatory process into allegations of potential misconduct by Mrs Embley relating to (a) client confidentiality and (b) care provision and (c) that such allegations were regarded by the Respondent as potentially serious in nature.
129. The Tribunal is not however satisfied on the facts that the Respondent brought any allegations of gross misconduct against Mrs Embley or subjected her to a disciplinary process.
130. When reaching the above conclusions, the Tribunal has had regard in particular to its findings of fact at paragraphs 57 – 66, 71 -73 and 75- 82 above.

Paragraphs 2 (a) (i) – (iv) of the List of Issues

131. The Tribunal is satisfied that Mrs Embley has established that (a) Ms Rhodes expressed concerns at a meeting with staff on 4 November 2016 regarding the number of staff who had transferred over to the Respondent from Select (paragraph 35 above) (b) Ms Rhodes again raised concerns at a meeting with Miss Lawson and Ms Holdsworth on 16 November 2016 that there were too many staff at Unit 1 following the transfer out of client B and asked Miss Lawson whether the Claimants (and 2 other members of staff) could be transferred out pursuant to TUPE with Client B and further whether Miss Lawson had any concerns regarding any of the 4 members of staff (including the Claimants) in response to which Miss Lawson indicated that any issues had been resolved (paragraph 50 above).
132. When considering the alleged breaches by the Respondent the Tribunal has also taken into account in particular that (a) it has not received any evidence from Ms Rhodes, Ms Roadhouse or Ms Holdsworth regarding such matters (notwithstanding that Ms Rhodes and Ms Roadhouse are still with the Respondent) and (b) the Tribunal has not been provided with any notes of the induction meetings which the Respondent conducted following the acquisition of the service from Select.
133. The Tribunal is not however satisfied on the facts that the Respondent acted in bad faith /in breach of contract (including in breach of the implied term of trust and confidence) as alleged by Mrs Embley in respect of Paragraphs 2 (a) (i) – (iv) of the List of Issues having regard in particular to the following matters: -

(1) The findings of the Tribunal at paragraph 36 above, including that Mrs Embley and Miss Lawson both confirmed in their oral evidence to the Tribunal that the Respondent had conducted induction meetings with staff following the TUPE transfer and that Mrs Embley confirmed that Ms Holdsworth had asked her during such meeting whether she had any concerns about any members of staff.

(2) The evidence of Mr Rhodes regarding (a) his appointment as investigating officer including that he was advised upon such appointment that concerns had been raised by staff during induction meetings concerning the alleged conduct of the Claimants and Miss Lawson in respect of client care and (b) the matters identified in his subsequent investigations into such matters (paragraphs 59 – 61 and pages 212 – 224 of the bundle including the signed statement of HAW) and the overall similar (but not identical nature) of the concerns raised.

(3) The contents of the Respondent's Document dated 25 April 2017 (pages 44 – 45) regarding such concerns.

134. In the circumstances the Tribunal is not satisfied that, viewed objectively, Mrs Embley has established on the balance of probabilities that the Respondent acted in breach of an express term of Mrs Embley's contract of employment and/or in breach of the implied term of trust and confidence in respect of the matters identified at Paragraphs 2 (a) (i) – (iv) of the List of Issues.

Paragraph 2 (a) (v) of the List of Issues – “The Respondent included in the allegations conduct which the Claimant says constituted whistleblowing”

135. In brief summary, Mrs Embley contends that the allegations made against her included conduct which constituted whistleblowing namely, the alleged disclosures to Ms Roadhouse on 14 and 15 November 2016 and subsequently to Client E's mother on 16 November 2016 relating to concerns regarding allegedly inadequate levels of care for Client E (and in respect of the first 2 alleged protected disclosures to Ms Roadhouse relating also to Client L).

136. In brief summary, the Respondent accepted that one of the allegations which was raised against Mrs Embley was that she had telephoned Client's E mother and breached confidentiality (on 16 November 2016) but contended that this related to a belief by the Respondent that Mrs Embley had contacted Client E's mother to complain about the way in which Mrs Embley and other staff had been treated following the transfer of the service from Select to the Respondent. The Respondent also accepted (after an initial denial) that Mrs Embley had contacted Ms Roadhouse on 14 November 2016 to raise concerns regarding the adequacy of staffing levels for Clients E and L in light of the forthcoming training for Client S.

137. The Tribunal is satisfied that the allegations against Mrs Embley included an allegation that she had breached client confidentiality. This allegation is referred to in the correspondence passing between the parties and in other contemporaneous material including (a) Mrs Embley's letter of suspension dated 18 November 2016 (paragraph 58) (b) the Respondent's letter to Mrs Embley dated 9 December 2016 (paragraph 63) and in Mr Rhodes' summary of evidence (first allegation on page 227 of the bundle).
138. The Tribunal is further satisfied that the allegation relating to alleged breach of confidentiality in respect of client care related to 2 matters namely that Mrs Embley (a) had contacted Client E's mother to raise concerns regarding lack of appropriate levels of care on Unit 1 for her daughter and associated health and safety concerns following the departure of Client B and the arrival of Client S and (b) that Mrs Embley had raised concerns with Client E's mother about the way in which staff were being treated following the TUPE transfer including in particular the reduced need for staff.
139. When reaching this conclusion the Tribunal has had regard in particular to its findings at paragraphs 54 - 56 above.
140. Having given the matter careful consideration, the Tribunal is satisfied that in so far as the allegations related to an alleged breach of confidentiality by Mrs Embley in respect of her contact with Client E's mother on 16 November 2016 for the purposes of raising concerns relating to the alleged insufficient level of care on Unit 1 (but not however in respect of any other matters) this constituted an allegation of alleged misconduct relating to "whistleblowing" by Mrs Embley (subject to Mrs Embley establishing that it was a protected public interest disclosure for the purposes of section 43 B (1) of the Act as considered further below in respect of Mrs Embley's claim pursuant to section 103A of the Act). The Tribunal is further satisfied that, viewed objectively, this constituted a breach of the implied term of trust and confidence as the Respondent has not shown that it had reasonable and proper cause for such action.

Paragraphs 2 (b) and (c) of the List of issues – relating to the suspension of Mrs Embley

141. The Tribunal has considered together the alleged breaches of contract by the Respondent in respect of Mrs Embley's suspension namely, that the Respondent acted in breach of contract in respect of both Mrs Embley's suspension and also her suspension without pay.
142. In brief summary, Mrs Embley contended that the Respondent did not have reasonable cause to suspend her and that the decision to

do so constituted a breach of the implied term of trust and confidence. Mrs Embley also contended that the decision to suspend her without pay, in any event, constituted a breach of a term of her contract and/or of the implied term of trust and confidence.

143. In brief summary, the Respondent contended that it had acted with reasonable and proper cause in suspending Mrs Embley on 17 November 2016 in the light of the concerns which had been raised relating to client care having regard in particular to the nature of the concerns (including putting clients to bed early and leaving them in bed in the morning) and the extreme vulnerability of the clients concerned. The Respondent further denied any breach of contract/ acting without reasonable or proper cause in respect of the suspension of Mrs Embley without pay in the light in particular of the following:- (a) her contract did not entitle her to any guaranteed minimum hours of work and (b) the Respondent's disciplinary policy entitled the Respondent to suspend an employee without pay pending an investigation (c) the Respondent understood on the basis of the information which was provided by Select that Mrs Embley was employed on a zero hours contract and (d) that Mrs Embley in any event affirmed any breach by subsequently accepting payment which was paid without admission of liability.
144. Having given the matter careful consideration, the Tribunal is satisfied that (a) the Respondent had a contractual right to suspend Mrs Embley in the event that it suspected that she had been guilty of misconduct (paragraph 14 of the contract of employment dated 23 December 2015 at pages 110 - 118 of the bundle including in particular page 115) (b) that the Respondent was entitled to suspend Mrs Embley (and Mrs Hezsely/ Miss Lowson) pending further investigation / had reasonable and proper cause to do so in the light of the concerns which had been raised by staff during induction meetings and the vulnerability of the clients concerned (paragraphs 18,19 and 36 above).
145. The Tribunal is not however satisfied that the Respondent had a contractual right to suspend Mrs Embley without pay. When reaching this conclusion the Tribunal has taken into account in particular, the following matters :- (a) it is clearly stated at paragraph 14 of Mrs Embley's contract dated 23 December 2015 that, "The Company may suspend you on full pay in the event that it has reason to believe that you have been guilty of misconduct" (b) whilst the contract does not provide for any minimum guaranteed hours of work it also does not contain any provision entitling the Respondent to operate the contract as a zero hours contract and (c) Mrs Embley had worked at Unit 1 for 48 to 60 hours per week for approximately 12 months prior to her suspension by the Respondent (paragraphs 21-23).

146. The Tribunal is therefore satisfied that, viewed objectively, the Respondent's failure to pay Mrs Embley whilst on suspension constituted a breach of the above-mentioned terms of her contract of employment.

Paragraphs 2 (d) and (e) of the List of Issues - the investigation

147. The Tribunal has considered together the allegations relating to the conduct of the investigation including the allegation that Mrs Embley was allegedly told that she was subject to a safeguarding investigation when there was no such extant investigation into her conduct.

148. In brief summary, Mrs Embley contended that the manner in which Mr Rhodes conducted the investigation was unreasonable including (a) that the allegations which were put to the Claimants during the meeting on 8 December 2016 were vague and unparticularised (so that they were unable meaningfully to respond to such allegations) (b) the length of the investigation and (c) that the Claimants were told by Mr Rhodes during the meeting on 22 December 2016 that they were personally the subject of a safeguarding investigation when there was no such safeguarding investigation.

149. In brief summary, the Respondent denied the investigation was unnecessarily lengthy, or otherwise unreasonable, and contended that it was unable to complete its investigations pending the completion of the safeguarding investigations by Devon County Council. The Respondent further denied that (a) the Claimants (or either of them) were told by Mr Rhodes at the meeting on 22 December 2016 that they were personally under investigation by Devon County Council or (b) that this was a reasonable interpretation of the Respondent's letter dated 22 December 2016.

150. Having given the matter careful consideration, the Tribunal is satisfied that the Respondent's investigation of the matter was (viewed objectively) unreasonable and over lengthy. When reaching this conclusion the Tribunal has taken into account in particular the following matters:- (a) the Respondent's disciplinary procedure states that disciplinary matters should be dealt with quickly and fairly (page 120 of the bundle) (b) the Claimants were suspended on 17 November 2016 and the Respondent did not conduct an investigatory meeting until 8 December 2016 (c) the Claimants were not provided with sufficient information at the meeting on 8 December 2016 to allow them a proper opportunity to respond to the allegations (including the relevant dates, incidents and persons involved) (d) there was a further delay in the process until 22 December 2016 (e) although Mr Rhodes

had decided by 22 December 2016 that there was insufficient evidence to proceed to a disciplinary hearing (and carried out no further investigations after that date) the Claimants were told that the Respondent's investigation was ongoing and that it was unlikely to be concluded until sometime in early 2017 at the earliest and (e) Mr Rhodes led the Claimants to believe that they were personally under investigation by safeguarding at Devon County Council and did not at any time inform the Claimants that the ongoing safeguarding investigation was an internal investigation by Devon County Council.

151. When reaching the above conclusions, the Tribunal has had regard in particular to its findings at paragraphs 16, 59 – 66, 78-79 and 81 – 82.

152. Having had regard to all of the above, the Tribunal is satisfied that, viewed objectively, Mrs Embley has established that the Respondent's conduct in respect of allegations 2 (d) and (e) constituted a breach of the Respondent's disciplinary procedure / the implied term of trust and confidence by the Respondent (including that the Respondent has failed to show that they had reasonable or proper cause for such conduct).

Paragraph 2 (f) - Mrs Embley's return to work

153. In summary, Mrs Embley contended that the decision by the Respondent to allow her to return to work at (a) a different place of work and (b) working casual hours as and when they became available (as opposed to her previous working arrangements) constituted an anticipatory breach of Mrs Embley's contractual terms as to hours, pay and place of work and/or any event, a breach of the implied term of trust and confidence (on the basis that her hours and place of work were regular and that they did not have reasonable cause for such action).

154. In summary, the Respondent denied that it breached the terms of Mrs Embley's contract of employment which (a) expressly stated that she did not have a fixed place of work and (b) did not guarantee her any minimum hours. Further, the Respondent contended that even if Mrs Embley was contractually entitled to work at Unit 1 and/or minimum hours of work that it in any event had reasonable and proper cause to act in the manner that it did given the concerns relating to Mrs Embley's work practices and the ongoing investigation by Devon County Council.

155. Having given the matter careful consideration, the Tribunal is satisfied that Mrs Embley did not have a fixed place of work under the terms of her contract of employment and further that the Respondent was entitled to transfer Mrs Embley to any other location

in its absolute discretion on reasonable notice (paragraph 22). The Tribunal is therefore not satisfied that the Respondent acted in breach of contract in offering to allow Mrs Embley to return to work at a different location.

156. The Tribunal is however satisfied that, viewed objectively, the Respondent acted in breach of contract in seeking to return Mrs Embley to work on a bank basis. When reaching this conclusion, the Tribunal has taken into account that Mrs Embley's contract of employment was stated to be on a sessional and rotational basis/did not guarantee her any minimum hours. The Tribunal has however also taken into account that Mrs Embley's contract did not contain any provision entitling them to operate Mrs Embley's contract on a zero hour or bank basis (paragraph 22). Further, the Tribunal has taken into account (a) Mrs Embley's previous working arrangements (paragraph 23) and (b) Mr Rhodes' evidence that it was necessary for the Respondent to recruit further staff following the acquisition of the service from Select as there was an abundance of available work.

157. The Tribunal is therefore satisfied, that the decision by the Respondent to seek to return Mrs Embley on a bank basis only constituted a breach/anticipatory breach of Mrs Embley's contract of employment.

Paragraph 2 (g) - the grievance

158. In summary, Mrs Embley contended that the Respondent had acted unreasonably and in breach of contract in dealing with her grievance including that the Respondent did not properly address the issues raised in her grievance/ investigate the matters raised and/or conduct a grievance hearing as part of the process.

159. In summary, the Respondent contended that it had dealt with Mrs Embley's grievance in a reasonable and proportionate manner including in particular as the issues raised within the grievance were either upheld or satisfactorily addressed by the Respondent in its written response.

160. Having given careful consideration to the findings of fact the Tribunal is satisfied as follows: – (a) under the terms of the Respondent's grievance procedure the Respondent was required, upon receipt of a grievance, to seek to resolve the matter informally (or if informal resolution was not possible) to invite the employee to a meeting to discuss the grievance (page 121 a of the bundle) (b) the Respondent (Mr Rhodes) did not seek an informal resolution of the matter and/or invite Mrs Embley to a meeting notwithstanding the terms of the Respondent's grievance policy and further that he confirmed to the Tribunal that he was aware of the guidance contained in the ACAS Code regarding the handling of grievances (c) the Respondent's response failed properly to address the matters raised at paragraphs 2 and 3 of Mrs Embley's grievance letter including the ongoing

failure to explain the nature of the allegations/ justification for the suspension and why the Respondent had now decided that Mrs Embley should be allowed to return to work at another location notwithstanding the alleged seriousness of the allegations and ongoing investigation by Devon County Council and (d) to investigate/ address Mrs Embley's contention that she was unwell as a result of financial pressures and the delay in dealing with her suspension and (d) the overall tone letter of response was curt and unsupportive and repeated the contention that there was an ongoing investigation by Devon County Council in relation to Mrs Embley's place of work and the allegations against her.

161. In the light of the above the Tribunal is satisfied that, viewed objectively, the Respondent acted in breach of contract (in the light of the failure to seek to resolve the matter informally/arrange a grievance meeting in accordance with the grievance procedure) and further acted without reasonable or proper cause in breach of the implied term trust and confidence in the overall handling of the grievance having regard to the matters referred to above.

Paragraph 3 of the List of Issues

162. The Tribunal is required to consider in respect of Paragraph 3 of the List of Issues whether any of the alleged conduct on the part of the Respondent individually or cumulatively constituted a fundamental breach of Mrs Embley's contract of employment by the Respondent.

163. In brief summary, Mrs Embley contended that all of the alleged breaches of contract, individually or cumulatively, constituted a fundamental breach of contract on the part of the Respondent. Mrs Embley relies in particular upon Paragraphs 2 (c) and /or (f) of the List of Issues namely, that the Respondent had no contractual right to suspend Mrs Embley without pay and further the alleged breaches of contract/anticipatory breaches of contract relating to the change in place of work, hours of work and pay.

164. In brief summary, the Respondent denied that it had committed (individually or cumulatively) any fundamental breach of the express terms of Mrs Embley's contract of employment and /or any breach of the implied term of trust and confidence including that, viewed objectively, the Respondent's conduct over time had demonstrated an intention to no longer be bound by the contract of employment. The Respondent relied in particular on the following: - (a) that as of 22 December 2016 the Respondent had lifted Mrs Embley's suspension and had invited her to return to work (b) the Respondent had paid Mrs Embley for her time on suspension and (c) on 12 January 2017 (page 254 of the bundle) the Respondent had written to Mrs Embley confirming that they would be in touch regarding returning to work and offering her shifts.

165. Having given the matter careful consideration the Tribunal is satisfied that viewed objectively: -

- (1) The Respondent acted (for the reasons previously explained above) in breach of the express terms of Mrs Embley's contract of employment and/or in breach of the implied term of trust and confidence in respect of the following matters: –(a) Allegation 2 (a) (v) (the allegation in respect of the conduct relating to “whistleblowing”) (b) Allegation 2 (c) (suspending Mrs Embley without pay) (c) Allegation 2 (d) (conducting an over a lengthy and/or otherwise unreasonable investigation process) (d) Allegation 2 (e) (telling Mrs Embley that she was subject to a safeguarding investigation when there was no safeguarding investigation into Mrs Embley's conduct) (f) Allegation 2 (f) (in part) (informing Mrs Embley whilst she was suspended that she could return to work working casual hours as and when they became available) and (g) Allegation 2 (g) dealing unreasonably with Mrs Embley's grievance.
- (2) The established breaches of the express terms relating to the suspension of Mrs Embley without pay (Allegation 2 (c)) and informing Mrs Embley that she could return to work working casual hours as and when they became available (Allegation 2 (f)) were having regard to the nature of the breaches (which related to pay/ core hours of work, viewed objectively, individually serious enough to constitute a fundamental breach of contract.
- (3) Further, the remaining breaches referred to above also individually constituted a breach of the implied term of trust and confidence.
- (4) If for any reason, the Tribunal is wrong with regard to its conclusions regarding the individual seriousness of the above-mentioned breaches they, in any event, cumulatively constituted a fundamental breach of contract and/ or a breach of the implied term of trust and confidence which entitled Mrs Embley to terminate her contract of employment with the Respondent without notice.

Paragraph 4 of the List of Issues – did Mrs Embley leave in response to the established breaches.

166. Having given careful consideration to its findings of fact/ above conclusions, the Tribunal is satisfied that: -

- (1) Mrs Embley resigned her employment with the Respondent for the reasons set out in her letter of resignation dated 23 February 2017 (paragraph 93 above).
- (2) The reasons for Mrs Embley's resignation included several of the established breaches of contract referred to above including in particular (a) suspending Mrs Embley without pay (Allegation 2 (c)) (b) conducting an over lengthy and/or otherwise unreasonable investigation process (Allegation 2(d)) (c) informing Mrs Embley that she was under investigation by safeguarding (Allegation 2 (e)) and (d) offering Mrs Embley a return to employment but only if there were available hours on a bank basis (Allegation 2 (f)).

Paragraph 5 of the List of Issues – did Mrs Embley affirm the contract

- 167.** The Tribunal is required to consider whether Mrs Embley delayed in resigning and thereby affirmed the contract.
- 168.** In summary, the Respondent contended that (a) Mrs Embley could not reasonably have been said to have resigned in response to the grievance outcome (which was not mentioned in Mrs Embley's letter of resignation) and (b) therefore the most recent alleged breaches of contract relied upon were those of 22 December 2016 following which Mrs Embley had continued to accept pay/ sick pay from the Respondent and therefore affirmed any breaches of contract.
- 169.** Having given careful consideration to our findings of fact the Tribunal is not satisfied, viewed objectively, that Mrs Embley unreasonably delayed in accepting the Respondent's breaches of contract such as to affirm the contract.
- 170.** When reaching this conclusion the Tribunal has taken into account in particular, the following matters (a) Mrs Embley was signed off sick from 8 December 2016 until the termination of her employment and advised Mr Rhodes in her grievance letter dated 11 January 2017 that she was on antidepressants (page 251 of the bundle) (b) Mrs Embley lodged a letter of grievance dated 11 January 2017 to which she did not receive a letter of response from Mr Rhodes until 21 February 2017 and (c) Mrs Embley resigned her employment two days later.
- 171.** In the circumstances, the Tribunal is not satisfied that there has been any unreasonable delay by Mrs Embley in accepting the established breaches of contract by the Respondent such as to have led to the affirmation of her contract of employment as alleged by the Respondent.

Paragraphs 6 & 7 of the List of Issues - the fairness of the dismissal

172. In the light of the above findings/ conclusions the Tribunal is satisfied that Mrs Embley was entitled to terminate her contract of employment with the Respondent (with or without notice) by reason of the Respondent's above-mentioned conduct for the purposes of section 95 (1) (c) of the Act.
173. The Respondent confirmed during the course of the Hearing that if the Claimants were able to establish that they had been constructively dismissed (or either of them) for the purposes of section 95 (1) (c) of the Act the Respondent would no longer contend that there was a fair reason for their dismissal for the purposes of section 98 (1)/(2) of the Act or that any dismissal was fair for the purposes of section 98 (4) of the Act.
174. Mrs Embley was therefore unfairly dismissed by the Respondent for the purposes of sections 95 (1) (c) and 98 of the Act.

Paragraphs 8 - 15 of the List of Issues -THE PROTECTED PUBLIC INTEREST DISCLOSURE CLAIM- pursuant to Section 103 A of the Act - Mrs Embley only

Paragraph 8 of the List of Issues - the alleged disclosures on 14 and 15 November 2016

175. The Tribunal is required to determine whether Mrs Embley informed Ms Roadhouse, a manager of the Respondent, that Unit 1 was not adequately resourced.
176. Mrs Embley's case is that she spoke to Ms Roadhouse on 14 and 15 November 2016.
177. The Respondent accepted (after originally denying that such conversation had taken place) that a conversation took place between Mrs Embley and Ms Roadhouse on 14 November 2016 but denied that a further conversation had taken place on 15 November 2016.
178. The Tribunal is satisfied in the light of its findings at paragraphs 39-42 above that there was a conversation between Mrs Embley and Ms Roadhouse on 14 November 2016 including that Mrs Embley raised concerns relating to the sufficiency of the available care for Clients E and L.
179. The Tribunal is not however satisfied, for the reasons explained at paragraphs 44 – 45 above, that a further conversation took place between Mrs Embley and Ms Roadhouse on 15 November 2016 as contended by Mrs Embley.

Paragraph 9 of the List of Issues - the alleged disclosure to Client E's mother on 16 November 2016.

180. The Tribunal is also required to determine whether Mrs Embley told a Client's mother (the mother of Client E) on 16 November 2016 that Unit 1 was understaffed and that she had concerns about Client E's well-being.
181. It is agreed between the parties that Mrs Embley spoke to Client E's mother on 16 November 2016 however the Respondent denied that the conversation centred on Client E's well-being.
182. The Tribunal is satisfied that Mrs Embley did raise with Client E's mother on 16 November 2016 concerns that Unit 1 was understaffed and the consequential effects on Client E's health and well-being. When reaching this conclusion the Tribunal has had regard in particular to the findings of fact at paragraphs 52 - 56 above.

Paragraphs 10 – 14 of the List of Issues – were the disclosures protected public interest disclosures

183. The Tribunal has considered first Paragraph 11 of the List of Issues namely, whether in Mrs Embley's reasonable belief her statements on 14 and 16 November 2016 constituted disclosures of information which tended to show the alleged breaches identified at Paragraph 11 (a) and (b) of the List of Issues (namely that the Respondent had failed was failing or was likely to fail to comply with any legal obligation to which it was subject and/or that the health and safety of any individual had been was being or was likely to be endangered).

The conversation with Ms Roadhouse on 14 November 2016

184. The Tribunal has considered first Mrs Embley's conversation with Ms Roadhouse on 14 November 2016.
185. In summary, Mrs Embley contended, for the purposes of section 43 B of the Act, that the conversation was clearly a disclosure of information and further that she also had a reasonable belief at the time that the disclosure was made to Ms Roadhouse that the health and safety of Clients E and L was being/was likely to be endangered because of the inadequate level of care on Unit 1 following the arrival of Client S and the proposed training and/or that the Respondent was failing or was likely to fail to comply with its legal obligation to provide adequate care for Clients E and L.
186. In summary, the Respondent denied that the discussion with Ms Roadhouse amounted to a disclosure of information/ a qualifying disclosure for the purposes of section 43 B of the Act including that Mrs

Embley had at the relevant time the necessary reasonable belief in the alleged above-mentioned breaches.

187. Having given the matter careful consideration in the light of our findings of fact and the statutory provisions referred to above, the Tribunal is satisfied as follows: -

- (1) Mrs Embley's conversation with Ms Roadhouse on 14 November 2016 was a disclosure of information for the purposes of section 43 B of the Act as she explained to Ms Roadhouse the factual nature of her concerns.
- (2) Mrs Embley's disclosure to Ms Roadhouse on 14 November 2016 did, in her reasonable belief tend to show that the Respondent had failed was failing or was likely to fail to comply with a legal obligation to provide adequate care to Clients E and L and/or that their health and safety was being or was likely to be endangered.

188. When reaching such conclusions, the Tribunal has had regard in particular to its findings at paragraphs 39-43. For the avoidance of doubt, the Tribunal is not satisfied that its findings at paragraphs 42, in respect of the subsequent conversation between Ms Roadhouse and Miss Lawson regarding care cover, negated the reasonable belief of Mrs Embley at the time that she contacted Ms Roadhouse.

189. The Tribunal is also satisfied for the purposes of Paragraph 10 of the List of Issues, that when Mrs Embley made her disclosure to Ms Roadhouse she had a reasonable belief that it was made in the public interest. When reaching such conclusion the Tribunal has given careful consideration to the additional written submissions of the parties regarding such matters including the guidance contained in the Judgment of the Court of Appeal in **Chesterton** referred to in such submissions.

190. When reaching this conclusion the Tribunal has taken into account in particular the following (a) Mrs Embley had concerns regarding the health and safety/well-being of two severely disabled clients with complex needs/ a high level of vulnerability (b) the health and safety of such clients was subject to regulation/ supervision including by Devon County Council's safeguarding arrangements and (c) the district nurse was raising related concerns at that time.

191. The Respondent accepted that Mrs Embley's disclosure to Ms Roadhouse on 14 November 2016 was made to Mrs Embley's employer for the purposes of section 43C (1) (a) of the Act. The Tribunal is therefore satisfied the disclosure which Mrs Embley made to

Ms Roadhouse on 14 November 2016 was a qualifying and protected interest disclosure for the purposes of section 43 A of the Act.

The alleged disclosure on 15 November 2016

192. For the reasons explained at paragraphs 44 – 45 above the Tribunal is not satisfied that Mrs Embley made a disclosure to Ms Roadhouse on 15 November 2016.

Paragraph 13 of the List of Issues – the conversation with Client E’s mother on 16 November 2016

193. The Tribunal has considered next Paragraph 13 of the List of Issues namely, whether the alleged disclosure to Client E’s mother on 16 November 2016 was a protected interest disclosure for the purposes of section 43 G of the Act.

194. In summary, Mrs Embley contended that she had made a disclosure to Client’s E mother as set out at paragraph 52 above. Mrs Embley further contended that (a) she reasonably believed that it was in the public interest and tended to show the breaches of health and safety/legal obligations referred to previously above in respect of the disclosure on 14 November 2016 (b) she believed that the disclosure of the information conveyed was substantially true and that she did not made the disclosure for personal gain.

195. In summary, the Respondent denied that Mrs Embley believed that the disclosure/information contained in it were substantially true/ that any disclosure was in the public interest / and/or it was reasonable in all the circumstances of the case for Mrs Embley to make the disclosure. In respect of the latter consideration the Respondent contended that the Tribunal should have regard in particular to the following namely:- (a) that the alleged disclosure was made to the mother of a vulnerable client and (b) the matter was not sufficiently serious to justify the alleged disclosure including as the training for Client S was only due to last for a limited period and the Respondent’s management team had already determined that there were sufficient staff to enable the training to take place without any adverse effect on any other client / had taken appropriate action to address any staffing issues.

196. Having given the matter careful consideration including in particular the statutory provisions referred to above and findings of fact at paragraphs 52-56 above the Tribunal is satisfied as follows: -

- (1) Mrs Embley’s conversation with Client E’s mother on 16 November 2016 was a disclosure of information for the

purposes of section 43B of the Act as she explained to Client E's mother the factual nature of her concerns (paragraphs 52 and 54 above).

- (2) Mrs Embley's disclosure to Client E's mother on 16 November 2016 did in her reasonable belief tend to show that the Respondent had failed, was failing or was likely to fail to comply with a legal obligation to provide adequate care to Clients E/L and/or that Client E's health and safety was being or was likely to be endangered.
- (3) When reaching such conclusions the Tribunal has taken into account in particular (a) the matters referred to at paragraph 52 above including the information which had been given to Mrs Embley by Mrs Hezsely (b) the concerns which had been raised by the district nurse on 14 November 2016 (paragraph 43) and (c) the absence of any evidence from the Respondent regarding the steps which it had taken to address any such issues other than the initial steps which had been taken by the Respondent following the conversation between Ms Roadhouse and Mrs Embley on 14 November 2016 (paragraph 42 above).
- (4) For the avoidance of doubt, the Tribunal is also satisfied that the fact that Mrs Embley also raised with Client E 's mother concerns relating to the alleged treatment of staff following the acquisition of the service by the Respondent did not preclude the care concerns raised from being a qualifying disclosure for the purposes of section 43 B of the Act/ Mrs Embley from having a reasonable belief in the alleged health and safety/legal breaches referred to above.
- (5) Mrs Embley had previously made a disclosure of substantially the same information to Ms Roadhouse on 14 November 2016.
- (6) When making the disclosure to Client's E mother, Mrs Embley had a reasonable belief that it was made in the public interest. When reaching this conclusion the Tribunal has taken into account the matters previously identified in respect of the protected disclosure to Ms Roadhouse on 14 November 2016.

Paragraph 14 of the List of Issues – section 43 H of the Act.

197. The Tribunal has gone on to consider whether the disclosure to Client E's mother also constituted a protected disclosure for the purposes of section 43 H of the Act.

198. Having given the matter careful consideration including the statutory provisions and findings previously referred to above, the

Tribunal is satisfied that Mrs Embley has complied with sections 43H (1) (b) and (c) of the Act (including that for the reasons previously explained that Mrs Embley had a reasonable belief that the disclosure was made in the public interest). The Tribunal is not however satisfied on the basis of the available evidence that the relevant failures were of “an exceptionally serious nature” for the purposes of section 43 H (1) (d) given the findings of fact at paragraphs 52 – 54 above including as it was not suggested that Client E had suffered any actual harm.

199. The Tribunal is therefore not satisfied that Mrs Embley’s disclosure to Client E’s mother on 16 November 2016 also constituted a protected disclosure for the purposes of section 43 H of the Act.

Paragraph 15 of the List of Issues - section 103 A of the Act- was the reason/ principal reason for Mrs Embley’s constructive dismissal that Mrs Embley had made protected interest disclosures.

200. The Tribunal has therefore gone on to consider whether the reason or, if more than one, the principal reason for Mrs Embley’s constructive dismissal was that Mrs Embley had made one or both of the protected public interest disclosures namely, (a) the protected public interest disclosure to Ms Roadhouse on 14 November 2016 and/or (b) the protected public interest disclosure to Client E’s mother on 16 November 2016.

201. In summary, Mrs Embley contended that there was evidence to indicate that some of the alleged fundamental breaches had a direct link to her protected disclosures including:- (a) that following Mrs Embley’s discussion with Client E’s mother on 16 November 2016 she was suspended on 17 November 2016 for breach of client confidentiality/in relation to client care provision (b) the call to Client E’s mother was the subject of Mr Rhodes’ investigation and Mr Rhodes’ subsequent conclusions at page 227 of the bundle and (c) that there was evidence to suggest that the fundamental breaches as a whole constituted a course of conduct which was designed to get Mrs Embley out of the building.

202. In summary, the Respondent denied that the making of any protected public interest disclosures was the reason (or the principal reason) for Mrs Embley’s alleged constructive dismissal including on the following grounds: – (a) Mrs Hezsely did not purport to have made a protected public interest disclosure however both of the Claimants were treated in exactly the same manner (b) Mr Rhodes had been informed by other managers within the business of the serious allegations relating to client care (including in particular putting clients to bed early at night and leaving them in bed late in the morning for the convenience of staff) (c) Mr Rhodes had been informed by other managers within the business that Mrs Embley had raised

dissatisfaction with the way in which staff had been treated since the transfer of the service to the Respondent and was unaware of Mrs Embley's version of events relating to the telephone call to Client E's mother until December 2016.

203. Having given the matter careful consideration including the relevant statutory provisions and findings of fact referred to above the Tribunal is satisfied as follows: -

- (1) Mrs Embley has established for the purposes of allegation 2 (a) (v) above that the allegation that she had breached client confidentiality (referred to in the letter of suspension dated 18 November 2016) related in part to Mrs Embley's protected public interest disclosure to Client's E mother on 16 November 2016.
- (2) Viewed objectively the taking of action against Mrs Embley for making such a protected public interest disclosure constituted a breach of the implied term of trust and confidence for which the Respondent has not established that it had proper cause.
- (3) The protected public interest disclosure to Client E's mother on 16 November 2016 was however, only one of the matters which gave rise to the allegation of breach of confidentiality which also related to (a) Mrs Embley's complaint to Client's E mother on 16 November 2016 about the way in which staff had been treated by the Respondent since the transfer from Select (the note at page 213 of the bundle and paragraphs 51 and 54 above) and (b) the conversation between Mrs Embley and Miss Lawson of on or around 16 November 2016 relating to the discussions between Miss Lawson and Ms Rhodes/ Ms Holdsworth which were subsequently disclosed by Mrs Embley to a work colleague and of which Ms Holdsworth/ Ms Rhodes in turn became aware (pages 45 and 213 of the bundle and paragraph 51 above).

The causal connection between the protected public interest disclosures and the Respondent's breaches of contract

The protected public interest disclosure on 14 November 2016

204. The Tribunal is not satisfied on the facts that Mrs Embley has established any causal connection between her protected public interest disclosure to Ms Roadhouse on 14 November 2016 and any established breaches of contract. When reaching this conclusion, the Tribunal has taken into account in particular the steps which were taken by Ms Roadhouse following her conversation with Mrs Embley on 14 November 2016 (paragraphs 41 and 42 above). There was no evidence before the Tribunal that the Respondent had taken any action against Ms Embley in respect of such protected disclosure.

The protected public interest disclosure to Client E's mother on 16 November 2016

205. Further, the Tribunal is not satisfied that the Mrs Embley has established on the facts any causal link between her protected public interest disclosure to Client E's mother on 16 November 2016 and any of the established breaches of contract (save to the limited extent referred to above in respect of the allegation of breach of confidentiality).
206. When reaching this conclusion, the Tribunal has taken into account in particular the following matters: –
- (1) **Paragraph 2 c of the List of Issues** - failure to pay Mrs Embley during suspension. The Tribunal is satisfied in the light of its findings of fact (paragraphs 17, 26 and 81 above) that (a) the reason why the Respondent did not initially make payment of salary to Mrs Embley during her suspension was that the Respondent understood that Mrs Embley (and also Mrs Hezsely) were employed on a zero hours contract which did not entitle them to receive minimum hours of work/minimum pay. Further, the Respondent's disciplinary procedure provided for suspension without pay in such circumstances (paragraph 16 and page 120 of the bundle) and (b) there is no evidence that the failure to make payment of salary to Mrs Embley during her suspension was connected to her protected disclosure.
 - (2) **Paragraphs 2 (d) and (e) of the List of Issues** - conducting an over lengthy and/or otherwise unreasonable investigation process and/or telling Mrs Embley that she was subject to a safeguarding investigation. Again, the Tribunal is not satisfied in the light of its findings of fact regarding such matters that Mrs Embley has established any evidence of any causal connection between her protected public interest disclosure to Client's E mother on 16 November 2016 and the above-mentioned conduct by the Respondent.
 - (3) When reaching this conclusion the Tribunal has taken into account in particular that (a) Mrs Hezsely (who had not made a protected public interest disclosure) was treated in a similar manner and (b) Mr Rhodes' investigations between 18 November 2016 and 22 December 2016 were primarily focused on the allegations of client care (paragraphs 59 – 66) (c) the decision by Mr Rhodes to allow Mrs Embley to return to work when he appreciated that the allegations against the Claimants were part of a wider culture at Unit 1 (paragraph 82) and (d) it

was not contended by Mrs Embley at the time of her grievance or in her letter of resignation that the reason for the treatment which she was complaining about was connected to any protected disclosure (paragraphs 86 and 93.)

- (4) **Paragraph 2 (f) of the List of Issues** - offering Mrs Embley to return to work on a bank basis only. Again, the Tribunal is not satisfied in the light of its findings of fact that Mrs Embley has established any evidence of any causal connection between the protected public interest disclosure to Client E's mother on 16 November 2016 and the subsequent decision to allow Mrs Embley to return to work on a bank basis.
- (5) When reaching this conclusion the Tribunal has taken into account in particular that (a) Mrs Hezsely (who had not made a protected disclosure) was treated in a similar manner and (b) that the Tribunal is satisfied on the facts that the reason why Mrs Embley was offered an opportunity to return to work on a bank basis was that the Respondent understood that she was not entitled to a minimum number of hours/ level of pay (paragraphs 17, 26 and 81 above).
- (6) **Paragraph 2 (g) of the List of Issues - the handling of Mrs Embley's grievance.** Again, the Tribunal is not satisfied in the light of its findings of fact that Mrs Embley has established any causal connection between her public interest disclosure to Client E's mother and the handling of Mrs Embley's grievance. When reaching this conclusion, the Tribunal has taken into account in particular:- (a) that Mrs Hezsely (who had not made a protected public interest disclosure) was treated in a similar manner (b) Mrs Embley did not raise any concerns relating to her protected public interest disclosure in her letter of grievance and (c) there is no reference to any such disclosure in Mr Rhodes' letter of response dated 21 February 2017.

The Tribunal's conclusions regarding Mrs Embley's complaint of constructive dismissal contrary to section 103 A of the Act.

207. The Tribunal is satisfied that (a) Mrs Embley has established that her protected public interest disclosure to Client E's mother was one of the reasons for the Respondent's breach of contract in respect of Paragraph 2 (a) (v) of the List of Issues and (b) Mrs Embley has therefore raised an issue as to whether the Respondent's contended reason for dismissal for the purposes of section 103A of the Act (as set out at paragraph 7 (3) above) was the real reason for Mrs Embley's constructive dismissal.

208. The Tribunal is further satisfied however that the Respondent has shown and /or that it is, in any event, evident on the facts that Mrs Embley's protected public interest disclosure to Client E's mother on 16 November 2016 and the Respondent's associated breach of contract referred to above were not the principal reason for Mrs Embley's constructive dismissal for the purposes of section 103A of the Act.
209. When reaching such conclusions the Tribunal has taken into account in particular the following :- (a) Paragraph 2 (a) (v) of the List of Issues relates to a limited element of the alleged breaches of contract by the Respondent relied upon by Mrs Embley (b) there was no reliance in Mrs Embley's letter of resignation on any such breach (paragraph 93 above) and (c) for the reasons previously explained at paragraphs 205 – 206 above, the Tribunal is satisfied that Mrs Embley has failed to establish on the facts any causal connection between the protected public interest disclosure to Client E's mother on 16 November 2016 and the remaining established breaches of contract which precipitated her resignation.
210. In all the circumstances, the Tribunal is satisfied that the protected public disclosure to Client E's mother on 16 November 2016 was not the reason or principal reason for the established breaches of contract/ the principal reason for Mrs Embley's constructive dismissal for the purposes of section 95 (1) (c) and 103 A of the Act.
211. In all the circumstances Mrs Embley's complaint of unfair dismissal pursuant to section 103 A of the Act is therefore dismissed.

Paragraph 16 of the List of Issues – Direct Age Discrimination contrary to Sections 5 and 13 of the 2010 Act.

212. Mrs Embley (a) relied on each of the allegations identified at paragraph 2 of the List of Issues as an instance of less favourable treatment because of her age and (b) contended that her constructive dismissal was also an act of direct age discrimination (namely, that the reason for the Respondent's fundamental breaches of contract was age). Mrs Embley (date of birth 18 February 1954) relied on the alleged comparators identified at Paragraph 17 of the List of Issues. The comparators have a wide range of ages (with years of birth ranging between 1964 and 1992).
213. In summary, Mrs Embley contended that the alleged fundamental breaches of contract constituted a course of conduct culminating in her constructive dismissal which was designed to get her (and Mrs Hezsely) out of the building and that the reason (or an effective cause) of such conduct was their age. Mrs Embley further contended that section 136 (2) of the 2010 Act is engaged in this case having regard in particular to the fact that Mrs Embley (and Mrs

Hezsely) were two of the oldest carers who regularly worked in Unit 1 at the material time and further that they were regarded by Ms Holdsworth as 2 of the people who would not be mucked about by the Respondent which perception is associated with age.

214. In summary, the Respondent contended that there is no evidence from which the Tribunal could conclude that Mrs Embley (or Mrs Hezsely) had been treated less favourably because of their age including in respect of any constructive dismissal. The Respondent also contended that none of the Claimants' named comparators were appropriate comparators as their circumstances at the relevant time were not materially the same as that of the Claimants particularly as none of the alleged comparators had allegations of misconduct raised against them by their colleagues. The Respondent further contended that it had taken exactly the same action against Miss Lowson (date of birth 28 August 1991) who was subject to similar allegations as the Claimants.
215. Having given the matter careful consideration, the Tribunal is not satisfied that Mrs Embley has established facts for the purposes of section 136 (2) of the 2010 Act from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has treated her less favourably because of age including in respect of her constructive dismissal.
216. When reaching this conclusion, the Tribunal has taken into account that Mrs Embley (and Mrs Hezsely) were the two oldest carers who worked regularly at Unit 1 at the material time and who were identified for possible transfer with Client B.
217. The Tribunal has however also taken into account in particular the following matters: -
- (1) The Claimants have not contended that any of the named comparators were subject to similar allegations relating to any breaches of confidentiality or in respect of client care provision.
 - (2) Miss Lowson (date of birth 28 August 1991) who was subject to similar allegations as the Claimants was treated in a similar manner including with regard to suspension, investigation and return to work. Further the Tribunal is satisfied that the reason why Miss Lowson received payment whilst on suspension was because the Respondent understood that she was employed on a different type of contract to the Claimants (which did not allow them to suspend her without pay) (paragraph 17).

(3) There is no evidence that SG (date of birth 28 October 1967) and/or JG (date of birth 18 October 1964) who were also considered for possible transfer with Client B during the meeting on 16 November 2016 had any action taken against them (paragraphs 46 and 49).

(4) Mrs Embley (and Mrs Hezsely) has failed to adduce any evidence to indicate that age was an effective cause of any of the established breaches of contract identified previously above (including in respect of their constructive dismissal).

218. Mrs Embley's complaints of direct age discrimination contrary to sections 5, 13 and 39 of the 2010 Act (including in respect of her constructive dismissal) are therefore dismissed.

MRS HEZSELY

219. Unless otherwise indicated below, the parties relied on similar arguments to those referred to above in respect of Mrs Embley. Mrs Hezsely did not contend that she made any protected public interest disclosures.

220. Further, the Tribunal has reached similar conclusions to those set out in detail above in respect of Mrs Embley unless otherwise identified below.

THE CONSTRUCTIVE DISMISSAL CLAIM - pursuant to sections 95 (1) (c) and 98 of the Act.

Paragraph 21 (a) (j) – (viii) of the List of Issues (the Tribunal has adhered to the numbering adopted at Paragraph 21 of the List of Issues).

221. The Tribunal is not satisfied, for the reasons already explained above in respect of Mrs Embley, that the Respondent acted in breach of an express or implied term of Mrs Hezsely's contract of employment (either singularly or cumulatively) including in breach of the implied term of trust and confidence in respect of any of the matters identified at Paragraphs 21 (a) (j) – (ix) of the List of Issues save as indicated below.

222. The Tribunal is satisfied that the Respondent acted in breach of the implied term of trust and confidence in respect of Paragraph 21 (a) (vii) of the List of Issues (the Respondent purposely exaggerated the allegations). When reaching this conclusion the Tribunal has taken into account that the Respondent stated in Mrs Hezsely's letter of suspension dated 18 November 2016 (page 211 of the bundle) that she had been suspended from duty pending an investigation to allegations which included breach of client confidentiality for which the Respondent has not provided any grounds.

Paragraph 21 (a) (ix) of the List of Issues

223. This allegation is not relevant in Mrs Hezsely's case as she did not contend that she had made a protected public interest disclosure.

Paragraphs 21 (b) and (c) of the List of Issues relating to the suspension of Mrs Hezsely

224. **Paragraph 21 (b) of the List of Issues** - the suspension of Mrs Hezsely- the Tribunal is not satisfied, viewed objectively, that the Respondent acted in breach of any express and/or implied term of Mrs Hezsely's contract of employment in respect of her suspension.

225. When reaching this conclusion, the Tribunal has taken into account that Mrs Hezsely's contract of employment did not include any express right of suspension (paragraph 28 above and pages 89-92 (b) of the bundle). The Tribunal has however also taken into account the terms of the Respondent's disciplinary procedure (page 120 of the bundle) which provided for suspension where investigations were taking place and further, in any event, the nature of the concerns which had been raised which related to the provision of client care to very vulnerable clients.

226. **Paragraph 21 (c) of the List of issues** - the suspension of Mrs Hezsely without pay. The Tribunal is however satisfied, that viewed objectively, the Respondent acted in breach of Mrs Hezsely's contract of employment in respect of her suspension without pay.

227. When reaching this conclusion the Tribunal has taken into account that the Respondent's disciplinary procedure at pages 119-121 of the bundle provides that an employee may be suspended without pay whilst investigations are undertaken. The Tribunal has also taken into account however that (a) Mrs Hezsely's contract of employment (which is at pages 89-92 b of the bundle) does not contain any provision entitling the Respondent to suspend Mrs Hezsely without pay and (b) whilst Mrs Hezsely's contract of employment does not guarantee her a set minimum number of hours there is no suggestion in the contract that Mrs Hezsely was employed on a zero hours basis and (c) that Mrs Hezsely had worked 36 hours and 48 hours alternative weeks on a continuous basis since 2012 (paragraph 29 above).

Paragraphs 21 (d) – (g) – relating to the investigation, safeguarding return to work on a bank basis and the handling of the grievance

228. The Tribunal is satisfied that, viewed objectively, the Respondent acted in breach of contract, to the extent and for the reasons identified in respect of Mrs Embley above, in relation to the alleged breaches at Paragraphs 21 (d) – (g) of the List of Issues.

Paragraph 22 of the List of Issues - did any of the breaches constitute a fundamental breach of contract.

229. Paragraph 22 of the List of Issues - The Tribunal is satisfied for the reasons previously explained in respect of Mrs Embley that viewed objectively, the breaches of contract identified above constituted (individually and/or cumulatively) fundamental express breaches of contract and/or breaches of the implied term of trust and confidence which entitled Mrs Hezsely to terminate her contract of employment with the Respondent without notice.

Paragraph 23 of the List of Issues -the reasons for Mrs Hezsely's resignation

230. Paragraph 23 of the List of Issues – did Mrs Hezsely resign in response to any of the established breaches of contract. Having given careful consideration to its findings of fact/ the above conclusions the Tribunal is satisfied that: –

- (1) Mrs Hezsely resigned her employment with the Respondent for the reasons set out in her letter of resignation dated 25 February 2017 (paragraph 96 above).
- (2) The reasons for Mrs Hezsely's resignation included several of the established breaches of contract referred to above including in particular (a) suspending Mrs Hezsely without pay (Paragraph 21 (c) of the List of Issues) (b) conducting an over lengthy and/or otherwise unreasonable investigation process (Paragraph 21 (d) of the List of Issues) and (c) informing Mrs Hezsely that she was under investigation by safeguarding (Paragraph 21 (e) of the List of Issues).

Paragraph 24 of the List of Issues - did Mrs Hezsely delay in resigning and so affirm the contract

231. Paragraph 24 of the List of Issues – affirmation of the contract of employment - Having given careful consideration to the findings of fact the Tribunal is not satisfied, viewed objectively, that Mrs Hezsely unreasonably delayed in accepting the above-mentioned breaches of contract such as to affirm her contract of employment.

232. When reaching this conclusion the Tribunal has taken into account in particular the following matters: - (a) Mrs Hezsely was signed off sick by her GP from December 2016 until the termination of employment with the diagnosis given on the sick note dated 12 December 2016 described as “a stress reaction” (page 244 of the bundle). Further Mrs Hezsely advised Mr Rhodes in her letter of resignation dated 25 February 2017 that the actions of the Respondent

had made her feel totally worthless and she was under the doctor for stress and depression and (b) Mrs Hezsely lodged a letter of grievance dated 12 January 2017 to which she did not receive a response from Mr Rhodes until 21 February 2017 and Mrs Hezsely resigned her employment four days later.

- 233.** In the circumstances, the Tribunal is not satisfied that there was any unreasonable delay by Mrs Hezsely in accepting the Respondent's breaches of contract and that she had therefore affirmed the contract as alleged by the Respondent.

Paragraphs 25 and 26 of the List of issues

234. In the light of the above findings/conclusions, the Tribunal is satisfied that Mrs Hezsely was entitled to terminate her contract of employment with the Respondent without notice by reason of the Respondent's above mentioned conduct for the purposes of section 95 (1) (c) of the Act.

235. As stated above in respect of Mrs Embley, the Respondent confirmed during the course of the hearing that if the Claimants were able to establish that they had been constructively dismissed for the purposes of section 95 (1) (c) of the Act the Respondent no longer contended that there was a fair reason for dismissal for the purposes of section 98 (1) /(2) of the Act or that any dismissal was fair for the purposes of section 98 (4) of the Act.

236. Mrs Hezsely was therefore unfairly dismissed by the Respondent for the purposes of section 98 of the Act.

Paragraphs 27 – 30 of the List of issues - the age discrimination claims.

237. For the reasons previously explained in respect of Mrs Embley's age discrimination claim (paragraphs 215 – 217 above), the Tribunal is not satisfied on the facts that Mrs Hezsely has established for the purposes of section 136 (2) of the 2010 Act facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent had discriminated against her because of her age.

238. In the circumstances Mrs Hezsely's complaints of direct age discrimination pursuant to sections 5, 13 and 39 of the 2010 Act (including in respect of her constructive dismissal) are therefore dismissed.

REMEDY MATTERS

Paragraph 34 of the List of issues – contribution

239. Paragraph 34 of the List of Issues - the Tribunal is required to consider whether there should be any deduction from any basic or compensatory awards awarded to the Claimants for contributory fault and if so, to what extent?
240. In summary, the Respondent contends that any basic and compensatory awards awarded to the Claimants should be reduced for contributory conduct as any dismissal was, at least to some extent, caused or contributed to by their blameworthy and culpable conduct. The Respondent relied in support of such contentions on the evidence which was obtained by Mr Rhodes during the investigation process to substantiate the allegations made against the Claimants.
241. The Claimants denied that they had been guilty of any such conduct and contended that no reduction should therefore be made to any basic and compensatory awards.
242. The Tribunal has reminded itself that in cases of constructive dismissal there must be a connection between the employee's conduct and the fundamental breach of contract in order for the provisions of sections 123 (6) of the Act to apply.
243. The Tribunal is not satisfied in the light of the breaches of contract which have been identified above that the Respondent has established the necessary connection between any conduct on the part of the Claimants and the Respondent's breaches of contract (which in summary relate to suspension without pay, unreasonable/ overly lengthy investigation and representations regarding safeguarding).
244. Further, the Tribunal is not, in any event, satisfied that the Respondent has established that the Claimants (or either of them) were guilty on the balance of probabilities of any culpable conduct justifying any reduction in any compensatory award. When reaching this conclusion the Tribunal has taken into account in particular the following:- (a) the allegations of alleged misconduct, which are denied by the Claimants, are unparticularised and the Respondent has failed to produce any evidence in support of any specific allegations (b) the evidence of Miss Lawson and at paragraph 50 above that any issues had been resolved and (c) Mr Rhodes had concluded by 22 December 2016 that the allegations raised against the Claimants was part of a culture on Unit 1 and was not limited to the Claimants. The Tribunal is therefore satisfied that it would not be just and equitable in such

circumstances to make any reduction to any compensatory award in respect of either of the Claimants.

245. The Tribunal is further satisfied for the reasons explained above, that it would not be just and equitable to make any reduction to any basic award awarded to the Claimants (or either of them).

Paragraph 35 of the List of Issues – Polkey reduction

246. The Respondent confirmed during the Hearing that they are no longer relying on section 123 (1) of the Act.

Paragraphs 36 and 37 of the List Issues

247. Paragraphs 36 and 37 of the List of Issues require the Tribunal to consider whether there should be any adjustments to any compensatory awards awarded to the Claimants (increases or reductions) by reason of any failures by either party to adhere to the provisions of the ACAS Code.

248. This matter was addressed very briefly at the conclusion of the Hearing with the parties both contending for the minimum reductions/ maximum increases in the compensatory award. Neither of the parties however identified the breaches of the ACAS Code upon which they relied or explained why any compensatory awards should be adjusted as contended above.

249. In the circumstances the Tribunal considers it appropriate for the determination of any adjustments to the compensatory awards to be determined at the remedy hearing unless the parties jointly request that this issue should be addressed by them by way of further written representations.

Employment Judge Goraj

Date: 31 March 2019