# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms L James**

**Respondent:** **Duffryn Ffrwd Manor Ltd**

**Heard at** **Pontypridd** **On: 12 and 13 March 2019**

**Before:** **Employment Judge R McDonald**

**Appearances**

**For the Claimant:** in person
**For the Respondent:** Ms Wynn Morgan (Counsel)

# JUDGMENT

The Judgment of the tribunal is as follows:

1. The claimant's claim that she was unfairly dismissed fails.

# REASONS

1. The claimant worked as a care assistant at the nursing and residential home run by the respondent ("the Home"). She was employed from 27 June 2010 until 20 April 2018. The respondent says the claimant was summarily dismissed for gross misconduct. It says the gross misconduct was switching off CCTV cameras in a room in the Home in February 2018. The claimant says she was unfairly dismissed. She says that the true reason for dismissal was that she had made protected disclosures. At the hearing she also raised allegations that there were inconsistencies in the CCTV footage on which her dismissal was based. I deal with that allegation in more detail below.

2. The claimant represented herself. The respondent was represented by Ms Wynn Morgan of counsel.

3. There was an agreed bundle of documents consisting of 140 pages. During the hearing a further document was added at p.141. This was a copy of a Facebook message send by the claimant on 22 May 2018. References in this judgement to page numbers are to pages in that bundle. As is usual, I only read those documents to which the parties referred me in evidence.

4. There was a significant dispute about CCTV footage produced by the respondent at the hearing. The respondent said this was the footage which led to it dismissing the claimant. The claimant said that the footage shown to the tribunal was different to the footage she was shown at the disciplinary hearing on 20 April 2018. I deal with that issue later in this judgement.

5. The claimant gave evidence in support of her case. For the respondent I heard evidence from Gemma Wilson (Nursing Manager at the Home); from Doctor Geoffrey Lloyd (a director and Responsible Individual at the respondent). Because of the dispute which arose during the first day of the hearing about the validity of this CCTV footage it was necessary to hear evidence from further witnesses for the respondent, namely Eddison Hii (CCTV controller and Finance Director for the respondent); and Anna Gardner (now the respondent's HR Manager but at the relevant time the respondent's HR Officer).

6. There were witness statements from Mrs Wilson and Dr Lloyd. Because they were called at the last minute, Mr Hii and Mrs Gardner gave oral evidence at the hearing. Ms Wynn Morgan cross examined the claimant and I gave the claimant the opportunity to cross examine the respondent's witnesses. Because she was representing herself and not familiar with the way tribunals work I explained that she needed to challenge any part of the respondent's witnesses' evidence with which she disagreed. I explained that otherwise the tribunal would take that evidence as being unchallenged. I also asked questions of all the witnesses.

7. At the end of the evidence I heard oral submissions from Ms Wynn Morgan and from the claimant. I then reserved my decision. I have not set out the submissions I heard in full but have referred to them at relevant points in this judgment.

**Preliminary issues**

8. At the start of the hearing I dealt with three preliminary issues. The third issue (the CCTV footage issue) led to the claimant making an application to amend her claim form which I decided during the lunch adjournment of the first day of the hearing.

*The respondent's delay in sending its witness statements to the claimant*

9. First, the claimant complained that although directions had been made that witness statements to be exchanged by 3 December 2018 she had not received the respondent's witness statements until the 3 or 4 March 2019. As the claimant pointed out, paragraph 7 of the Case Management Order made by Employment Judge P Davies does require the parties to mutually exchange statements by 3 December 2018 (p.50).

10. For the respondent, Ms Wynn Morgan explained that the case had originally been listed for hearing in January 2019. The tribunal then notified the parties that the hearing was going to be postponed. As a result, on 21 November 2018 the respondent wrote to the tribunal suggesting that the further steps in the Case Management Order be delayed until after the Christmas period. The respondent had written again to the tribunal on 26 November 2018 reiterating that request. There had been no correspondence from the claimant about the witness statements being late and Ms Wynn Morgan submitted that the claimant had had sufficient time to read and familiarise herself with the statements even if they were late.

11. There was nothing in the papers before me which clarified whether the respondent's request to delay exchange of witness statements had been agreed. Even if it had, the respondent accepted that it did not send the claimant its witness statements until the first week of March 2019, a week or so before the hearing. That is significantly later than "after Christmas".

12. However, the written statements concerned (those of Mrs Wilson and Doctor Lloyd) were not long, one being five pages and the other seven pages. Although late, the claimant did have a week to read and familiarise herself with them before this hearing and confirmed she had done so. The overriding objective for the tribunal is to deal with cases justly. I decided the significant prejudice to the respondent if it were not allowed to rely on the evidence in the statements outweighed the prejudice to the claimant of receiving the statements late in the day. I therefore allowed the respondent to rely on the evidence in those statements.

*The claimant's witness statement*

13. The claimant had not produced a witness statement in the usual form for the hearing. In answer to my question she confirmed that the handwritten

document at pp.70-71 was her written statement of evidence. She also confirmed that the protected disclosures she relied on were those set out in the handwritten schedule at pp.52-55 ("the Schedule"). She agreed that the typed-up version of that handwritten schedule produced by the respondent (at pp.58-62) was accurate.

*The CCTV footage*

14. The third preliminary issue related to the two pieces of CCTV footage put in evidence by the respondent. This was footage from the CCTV camera in a recreation room for residents at the Home called the Garden Day Room ("the GDR").

15. The CCTV system was a key part of the Home's mechanism for ensuring the safety and welfare of residents. The claimant accepted that in January 2018, the respondent had put up warning notices which made it clear that tampering with the CCTV cameras in the Home was a serious disciplinary offence which could lead to dismissal. The respondent's case was that the footage showed the claimant turning off the camera on the 23 and 27 February 2018 after the warning notices had been put up. It therefore provided conclusive evidence of gross misconduct by the claimant. The claimant accepted that the footage showed her switching off the camera in the GDR on two occasions.

16. However, when she was shown the footage shown to the tribunal (on Mrs Wilson's laptop) at the start of the hearing, the claimant denied it was the footage shown to her at her disciplinary meeting on 20 April 2018. I asked her whether she was now saying that the respondent had somehow tampered with the CCTV footage. She said that she was saying that.

17. Her case was that footage she was shown at the disciplinary hearing showed the GDR from a different angle, with the camera pointing at the wall of the room. It showed that there was no warning notice on the GRD wall. Her case was that the footage at the disciplinary hearing was footage of the GDR from before the warning notice had been put up. In other words, the claimant alleged that the respondent had used footage from 2017 but tampered with it so that when shown to the tribunal it looked like the incidents happened in February 2018.

18. I deal with the evidence and my findings relating to this later in this judgment. However, for the respondent, Ms Wynn Morgan submitted that as the claimant was making new allegations and that she would need to apply to amend her claim form if the tribunal were to consider them. She pointed out that this was the first time this allegation had been made. The claimant hadn't made a similar allegation either at the disciplinary hearing or at any point since. Had she done so, the respondent would have been

able to call evidence to refute the allegations. Ms Wynn Morgan said that the overriding objective required that the case be dealt with justly and it was unfair to the respondent for these allegations of dishonesty and tampering with evidence to be raised at this very late stage.

19. The claimant said that she had realised at most a couple of weeks after the disciplinary hearing that the footage must date from 2017. That was because the second person shown in one of the pieces of footage was an agency worker who did not work for the respondent after the end of 2017. The claimant accepted that she had realised that there was an issue with the CCTV before she had put in her claim form to the tribunal. She said that she had not included the allegation in her claim form because she thought she needed more evidence to back it up before she could do so.

20. I explained to the claimant that because the allegation that the footage evidence had been tampered with was not included in her claim form I would need to consider whether she needed to amend the claim form to add the allegation. If I decided that she did need to amend the claim form I would then have to consider whether any application to amend should be granted. I made clear to the claimant that an allegation that a party to a tribunal case has tampered with or fabricated evidence is a serious allegation. If the tribunal found there was no basis for the allegation then the respondent might apply for costs on the basis that the claimant had conducted the case unreasonably. I warned the claimant that having heard her explanation I was struggling to see the basis for the allegation.

21. Having warned the claimant of the possible costs consequences of continuing with that allegation, I asked whether she did want to carry on with it. She confirmed that she did and that she wanted to apply to amend her claim form to include the allegation if it was necessary to do so. I considered that application over the lunch break. I allowed the amendment and gave my reasons at the hearing. I set those out reasons below for convenience.

*The claimant's application to amend her claim form*

22. The respondent submitted that the claimant should amend her claim form if she wanted to add allegations that the CCTV footage shown at a disciplinary hearing was actually from before December 2017.

23. The first question is whether there is a need to amend the claim at all. On one view, the new allegation is evidence relevant to the matter already in dispute, i.e. whether the true reason for dismissal was whistleblowing or gross misconduct. However, it does seem to me that the allegation does raise a new issue, i.e. a claim that even if the dismissal was not automatically unfair due to whistleblowing, it was unfair because based

on evidence which related to a different date from that alleged by the respondent. The claimant's case is that the video evidence from before January 2018 (when a warning notice about tampering with the CCTV camera being a disciplinary offence was put up) was used as the basis for dismissal which the respondent says is based on incidents in February 2018. In essence the claimant is saying that even if she was not automatically unfairly dismissed because of whistleblowing the dismissal was otherwise unfair on "ordinary" unfair dismissal principles. In the circumstances I do find that an application to amend is necessary

24. The next question is whether the amendment should be allowed. In **Pruzhanskaya v International Trade and Exhibitors (JV), [2018] 7 WLUK 377**, the EAT confirmed that adding an alleged reason for unfairness to an existing unfair dismissal claim does not involve bringing a new complaint with a new time limit. Although the time limit issue is not relevant I do need to take into the balance of hardship and prejudice in relation to allowing the amendment.

25. For the claimant, she has said that she did not add the allegation to her claim for because she thought she needed evidence to do so. She confirmed she was first aware that, to her mind, the footage at the disciplinary hearing was pre-January 2018 before she filed her claim form

26. I take Miss Wynn Morgan's point that the late raising of this allegation means that her witnesses could not address it in their witness statements nor were they alerted that it would be an issue on cross examination. She also suggested that evidence might need to be called about the CCTV system and about who the second person shown on the CCTV on 27 February 2018 was. However, it seems to me that the validity of the CCTV is something which Mrs Wilson for the respondent can provide evidence about. She was in any event bound to need to give evidence about the disciplinary hearing itself since the burden is on the employer to show the reason for dismissal in an unfair dismissal case. The two-day nature of the hearing means that the respondent can call other evidence on the second day if need be

27. I accept that there is prejudice to the respondent in that the case has been prolonged by the late raising of this matter. It may also be prolonged because further evidence may be needed from Mrs Wilson and others. The case is listed for two days and I do not think that further evidence will lead to the case not been completed in that timescale and being part heard.

28. There is also the possibility of costs where one party's conduct has extended the length of the hearing through unreasonable conduct. On

balance therefore I allowed the claimant's application to amend her claim to include an allegation that her dismissal was unfair because it was based on footage from before January 2018, i.e. before the date when the notice prohibiting turning off the CCTV was put up by the respondent and that the dismissal was therefore unfair on ordinary unfair dismissal principles even if it was not because of whistleblowing.

## The issues in the case

29. As clarified by the submissions made at the end of the hearing, the issues I needed to decide were:

    a. Did the claimant "whistleblow", i.e. make protected disclosure(s) as defined by s.43A to s.43H of the Employment Rights Act 1996 ("ERA")?
    b. If so, was the reason (or where there was more than one, the principal reason) for her dismissal the fact that she made protected disclosure(s)? If it was then s.103A of ERA says her dismissal would automatically be an unfair dismissal.
    c. If the claimant did not make protected disclosure(s) or they were not the reason (or where there was more than one, the principal reason) for her dismissal, was her dismissal unfair for any other reason?

30. In answering the question at 9(c) I needed to make findings on the claimant's allegations that:
    a. the CCTV footage I was shown at the tribunal was not that shown to her at her disciplinary hearing;
    b. the CCTV footage shown to her at the disciplinary hearing and on which her dismissal was said to be based dated from before January 2018, when the respondent put up a notice warning staff not to turn off the CCTV;
    c. other staff also turned off or "knocked off" the CCTV cameras but were not dismissed.

## The relevant law

Protected Disclosures

31. S.43A to s.43H of ERA define what counts as a "protected disclosure", (commonly known as "whistleblowing"). To be protected a disclosure must satisfy three conditions:

    a. it must be a 'disclosure of information'; and

b. it must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' in s.43B(1) has occurred or is likely to occur; and
c. it must be made in accordance with one of six specified methods of disclosure.

32. *"Disclosure of information"*: In order for a statement or disclosure to be a qualifying disclosure, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s.43B(1) - **Kilraine v Wandsworth London Borough Council [2018] I.C.R. 1850, para.35**. It counts as a disclosure even if the person to whom disclosure is made is already aware of the information (s.43L(3) ERA).

33. *"A qualifying disclosure"*: to be a protected disclosure, the worker making the disclosure has to have a reasonable belief that it is in the public interest and tends to show one or more of the six matters listed at s.43B(1)(a)-(f) ERA. For the purposes of this case the potentially relevant matters are:
    - That a person is failing to comply with any legal obligations to which they are subject (s.43B(1)(b) ERA); and/or
    - That the health or safety of any individual has been, is being or is likely to be damaged (s.43B(1)(d) ERA).

34. *"Methods of disclosure"*: to be a protected disclosure, the disclosure has to be made by a worker in accordance with any of s.43C to 43H ERA. The methods of disclosure relevant to this case are
    - to the worker's employer (s.43C ERA)
    - to a prescribed person (s.43F ERA).

35. In this case it is not disputed that the relevant prescribed person in relation to the provision of care services is Care Inspectorate Wales or, as it was known until January 2018, Care and Social Services Inspectorate Wales ("CSSIW"). Because all the parties referred to the organisation as CSSIW I have used that name in this judgment.

36. Where a worker makes a disclosure to a prescribed person a disclosure will only be a qualifying disclosure where the worker reasonably believes that the relevant failure falls within the description of matters in respect of which the person is prescribed (s.43(F)(1)(b)(i) ERA) and that the information disclosed or any allegations contained in it are substantially true (s.43(F)(1)(b)(ii) ERA).

Unfair dismissal

37. S.94 ERA gives an employee a right not to be unfairly dismissed by her employer. To qualify for that right an employee usually needs two years' continuous service, which the claimant has in this case.

38. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal. In this case the respondent says the reason for dismissal was the claimant's (mis)conduct which s.98(2)(b) says is a potentially for reason for dismissal.

39. Where an employer has shown a potentially fair reason for dismissal, whether the dismissal was fair or unfair depends on whether in the circumstances of the case the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The tribunal has to decide that in accordance with equity and the substantive merits of the case. (S.98(4) ERA).

40. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three part test namely –
    (1) Did the employer have a genuine belief in the employee's guilt?
    (2) Was that belief based on reasonable grounds?
    (3) Were those grounds formed from a reasonable investigation?

41. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted.

42. That "band of reasonable responses test" also applies in assessing the reasonableness of the investigation carried out into a conduct matter (**Sainsbury's Supermarkets v Hitt [2003] IRLR 23**).

43. Where one side to a contract has broken a fundamental term of the employment contract, there by repudiating it, the other side has an option to terminate immediately. So, where an employee has committed an act of gross misconduct the employer can summarily dismiss her without notice or pay in lieu.

44. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps

had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

45. If a tribunal finds that a dismissal was unfair the compensation it should award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

46. A just and equitable reduction can be made where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called Polkey reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142**).

47. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

48. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Automatically unfair dismissal because of whistleblowing

49. The ERA says that dismissal for some reasons will always be automatically unfair. This includes a dismissal because the employee has made a protected disclosure (s.103A ERA):

"103A Protected Disclosure

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

The burden of proving the reason for dismissal

50. Guidance on how s.103A ERA should be applied by the tribunal was provided by the Court of Appeal in **Kuzel v Roche [2008] EWCA Civ 380 [2008] IRLR 530.** In summary, the Court of Appeal said that:

    a. It is for the employer to show that it had a reason for the dismissal; that the reason was, as it asserted, a potentially fair one, [in this case misconduct]; and to show that it was not some other reason.
    b. When the employee contests the reason put forward by the employer there is no burden on her to disprove it, let alone positively prove a different reason.
    c. However, where an employee positively asserts that there was a different and inadmissible reason for the dismissal, she must produce some evidence supporting the positive case, such as making protected disclosures.
    d. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
    e. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
    f. The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was.
    g. If the employer does not show to the satisfaction of the tribunal that the reason was what it asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
    h. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

## Evidence, findings of fact and conclusion on each issue

51. I have set out below my findings of fact based on the evidence I heard, the documents from the hearing bundle which the parties referred to in evidence and the CCTV footage I was shown at the hearing. The nature of this case means it is more convenient to deal with the evidence, findings and conclusions on each issue in turn, rather than setting out all the evidence first and then setting out the discussions and conclusions. For convenience, I have summarised my overall conclusions on the issues at the end of my judgment.

52. The matters I deal with below are:
    a. The CCTV footage;
    b. Whether the claimant made protected disclosures;
    c. The reason or reason(s) for dismissal;
    d. If protected disclosures were not the reason or principal reason for dismissal, was the dismissal fair.

The CCTV footage

53. It is convenient first to deal with the evidence I heard and saw relating to the CCTV footage.

54. I was shown two pieces of CCTV footage which were on Mrs Wilson's laptop. The claimant agreed that the footage showed the GDR and that in both cases the footage ended with her entering the room and switching the camera off. The footage I was shown included as part of the footage the date and time when the footage was shot. The first piece of footage was dated the 23 February 2018. The second piece of footage was dated the 27 February 2018.

55. The camera in question was shown in photos included in the bundle (pp.123-124). They show a single camera in the top right hand corner of one of the walls of the GDR.

56. The claimant made two allegations about the CCTV footage. First, she said that the footage I was shown at the tribunal hearing was not the footage she was shown during the disciplinary hearing on 20 April 2018. Second, she claimed that the footage shown to her at that disciplinary hearing dated from before January 2018. The reason that is relevant is that the claimant says that she did not switch off the CCTV cameras after the respondent put up the Warning Notice.

57. The claimant said that in the footage she was shown at the disciplinary hearing the wall underneath the camera could be seen and the Warning Notice was not there. She said this proved that the footage was from before January 2018 (when it is agreed the Warning Notice was put up).

58. I asked the claimant whether she saying that the footage I had seen at the tribunal hearing was from another two occasions when she had switched off the CCTV camera in the GDR, i.e. that there were in total four occasions when she had done so. The claimant said that was not what she was saying. Instead, her evidence was that the footage shown at the disciplinary hearing was footage of the same two incidents that I had seen but with the GDR camera pointing at a different angle, i.e. towards the wall of the GDR rather than into the centre of the room.

59. Obviously, if the claimant's case was correct it also meant that the date and time on the footage I had been shown at the tribunal hearing was somehow fabricated or tampered with by the respondent. Otherwise, it would have shown a date before January 2018.

60. Mr Hii gave unchallenged evidence about how the CCTV system worked. His evidence was that his role was to monitor the CCTV system and ensure it was working and not tampered with. He confirmed that there was only one camera in the GDR and that it only had one lens. It would not be possible for that camera to take footage of the same incident from more than one angle at the same time. He also gave unchallenged evidence that the footage in the CCTV system is retained for 2 to 3 weeks after which it is overwritten because the memory is full. His unchallenged evidence was that he didn't have the skill or knowledge to change the date and time on any of the CCTV footage - it is imprinted on it automatically.

61. Mr Hii played no part in the investigatory and disciplinary process against the claimant and so couldn't give direct evidence about what footage was shown at the disciplinary hearing. Of those at the disciplinary hearing, Mrs Gardner's evidence was that the footage she was shown at the tribunal hearing was the footage she had seen at the disciplinary hearing.

62. Mrs Wilson's evidence was also that the footage shown at the tribunal hearing was the only CCTV footage of the two incidents when the claimant switched off the camera. She said Mr Hii had given her the footage on an USB stick. That was the only copy she ever had of the CCTV footage. That was the footage shown to the claimant at the disciplinary hearing and it was that same footage which had been shown to the tribunal.

63. The claimant suggested that there were inconsistencies in Mrs Wilson's evidence when it came to the CCTV footage. At paragraph 9 of her witness statement Mrs Wilson says that she saw the claimant tampering with the camera on two separate occasions. She says those two occasions were "23rd of February 2018 @ 12.42 am" and "27th of February 2018 @ 1.28 am". The claimant said that this was inconsistent with the handwritten note at page 84 of the bundle. Mrs Wilson confirmed that that was her note and that it formed part of the evidence at the disciplinary hearing. That handwritten note says "27/2/18 – Time 1.18" and on the next line "23/2/18 –Time 12:37".

64. There are two different meanings to "time" when it comes to the CCTV footage. The first is the time of day when the recording took place. The second is the duration/point in time within the footage itself.

65. From my viewing of the videos, the footage dated 23rd of February 2018 starts at 12.30 am. At 12 minutes 37 seconds into that footage a member of staff who is not the claimant enters the room. The claimant first appears at 13 minutes 44 seconds into that clip, i.e. at 12.44 a.m. The footage dated 27th of February 2018 starts at 11.39 p.m. The claimant appears at 1 minute 18 seconds into that footage, i.e. around 11.41 p.m. and shortly afterwards turns off the camera.

66. I agree with the claimant that there are discrepancies in the respondent's evidence. Mrs Wilson's evidence in cross examination was that the "times" in her handwritten note on p.84 referred to different things. In the entry for 23 February 2018, "12:37" referred to 12:37 a.m. while "1.18" for 27 February 2018 referred to the point in the footage when the claimant appears. She said that her statement wrongly referred to "1.28 a.m." when it should have referred to 1 minute 28 seconds into the footage.

67. Even with Mrs Wilson's explanation, inconsistencies remain. The issue for me to decide is the significance of those inconsistencies. On balance, I accept Mrs Wilson's evidence that any discrepancies in the various "times" arise from confusion in noting times rather than anything else more sinister. I note that the "times" in the handwritten note at page 84 are written differently with a full stop between the "1" and "18" for the 27 February 2018 entry and a colon between the "12" and "37" for the 23 February 2018 entry. That seems to me to support Mrs Wilson's evidence that she was making a note of two different kinds of "time" while watching the footage. More importantly it seems to me that despite these minor discrepancies the two key elements of the respondent's evidence about the footage remains consistent. The first is that the footage relates to incidents on the 23rd and 27th of February 2018. The second is that the footage for each date shows the claimant switching off the CCTV camera in the GDR. Although the claimant has highlighted minor discrepancies, I

do not see how they support her case that the footage related to incidents which took place before January 2018.

68. In cross-examination, it was pointed out to the claimant that she didn't raise any issues about the CCTV footage at the disciplinary hearing. In particular, she didn't say anything about the footage being from before January 2018. The claimant's explanation was that she only realised that that was the case after she left the disciplinary hearing. What caused her to realise it was that the footage shows a second person coming into the GDR with the claimant. The claimant's case was that this was an agency worker who had not worked for the respondent after December 2017. She said that it was only then she realised the footage must date from before the Warning Notice was put up. She did not explain why she did not appeal at that point.

69. One difficulty for the claimant is that her claims are inconsistent with each other. On the one hand, she says that the footage she was shown at the disciplinary hearing have the camera pointing at the wall. If that were the case, however, it seems to me that the footage would not have shown the claimant and the agency worker walking into the GDR.

70. The more fundamental problem is that the claimant's version of events is not credible. She did not challenge Mr Hii's evidence that the camera in the room could only take footage of an incident from one angle at a time. If the camera was recording the claimant coming into the GDR and turning off the camera, it could not at the same time be facing the wall.

71. In addition to that, Mr Hii's unchallenged evidence was that the footage was overwritten after 2 to 3 weeks. If the claimant is correct that the footage actually dates from before January 2018 then the respondent must somehow have kept it and prevented it being overwritten for two months. The claimant did not provide any explanation as to why the respondent would store footage of her from before January 2018, i.e. at least two months before, on the claimant's own case, she made her first protected disclosure on 4 March 2018.

72. The strongest evidence in support of the claimant's arguments are the seeming inconsistencies in Mrs Wilson's evidence. However, I accept that those apparent inconsistencies are minor discrepancies in noting times which arise from confusion rather than dishonesty or covering up a tampering with the footage.

73. Taking all that into account I find that the footage I was shown at the tribunal hearing was the same footage as that shown to the claimant at the disciplinary hearing on 20 April 2018. I also accept the respondent's

case that each piece of footage dated from the date shown on it, i.e. 23 February 2018 and 27 February 2018 respectively.

Did the claimant make protected disclosure(s)

74. The Schedule (p.52-55) sets out the actions which the claimant says amounted to protected disclosures. In the Case Management Order made on 1 October 2018 by Employment Judge P Davies the claimant was directed to put into the Schedule the date of the alleged protected disclosure(s); what these were; and how and to whom she made disclosures. The Schedule sets out seven incidents (Ms Wynn-Morgan in her submissions referred to eight but I think that is double counting one incident which spreads over two pages). I agree with Ms Wynn Morgan's submission that only two of those could even potentially amount to protected disclosures. These are the conversation with Gemma Wilson on 4 March 2018 and what is referred to as "call to care standards" on 7 March 2018.

75. The other five incidents which span from 3 March 2018 to the claimant's disciplinary hearing on 20 April 2018 do not record disclosures of information. Instead, they set out the claimant's evidence about the way she was treated during the investigatory and disciplinary process which led to her dismissal.

76. I deal below with my findings of fact and conclusions on the two incidents which do potentially involve protected disclosures.

*Conversation with Mrs Wilson on 4 March 2018*

77. The first incident relied on by the claimant was her conversation with Mrs Wilson on 4 March 2018. The claimant's schedule is confusing when it comes to this incident. Although the date of incident is given as the 4 March 2018 in the third column, the claimant says that she "brought a grievance to Mrs Wilson on 6 March". In her oral evidence, however, the claimant confirmed that she did not bring any kind of formal grievance to Mrs Wilson. Instead, she said she had spoken to Mrs Wilson about her concerns on the 4 March 2018.

78. The concerns she raised were about the care given to residents during a period of heavy snow which led to difficulties in staff getting in to work to relieve those on site. In her Schedule, she says that the concerns she raised were about a lack of continuous care. Specifically she says she raised concerns about staff being allowed to sleep; residents' pads being checked but not changed at 1 a.m. (only at 5 a.m.); residents being got out of bed from 5.30 a.m. so they could get them out of bed in case staff

didn't make it in. In her Schedule she says that the staff's "priority was themselves" (p.52).

79. In her evidence, Mrs Wilson accepted that she had a conversation with the claimant on 4 March 2018 and that in it the claimant "raised a complaint that residents were being pulled out of bed at 5:30 a.m. onwards, "so they could get them out of bed in case staff didn't make it in"". She also accepted that because heavy snow had made it difficult for staff to get in to relieve colleagues, some staff had been working continuously for longer than they should. She therefore decided that some of them should be able to sleep while other staff worked and did pressure relief and change pads for some of the residents. She also confirmed that as the nursing manager she took the decision to skip the 1 a.m. pad round and complete checks only (paragraphs 20 and 21 of Mrs Wilson's witness statement).

80. Both Mrs Wilson and the claimant accepted that the conversation was heated and that they both raised their voices to such an extent that someone knocked on the door to say that they could be heard outside.

81. Ms Wynn Morgan accepted this conversation might be a protected disclosure.

82. I find that it was. The claimant was disclosing factual information about what was happening to the residents to her employer. I find that she did so in the reasonable belief that doing so was in the public interest and tended to show that either that the health and safety of residents was or was likely to be endangered (s.43B(1)(d) ERA) and/or that the respondent was failing or likely to fail to comply with legal obligations relating to the care of the residents (s.43B(1)(b) ERA). The claimant's evidence, which I accept, was that she raised issue because of concerns about the failure to provide continuous care to the residents. Ms Wynn-Morgan did not challenge that evidence nor seek to suggest that the claimant lacked the reasonable belief required by section 43B(1).

83. I therefore conclude that the conversation with Mrs Wilson on 4 March 2018 was a protected disclosure.

*Call to CSSIW on 7 March 2018*

84. The second action in the Schedule which is potentially a protected disclosure is what the claimant refers to as a "call to care standards" on 7 March 2018. It is worth quoting the entry in the Schedule in full:

"asked if care standard would let me know if the grievance and had talk over with [Mrs Wilson] was right. I feel she neglected care they asked if I would like to whistleblowing, put me through explained, and they told me they would ring [Mrs Wilson], and let me know what they said close".

85. Under cross examination, the claimant's evidence was that she had rung CSSIW on 7 March 2018 to check whether it was right that a nursing home could leave people in the situation which the respondent had. The claimant confirmed she did so anonymously. When asked in cross examination whether CSSIW had followed up, the claimant said that CSSIW had rung Mrs Wilson.

86. Mrs Wilson's evidence was that she was contacted by CSSIW on 25 April 2018, i.e. two days after the claimant was dismissed) about an anonymous complaint arising from the "snow day" incident (paragraph 24 of Mrs Wilson's written statement).

87. As with other parts of her case, the claimant's evidence in relation to this incident was not entirely clear. At times, she seemed to be suggesting that she had only rung CSSIW to make a general inquiry about the situation she had raised with Mrs Wilson on 4 March. At other times she referred to this as "whistleblowing" and, as I have quoted above, her Schedule states that she did ask to be put through to the whistleblowing line and that CSSIW told her they would ring Mrs Wilson as a result of what the claimant told them. I also note that Mrs Wilson's evidence in her witness statement was that CSSIW did contact her about what had happened when there was heavy snow in early March 2018. There was no suggestion of the claimant or anyone else contacting CSSIW about the situation at the Home on any other occasion. That does seem to me to support the claimant's case that she provided CSSIW with specific information when she contacted them on 7 March 2018.

88. The key issue in relation to this disclosure is whether it amounted to a "disclosure of information". It is clear that if it was, it was made to the proper prescribed person under s.43F. There was also no suggestion from Ms Wynn Morgan that the claimant lacked the necessary belief in s.43(F)(1)(b)(ii) ERA that any information she shared with CSSIW or allegations contained in it were substantially true.

89. Ms Wynn Morgan did however submit that the claimant's own evidence was that she had only contacted CSSIW for advice and that undermined her argument that she had made a protected disclosure. I accept that the claimant's evidence was that she did contact CSSIW to check whether what Ms Wilson had told her on 4 March 2018 was correct. However, it doesn't seem to me that the initial motivation for contacting CSSIW

prevents her conversation with them from being a protected disclosure if it meets the conditions set out in s.43A-H.

90. On balance I find that the claimant did disclose information to CSSIW during her call on 7 March 2018 and in doing so made a protected disclosure. It seems to me she must have made a "disclosure of information" otherwise CSSIW would not know what care provider to contact nor what set of circumstances to ask Mrs Wilson about.

91. I therefore find that the conversation the claimant had with CSSIW on 7 March 2018 was a protected disclosure.

The reason or reason(s) for dismissal

92. As the legal cases make clear, it is for the employer to show a potentially fair reason for a dismissal. It is not for the claimant to prove that her dismissal was due to making protected disclosures. The task of the tribunal, having heard the evidence from both sides is to decide what was the reason or principal reason for dismissal having considered the evidence as a whole.

93. In this case, the respondent says that the reason for dismissal was the claimant's conduct. Specifically, it says that she was guilty of gross misconduct when she switched off the CCTV camera in the GDR on the 23rd and 27th of February 2018. It had footage showing the claimant turning off the CCTV camera and I have found that, contrary to the claimant's submission, that footage was from the 23rd and 27th of February 2018 rather than from before January 2018.

94. What the claimant says, however, is that after she made protected disclosures on the 3 March and 7 March 2018, Mrs Wilson started a "witch-hunt" against her. Her case, as I understand it, is that Mrs Wilson went looking for evidence of misconduct by the claimant so that she could get rid of her.

95. It is useful to set out a brief narrative of the events which led to the disciplinary hearing on 20 April 2018 at which the claimant was dismissed.

96. The first protected disclosure was on 4 March 2018. There is no doubt that Mrs Wilson was aware of that disclosure because it was made to her.

97. The second protected disclosure was, I have found, made to CSSIW on 7 March 2018. The claimant in her evidence accepted that Mrs Wilson did not know that she had made that disclosure to CSSIW (at least until they contacted Mrs Wilson after the claimant's dismissal). The claimant,

however, said that Mrs Wilson would have been aware of rumours that the claimant had contacted CSSIW. Mrs Wilson denied that and the claimant did not provide any evidence to support her assertion. For example, she did not give evidence that she had told colleagues that she had contacted CSSIW. Indeed at p.141 of the bundle is a Facebook message from the claimant to Mrs Wilson on 22 March 2018 in which she says "no Gemma I haven't reported you I whistle blew to you only".

98. I found Mrs Wilson's evidence on this point credible whereas the claimant had a tendency to make assertions which she could not then back up with evidence. I find that Mrs Wilson was not aware that the claimant had made a protected disclosure to CSSIW on 7 March 2018 and indeed, from 22 March 2018 believed (as she says at para 23 of her witness statement) that the claimant was not intending to pursue the matters raised with her on 4 March 2018 any further.

99. The next thing that happened, according to Mrs Wilson's witness statement (para. 7) was that she received a complaint from a senior carer about comments the claimant had allegedly made to her. The details of the complaint are not relevant. Briefly, the claimant was alleged to have referred to something that happened to a resident in a way which upset the senior carer. Mrs Wilson said that she received the complaint on 9 March 2018. At page 81 – 82 of the bundle is a handwritten "to whom it may concern" statement by the senior carer about the incident. It is dated 7 March 2018 and at the top says "6.40 a.m.".

100. There were then further complaints against the claimant in fairly quick succession. The first of those was a written complaint from staff members that she had made inappropriate comments which were described by those raising the complaint as "a form of racism" (p.83).

101. There was then a complaint from a resident about an incident on 30 March 2018. Mrs Wilson took a handwritten note of the complaint on 31 March 2018 (p.79). Very briefly, the complaint was that the resident had sustained an injury and that the claimant had raised her voice to the resident.

102. In addition to those complaints, Mrs Wilson said that Mr Hii brought to her attention the footage showing the claimant turning off the CCTV camera on the 23rd and 27th February. According to her witness statement that was brought to her attention on 20 March 2018 (para 8). However, in her oral evidence Mrs Wilson accepted that that date could not be correct. She said that the CCTV footage came to light after the proposed investigatory meeting on 5 April 2018 but before the 12 April 2018 when the disciplinary hearing letter was sent to the claimant.

103. The evidence about the process leading to the disciplinary hearing on the 20 April 2018 was not always clear. In particular, it is not clear which complaints formed the basis of the initial investigatory proceedings.

104. The first step was a letter dated 29 March 2018 inviting the claimant to an investigatory meeting on the 5 April 2018 (p.74). It refers to "a complaint" being made against the claimant. It does not specify what the complaint is about. It cannot be the complaint by the resident because that complaint was not made until the 31 March 2018. It doesn't seem natural to refer to switching off the CCTV camera as a "complaint" and, as I've noted, Mrs Wilson's oral evidence was that the footage came to light after the 5 April 2018. It seems fair to assume, therefore, that the investigatory meeting was either about the complaint by the senior carer or the complaint of inappropriate comments.

105. Whichever complaint the meeting was about, it did not happen because, as is agreed, the letter was sent to the claimant's previous address and so she did not get the letter. Although the claimant suggested there was something sinister in the use of the wrong address it seems to me on the balance of probabilities that is was due to a genuine error on the part of the respondent. The claimant also suggested that Mrs Wilson had deliberately set the meeting to take place on the claimant's day off. However, the letter setting up that meeting was sent by Mrs Gardner, not Mrs Wilson, and there was no evidence to suggest that Mrs Gardner was aware of the claimant's day off.

106. The next step was a letter dated 12 April 2018 inviting the claimant to attend a disciplinary hearing on the 20 April 2018 (p.77-78). This referred to three specific matters: the senior carer's complaint; the resident's complaint; and the allegation of tampering with the CCTV footage. Included with that letter were copies of the supporting evidence.

107. At the disciplinary hearing on 20 April 2018 the respondent decided that the senior carer's complaint and the resident's complaint were not upheld. Those complaints did not form part of the reason for her dismissal. Instead the claimant was dismissed for gross misconduct for turning off the CCTV camera in the GDR, which she admitted doing.

108. Since the claimant's case is that Mrs Wilson carried out a "witch-hunt" to gather evidence against her because of her protected disclosure I need to make findings about how those other complaint came about.

109. The claimant did not provide any evidence to suggest that Mrs Wilson had actively encouraged the senior carer to raise a complaint

against the claimant. In fact, the evidence suggested that Mrs Wilson had relatively little contact with the night staff - something which led to Mrs Wilson holding a meeting with the night staff on 13th of April 2018 (p.127-132). In the note of that meeting, Mrs Wilson notes that she cannot get into the home before 7:30 AM because of her childcare responsibilities. The senior carer's complaint is timed at 6.40 a.m., before the time Mrs Wilson could get in to the home. On balance, therefore, I find that the senior carer's complaint was not actively solicited by Mrs Wilson.

110. The claimant did not produce any evidence that Mrs Wilson had solicited the other complaint from staff about her. That complaint in any event did not form any part of the disciplinary proceedings.

111. When it comes to the CCTV footage, the unchallenged evidence from Mr Hii was that it came to light because he periodically carries out monitoring of the CCTV footage to check that no cameras been tampered with. As I understand it, he does that by fast forwarding through the footage on a monitor which shows the footage from all the CCTV cameras. Any period when any cameras are switched off is easily spotted because it appears as a blank, black patch on the monitor. His evidence was that that was how he spotted the incidents on the 23rd and 27th of March 2013.

112. Mr Hii's evidence was not very certain when it came to remembering the dates when things happened. He thought that he had carried out his review of the CCTV footage at the beginning of the second week of March so around 8 March 2018. He could not remember exactly when he brought the matter to Mrs Wilson's attention but thought it was about a week after he carried out his regular review. Given the evidence from Mrs Wilson it seems to me likely that there was an even bigger delay than that – otherwise it seems strange that the allegations were not mentioned before the 12th April 2018 disciplinary letter.

113. In terms of process, Mr Hii said that he carried out the monitoring on a regular basis. He said that if he saw evidence of staff turning off the camera then he would report the matter to Mrs Wilson taking a copy of the footage as he had done in this case. He said that he could not remember any other incidents of staff turning off cameras. There had been incidents where there had been a break in footage before but they were due to a power cut.

114. Mr Hii's evidence was not entirely satisfactory particularly when it came to the apparent delay between his identifying the evidence of misconduct and bringing it to Mrs Wilson's attention. Given the evidence I heard from the respondent's witnesses about the seriousness with which

tampering with the CCTV system was viewed, it is perhaps surprising that he didn't raise the matter with Mrs Wilson as soon as he discovered it.

115. One aspect of Mr Hii's evidence was consistent, however, namely that it was he who brought the footage to Mrs Wilson's attention as a result of his routine monitoring of the CCTV footage rather than Mrs Wilson asking him to look for footage to "incriminate" the claimant. Again, there was no evidence of Mrs Wilson looking for evidence to use against the claimant as part of a "witch-hunt".

116. When it comes to the resident's complaint, the claimant did not suggest that Mrs Wilson had solicited that complaint. The complaint came about because of an injury (a skin tear) suffered by the resident. That led her to complain partly because she had had previous run-ins with the claimant (p.79).

117. Taking the evidence about all the complaints in the round, I do not accept the claimant's suggestion that Mrs Wilson carried out a "witch-hunt" to gather evidence against the claimant because she had made protected disclosures. That does not necessarily mean, however, that the claimant's unfair dismissal claim based on whistleblowing fails. I remind myself that the onus is not on her to prove the dismissal was because of whistleblowing but on the respondent to satisfy the tribunal what the real reason for dismissal was and that it was a potentially fair reason.

118. The other way that the claimant put her case was that she was "singled out" for disciplinary action in relation to the CCTV camera. Her case (which she did raise at the disciplinary hearing) was that "you have singled me out because I know everyone else knocked it [i.e. the CCTV camera] off" (p.92). The respondent has three things to say about that. First, the claimant only made that allegation once she had been informed of the decision to dismiss. She did not raise it during the main part of the disciplinary hearing. I don't think there is much in that argument. Second, the respondent says that there was no evidence of anyone else turning off the CCTV camera after the Warning Notice was put up in the GDR. That was the evidence from Mr Hii and that evidence was not challenged. Third, the respondent says that it did take action against others. At page 133 of the bundle there was a dismissal letter relating to KL, a previous employee. That letter was dated 26 January 2018 and recorded the summary dismissal of the employee for gross misconduct. The reason for dismissal was that the employee had slept whilst on duty as a carer and had said to the person making allegations against her "if you want to have a break or rest or go to sleep then push the chair right in the corner because the cameras can't see you there". Although the claimant claimed in her evidence that KL was not sacked for "knocking off" the CCTV camera, she accepted in cross examination that she did not know KL that

well and did not know the details of the disciplinary hearing. I accept that on the respondent's own evidence KL was dismissed for tampering with rather than switching off the CCTV camera and for sleeping on duty. However, I do accept the point that it shows the respondent viewed the issue of sleeping on duty and/or tampering with the CCTV cameras to be a serious disciplinary offence justifying summary dismissal for others than the claimant.

119. During her evidence the claimant did say that there were other staff who she said had "knocked off" the CCTV camera in the GDR after January 2018. However, when challenged to provide details, she refused to do so. In the absence of those details, I find that there is no evidence that the respondent had the basis for taking disciplinary action against other staff for tampering with the CCTV camera after January 2018. As elsewhere in her evidence, the claimant's credibility on this point was damaged by her tendency to make sweeping assertions without being able or willing to provide any specific evidence to back up those assertions.

120. The respondent's case is that the potentially fair reason for dismissal was the claimant's conduct.

121. What had happened at the Home towards the end of 2017 is important context. Mrs Wilson and Dr Lloyd both gave evidence about the importance of the CCTV system. The unchallenged evidence from Dr Lloyd was that towards the end of 2017 the Home had come under scrutiny from the Protection of Vulnerable Adults ("POVA") team following reports from an ex-member of staff (para 8 of Dr Lloyd's witness statement). The POVA team suggested that the Home review CCTV footage on a regular basis because of concerns that staff were sleeping on duty.

122. The unchallenged evidence was that Mrs Wilson held a meeting with night staff in November 2017 to reiterate the importance of night staff not sleeping on duty (Mrs Wilson's statement para 5). However, Mrs Wilson's evidence was that night staff continued to use the GDR to sleep in and that some staff were turning off the CCTV camera so they would not be recorded sleeping (para 6 of her statement). (I note in passing that this is consistent with the claimant's claim that "everybody" knocked off the cameras). It was because of this continued practice that the Warning Notice was put up in the GDR.

123. I accept that by January 2018, the respondent had made it clear through the Warning Notice that tampering with the CCTV was a serious disciplinary matter which would lead to action including dismissal. It was

against that background that the CCTV footage which showed the claimant turning off the CCTV camera in the GDR has to be seen. Such conduct clearly provided a potential reason for dismissal.

124. That does not rule out the possibility that the claimant's whistleblowing was the real reason (or principal reason if more than one) for the dismissal. It is possible that the footage arrived at the "right time" for the respondent, providing a justification for dismissing an employee who they wanted to get rid of because she was a whistleblower.

125. Two other elements of the evidence are relevant. The first is the evidence about the relationship between Mrs Wilson and the claimant. In her statement (p.71) the claimant describes herself as "a fiery personality". In a reference which Mrs Wilson completed in July 2017 (p.139-140) she describes the claimant as "very hard-working but a strong character can become difficult at times as she is very opinionated". In her statement (para 21) Mrs Wilson said that the conversation with the claimant on 4 March 2018 was "heated" at times and that "this was not unusual as the claimant was very forthright in her opinions and not afraid to raise any issues that she had". The way the relationship was described was that the two had "butted heads" before. That context is it seems to me relevant in understanding how Mrs Wilson might have reacted to the conversation on 4 March 2018. Her evidence, which I accept, was that that conversation was not out of line with conversations she had with the claimant before. In other words, it was not of such a nature as to cause Mrs Wilson to think of the claimant as a troublemaker who she needed to get rid of where she had not done so before that dispute.

126. The second element relates to the credibility of Mrs Wilson. That is key, since she was a decision maker at the disciplinary hearing on 20 April 2018. She made the decision to dismiss knowing that the claimant had made a protected disclosure on 4 March 2018. Her evidence was that that protected disclosure played no part in the decision to dismiss. When it can came to her credibility, Ms Wynn Morgan accepted that there were discrepancies in Mrs Wilson's written statement and her oral evidence. These related in particular to the "times" of the CCTV footage and the date when Mr Hii brought the CCTV footage to her. However, Ms Wynn Morgan submitted that those were minor discrepancies and that Mrs Wilson in her evidence did not shy away from admitting when mistakes had been made in preparing her statement. I accept that submission. I did find Mrs Wilson's a credible witness, willing to acknowledge inconsistencies but answering questions in a straightforward way.

127. Stepping back and viewing the evidence and my findings in the round. The main points supporting the contention that the real reason for dismissal was the claimant's protected disclosure are:

a. Mrs Wilson, one of the dismissal decision makers, was aware that the claimant had made a protected disclosure (because made to her) on 4 March 2018.
b. The fact that the complaints leading to the disciplinary meeting on 20 April 2018 started within days of the claimant's conversation/dispute with Mrs Wilson on 4 March 2018.
c. That there was no evidence of previous complaints or disciplinary action against the claimant but within a few weeks of her whistleblowing there were three (if the "inappropriate language" complaint which was not pursed is also counted).
d. That although tampering with the CCTV cameras was viewed as a dismissal offence, Mr Hii did not bring the footage to Mrs Wilson's attention (or she did not act on it) for around 3-4 weeks (from the 8 March 2018 when Mr Hii suggested was the date of his monitoring review to some point after the 5 April but before the 12 April 2018).

128. On the other side of the balance:

a. By 22 March 2018 the claimant had told Mrs Wilson that she was not intending to whistleblow further to CSSIW (p.141).
b. Although the dispute on 4 March 2018 was heated, the evidence from both the claimant and Mrs Wilson was that this was not unusual-they had "butted heads" before. In other words, although it involved protected disclosures, it was not such as to cause Mrs Wilson to think of the claimant as any more of a troublemaker than she had before the 4 March 2018.
c. There was no evidence that Mrs Wilson solicited the complaints against the claimant rather than responding to complaints made by staff and a resident.
d. The CCTV requirement was a serious matter for the respondent given the previous scrutiny by POVA.
e. The footage clearly showed the claimant turning off the camera in February 2018, after the Warning Notice had been up for a month.
f. The claimant admitted that she had turned off the camera.
g. There was no evidence that anyone else had switched off the cameras after the notice was put up in January 2018.
h. The respondent had dismissed an employee who had been found to have slept on duty (although she had it appears moved to a position where she could not be seen by the camera rather than switched off the cameras).
i. Mrs Wilson's evidence was that the protected disclosure did not form part of the reason for dismissal. I found her evidence credible.

j. The claimant did not raise her whistleblowing during the disciplinary hearing nor did she appeal against the decision on the basis it was linked to making protected disclosures.

129. I can see why, with hindsight, the claimant might feel that the timing of complaints against her within weeks of her whistleblowing was more than a coincidence. However, on balance, I accept the respondent's evidence that the real reason for dismissal in this case was the claimant's misconduct in turning off the CCTV cameras.

<u>If making protected disclosures were not the reason or principal reason for dismissal, was the dismissal fair?</u>

130. I have found that the reason for the claimant's dismissal was her misconduct in turning off the CCTV camera in the GDR. As I discussed above, some aspects of the investigatory process was not entirely clear from the evidence. I accept, however, that the CCTV footage gave clear evidence of misconduct on the part of the claimant. In terms of a "reasonable investigation" I accept that there was no need for a prolonged investigation given the conclusive nature of that CCTV footage and the claimant's acceptance she had turned off the camera on both occasions. I have no doubt that the respondent genuinely believed that the claimant was guilty of gross misconduct.

131. In the course of evidence I explored two issues relating to the fairness of the dismissal with the parties.

132. The first was the suggestion by the claimant that she was "singled out" for disciplinary action. That is relevant to the question of the reason for dismissal. It is also relevant to the fairness of the dismissal. A dismissal may be unfair if the employer treats employees found to have committed the same misconduct inconsistently. In this case, however, I accept the respondent's evidence that the claimant was the only employee for which there was clear evidence that she had turned off the CCTV camera after the Warning Notice was put up in January 2018.

133. The second issue was the consideration of a sanction other than dismissal for the claimant's misconduct. Both Mrs Wilson and Mrs Gardner were adamant that tampering with the cameras was such a serious issue that summary dismissal would always be justified. For that reason, once they had decided that the claimant had turned off the cameras, they had decided to dismiss without considering whether any other sanctions might be appropriate. I pointed out to Mrs Gardner that the Warning Notice seemed to contemplate some circumstances when dismissal wouldn't automatically follow. It says that "anyone [who moves

or interferes with any camera] will be liable to disciplinary action up to and including dismissal".

134. Mrs Gardner's explanation was that the HR consultants with whom the respondent works had supplied that wording. When I pressed her on the issue, she said that there might be very very limited circumstances where an employee might be justified in turning off the CCTV. One such might possibly be where that was the only way to get privacy for a conversation which had to be held in the GDR (e.g. if the staff member was taking a call relating to a medical emergency which might include sensitive details). Dr Lloyd in his evidence also said that there might be very exceptional circumstances where a dismissal was not appropriate but that was not the case in the claimant's circumstances.

135. The only explanation the claimant had given for turning off the camera at the disciplinary hearing was that she thought it was a single camera that had been placed in the GDR to monitor when a resident used that room. She explained to me that a resident who was a smoker used to use the outdoor part of the GDR to save having to go downstairs into the garden to smoke. That resident wasn't there anymore and so, she suggested, the CCTV wasn't needed. The respondent's response was that the Warning Notice was very clear and that because the GDR was accessible to residents at all times the CCTV camera needed to be on.

136. I accept Ms Wynn Morgan submission that given the seriousness of the claimant's misconduct it was not unreasonable for the respondent to move straight to dismissal rather than considering other sanctions this case.

**Summary of conclusions**

137. Returning to the issues in the case identified above. In summary, my conclusions (which I have set out in full in relation to each issue above) are:

*Did the claimant "whistleblow", i.e. make protected disclosure(s) as defined by s.43A to s.43H of the Employment Rights Act 1996 ("ERA")?*

138. Yes. The discussion with Mrs Wilson on 4 March 2018 and the claimant's phone call to CSSIW on 7 March 2018 both included protected disclosures.

*If so, was the reason (or where there is more than one, the principal reason) for her dismissal the fact that she made protected disclosure(s)?*

139. No. The respondent has satisfied me that the reason for dismissal was the claimant's misconduct in turning off the CCTV camera in the GDR on 23 and 27 February 2018. The protected disclosures she made were not the reason or the principal reason for that dismissal.

*If the claimant did not make protected disclosure(s) or they were not the reason (or where there is more than one, the principal reason) for her dismissal, was her dismissal unfair for any other reason?*

140. No. The dismissal was for a potentially fair reason (conduct).

141. I have found that:
   a. the CCTV footage I was shown at the tribunal was that shown to the claimant at her disciplinary hearing;
   b. that footage, which was shown to her at the disciplinary hearing and on which her dismissal was based did not date from before January 2018. It dated from February 2018, after the respondent put up a notice warning staff not to turn off the CCTV;
   c. there was no evidence that other staff had turned off or "knocked off" the CCTV cameras after the Warning Notice was put up in the GDR.

142. I conclude that the respondent genuinely believed in the claimant's guilt; had reasonable grounds for the belief (indeed the claimant accepted that she had turned off the CCTV cameras); and that was based on reasonable investigation. Given the existence of the Warning Notice and the importance of maintaining effective CCTV monitoring throughout the Home I accept the dismissal was within the band of reasonable responses to the claimant's conduct.

143. There is one final point which I think it is worthwhile me making. The claimant throughout the case was concerned to emphasise that she was a good care worker. It is important to say that the respondent did not suggest otherwise. That is not what this case was about. The fact that I have found that the respondent dismissed the claimant fairly because she switched off the CCTV camera does not reflect on her skills as a carer. I notice that in the disciplinary hearing notes Mrs Wilson says that "you are a fantastic carer" and in the reference at p.136-137 refers to her as a "very hard working individual …reliable and had good timekeeping while employed by us".

_____
Employment Judge McDonald
Dated: 16 April 2019

JUDGMENT SENT TO THE PARTIES ON

17 April 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS