EMPLOYMENT TRIBUNALS

Claimant: Ms S M Brennan

Respondent: Newbarn Limited

Heard at: Manchester **On:** 25-29 March 2019
1 and 2 April 2019
5 April 2019
(in Chambers)
30 April 2019
(in Chambers)

Before: Employment Judge Slater
Mr R W Harrison
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Mr S Lewis of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal, relying on s.98 Employment Rights Act 1996, is well founded.

2. The complaint of constructive unfair dismissal, relying on s.103A Employment Rights Act 1996, is not well founded.

3. The complaint of breach of contract in relation to the failure to give notice of termination is well founded.

4. The tribunal has no jurisdiction to consider the complaints of detrimental treatment, contrary to s.47B Employment Rights Act 1996, since the complaints were presented out of time.

5. There will be a remedy hearing on 15 July 2019.

REASONS

Summary

1. The claimant was a Support Worker employed by the respondent, a publicly funded housing and support provider, from 2013 until she resigned in March 2017. She claimed she was constructively unfairly dismissed by reason of treatment from March 2015 until February 2017. The claimant considered herself to have been unfairly scapegoated by the respondent following the police raising concerns in March 2015 about a residential project run by the respondent. The claimant argued that the treatment relied on for the constructive unfair dismissal claim was also detrimental treatment on the ground of making protected disclosures, including a disclosure to the Care Quality Commission (CQC).

Claims and issues

2. The claimant claimed constructive unfair dismissal relying on section 103A Employment Rights Act 1996 ("ERA") and section 98 ERA. She also claimed that she suffered detriments because she made protected disclosures, contrary to s.47B ERA.

3. On her claim form, the claimant had ticked the box to indicate that she was claiming notice pay. A breach of contract claim in respect of failure to give notice had not been included in the agreed List of Issues, and it appeared that the breach of contract claim had not been discussed at the preliminary hearings. The claimant said she wished to pursue this claim for breach of contract. Although the respondent initially raised concern about this being pursued when it had not been include on the list of issues, the respondent did not, after discussion, object to this claim being pursued.

4. The agreed issues in relation to the complaints were as follows:

Protected Disclosures

(1) Can the claimant prove that on any of the following occasions she made a protected disclosure in that:

(a) she disclosed information;

(b) she reasonably believed the information disclosed tended to show one of the matters set out in section 43B(1);

(c) she reasonably believed that the disclosure was made in the public interest; and

(d) the disclosure was made in accordance with any of sections 43C-43H:

PD1 – 18 March 2015

PD2(a) – 1 April 2015

PD2 (b) – 15 April 2016

PD2(c) – Various dates

PD2(d) – 1 April 2016

PD3(a) – January 2015

PD3(b) – March 2015

PD3(c) – April 2015

PD3(d) – May 2015

PD3(e) – June 2015

PD3(f) – July 2015

PD3(g) – August 2015

PD3(h) – 24 August 2015

PD3(i) – Various dates

Detriment in Employment – section 47B Employment Rights Act 1996

(2) If so, was the claimant subjected to a detriment by any act or deliberate failure to act on the part of the respondent in any of the following alleged respects:

Incident 1 – 19 March 2015

Incident 2 – 18 March 2015

Incident 3 – 1 April 2015

Incident 4 – 27 May 2015

Incident 5 – June 2015

Incident 6 – May 2016

Incident 7 – 27 May 2016

Incident 8 – 29 March 2016

Incident 9 – 1 April 2016

Incident 10 – January to August 2015

Incident 11 – 28 May 2016

Incident 12 – January 2017

Incident 13 – 24 February 2017

(3) If so, bearing in mind the obligation on the respondent to show the ground on which any act or deliberate failure to act was done, was any such act or any deliberate failure to act done on the ground that the claimant had made a protected disclosure?

Time Limits

(4) Insofar as any of the matters for which the claimant seeks a remedy occurred more than three months prior to the presentation of her claim, allowing for the effect of early conciliation, can the claimant show:

(a) that the act or deliberate failure to act formed part of a series of such acts or failures of which the last occurred less than three months before presentation of her claim; or

(b) that it was not reasonably practicable for her complaint to be presented within time and that it was presented within such further period as the Tribunal considers reasonable?

Unfair Dismissal

Dismissal

(5) Can the claimant establish that her resignation should be construed as a dismissal in that:

(a) the respondent committed a breach of the implied term of trust and confidence by virtue of any combination of the incidents set out in paragraph (2) above, whether or not those matters also amounted to a detriment on the ground of a protected disclosure;

(b) that breach was a reason for the claimant's resignation; and

(c) the claimant had not lost the right to resign by affirming the contract, whether through delay or otherwise?

Fairness

(6) If the claimant was dismissed, what was the reason or principal reason for the treatment which amounted to a repudiatory breach of her contract? Was it:

(a) one or more protected disclosures, meaning dismissal is automatically unfair under section 103A; or

(b) a potentially fair reason, in which case the question of fairness arises under section 98(4); or

(c) a reason which is in neither of the above categories, in which case the dismissal is unfair under section 98?

(7) If the respondent shows a potentially fair reason for the constructive dismissal of the claimant, was that constructive dismissal fair or unfair under section 98(4)?

Breach of Contract (Notice Pay)

(8) Was the claimant constructively dismissed?

Remedy

(9) If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include:

(a) Whether compensation for unfair dismissal should be reduced to reflect the likelihood that employment would have ended in any event for lawful reasons;

(b) Whether compensation should be reduced on account of contributory fault or any other conduct on the part of the claimant;

(c) Whether compensation should be increased or reduced on account of an unreasonable failure by either party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures;

(d) Whether any compensation should be reduced if protected disclosures are found not to have been made in good faith;

(e) Whether the claimant has taken all reasonable steps to minimise her losses following an unfair dismissal; and

(f) The appropriate award for any detrimental treatment short of dismissal.

Evidence and cast list

5. We heard evidence from the claimant and, for the respondent, from:

Lynn Collins: now Registered Service Manager, and a company director of the respondent but, at relevant times, a Service Manager for the respondent.

Tony Giddins: Business director of the respondent company. His involvement in relevant events included being the disciplinary officer for the disciplinary hearing in March 2016 which resulted in a written warning to the claimant.

Rebecca Dixon and Samantha Moxham, an employee and director respectively of Halo HR, who provided HR services to the respondent in a period including March 2016 to January 2017.

6. A witness statement was submitted by the claimant for Jill Kitching, who had been employed by the respondent. Ms Kitching did not attend to give evidence. We read the statement. However, the matters covered by this did not appear to be of any relevance to what we needed to decide so we made no findings of fact based on this statement. We did hear evidence from other witnesses about Jill Kitching's role in

alleged failures of the claimant to report properly sickness absence, but Ms Kitching's witness statement did not deal with these matters.

7. Other people involved in relevant events, but who did not give evidence, included the following:

> Kiaran Burke: owner and sole director of the respondent company at relevant times. He was the author of one of the letters dated 24 February 2017 which the claimant relied on as the last incident constituting part of a breach of the implied duty of mutual trust and confidence and as detrimental treatment on grounds of making protected disclosures. Sadly, sometime after the events with which this case is concerned, and prior to this Tribunal hearing, Mr Burke died. Mr Burke was Lynn Collins' life partner.
>
> Laura McKee: the claimant's line manager.
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> Anna Edwards: an HR consultant engaged by the respondent, whose involvement included conducting the disciplinary hearing on 1 April 2015 before it was aborted.
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> Laura Drinkwater: an HR consultant with Anna Edwards' HR consultancy, who heard the claimant's grievance dated 17 April 2015.
>
> Nigel Finch: an HR consultant who heard the appeal against the grievance outcome of Laura Drinkwater.
>
> Tony Hindle: an HR consultant who heard the appeal against the written warning issued by Tony Giddins.

8. There was some late disclosure during the course of the hearing. This included handwritten notes made by Lynn Collins during meetings on 18 and 19 March 2015.

Facts

9. The respondent is a publicly funded housing and support provider, providing accommodation and support services to vulnerable adults and service users with complex mental health conditions and learning disabilities, including those with autistic spectrum conditions. The position at March 2015 was that there was one Director, Kiaran Burke, who had been running the company for around 25 years. There are now a number of Directors, including Lynn Collins, who was a Service Manager of the respondent from 6 September 2006 and at all relevant times for this case.

10. There was some dispute between the claimant and the respondent as to the size of the organisation at relevant times. There were somewhere between four and ten managers at relevant times. It is not necessary for us to decide on the exact number. The evidence of Lynn Collins is that at March 2015 there were 34 staff including 13 bank staff.

11. The claimant's previous career was as a teacher, manager and adviser. She was made redundant in 2012 and, after some gap, began taking her teacher's pension early. She also did some self-employed work as a counsellor. The claimant

did some work on a self-employed basis for the respondent initially, beginning in 2012. With effect from 1 May 2013, she began employment with the respondent as a Support Worker.

12. Events giving rise to the claims in this case relate to one of the respondent's properties in which they provided supported accommodation. Tenants in this property had to be at least 18 years old. There was a Tenants' Charter of Rights which included the right for tenants to invite whomever they chose into their room or house, the right to have their dignity respected and to be treated as an individual and the right to live their chosen lifestyle. Prior to 18 March 2015, the respondent had no policy about recording visitors to tenants.

13. It is clear from the evidence of Lynn Collins and the documentary evidence that the respondent was understandably concerned to maintain their reputation. They were a small organisation competing with larger providers for business. Damage to their reputation could have led to the loss of contracts and, potentially, adverse consequences for the viability of the business.

14. When the claimant started employment, Mr Burke emailed the respondent's accountant, notifying the accountant of the claimant starting employment. The claimant did not notify the respondent that she had other income in the form of her teacher's pension. It appears that the respondent applied to the claimant a tax code which did not take into account her other income in the tax years 2013-2014 and 2014-2015. The claimant only became aware of this when she sought assistance with her self-assessment from an accountant towards the end of the tax year 2014/2015. She was shocked to be informed by HMRC towards the end of January 2015 that she owed £1,792 tax for 2013-2014 and was on track to owe a similar amount for the tax year 2014-2015. The claimant was told by HMRC that they had no record of PAYE for the respondent. The claimant spoke to Lynn Collins about this. Lynn Collins emailed the respondent's accountant on 29 January 2015. She gave the accountant the details of the claimant's accountant and asked the respondent's accountant to ring the claimant's accountant and give her any information that she needed. The claimant agreed in evidence that, when she raised matters with Lynn Collins about her tax in January, she was not making a disclosure in the public interest; she was concerned to sort out her own private tax affairs.

15. In early March 2015, the claimant saw some visitors in Tenant H's flat. What the claimant saw and what she did in response to this became the basis for disciplinary proceedings being commenced later that month and then being revived in March 2016. As we note later, there came to be a dispute about what the claimant said she had seen and whether this should have been reported or flagged up in some further way than what was done by the claimant at the time. Lynn Collins accepted in evidence that the claimant had gone to the office in the house next door and spoken to a manager, although the manager was never identified. What is not in dispute is that the claimant saw, in Tenant H's flat, a visitor she had not seen before; this visitor, who was a black man, was in Tenant H's flat, together with two young women who were also visiting. The claimant asked who the man was and one of the visitors referred to him as being an "uncle by marriage". She saw the man holding hands with one of the young women. The claimant subsequently learned that one of the young women was, in fact, a 14 year old girl. The claimant has been consistent throughout in saying that she did not realise that the girl was that young. The man stopped holding hands with the female visitor when the claimant was in the room.

16. On 18 March 2015, the policed visited the premises to speak to Tenant H about a 14 year old girl who was missing. The claimant let the police in and spoke to them. The claimant told the police that the respondent had no visitor policy. Tenant L came up in conversation and the claimant disclosed that Tenant L was living on the premises. Tenant L was known to the police for domestic violence against his girlfriend and the police were concerned to find that he was living there. The claimant told the police about her sighting of a black man with two young women visitors in Tenant H's flat. Lynn Collins accepted that she was aware that the claimant had passed all this information to the police.

17. After speaking to the claimant and Tenant L, the police spoke to Lynn Collins. Lynn Collins understood from what they told her that they were looking for a missing girl. The police officer stated that they had serious concerns about the 171 Project and would be raising their concerns with the Rochdale MBC Adult Care Team. Lynn Collins was concerned that this had the potential to bring the respondent's reputation into disrepute with Rochdale MBC's Adult Care Service, who were the respondent's major client. We find that the police made some comment about someone or something being "ambivalent". Lynn Collins understood them to be making this comment in relation to a staff member they had spoken to, which was the claimant.

18. The claimant and Lynn Collins both say that they were told by the police on 18 March 2015 that there was an allegation that the 14 year old girl who had been visiting tenant H had been sexually assaulted. The notes of the staff meeting on 18 March 2015 record that a complaint had been made that a 25 year old man had been in tenant H's flat and a complaint was made that he had sexually assaulted the 14 year old girl.

19. The evidence as to what, if anything, the claimant and Lynn Collins were told about where it is alleged the sexual assault took place is inconsistent. The claimant gave evidence that the police told her it was alleged that the assault had taken place on the respondent's premises. Lynn Collins gave evidence that the police did not say where the alleged assault was said to have taken place and she did not understand there to have been an allegation that it had taken place on the respondent's premises. She accepted that, if it had happened in a tenant's flat, this incident would have involved the respondent.

20. Based on the notes made of the meetings on 18 and 19 March, we find that the claimant and Lynn Collins did not understand at this time that there was an allegation that the missing 14 year old had been sexually assaulted on the premises. We consider that, if the claimant or Lynn Collins had been told that there was an allegation that sexual assault had taken place on the respondent's premises, this would have been clearly flagged up and recorded in the meetings on 18 and 19 March; it was not. We accept, however, that the claimant came to believe that the allegation was that the alleged sexual assault on the 14 year old girl by a 25 year old man had happened on the respondent's premises. It is unclear how the claimant formed this understanding. However, it may be that the claimant gained this understanding, or misunderstanding, from the respondent's own letters. The respondent's letters setting out disciplinary allegations put to the claimant by the respondent on 23 March 2015 and again in later letters inaccurately stated that the police were investigating something to which the claimant was alleged to be a witness. The letters referred to the police attending the premises "with concerns of an incident that occurred in a tenant's flat". This could clearly be understood as

meaning that the alleged sexual assault was said to have occurred in a tenant's flat. We consider that, with the passage of time, and given the claimant made no notes at the time of what she had been told by the police, she has incorrectly attributed the basis of her belief that the allegation was of sexual assault at the respondent's premises to what she was told by the police at the time, when her belief was, in reality, formed at a later date on the basis of other material.

21. Lynn Collins gave evidence that she understood the police's concerns to relate to the ambivalent attitude or manner of the claimant. However, based on the action points which are recorded in the notes of the staff meeting on 18 March 2015, we find that the police's concerns were of a wider nature. It is apparent from these action points that the police were concerned about there being under 18s on the premises. The police told Lynn Collins that they should not have under 18s on the premises. They expressed concern also about Tenant L living there. Lynn Collins took no notes during her conversation with the police, although she has a normal practice of taking notes at the time. She said this was because she was taken by surprise by the police visit.

22. After the police had left, Lynn Collins chaired a staff meeting. Although none of the notes record this, it is common ground that she started the meeting by saying that the staff member the police had spoken to appeared to be ambivalent. We have seen typed notes made by Lynn Collins and, during the course of the hearing, handwritten notes were disclosed which Lynn Collins had taken during the course of the meeting. It is unclear from the typed notes whether the source of some of the information contained in the notes is the claimant or the police. We consider it more likely than not that the specific information about the age of the man and the girl described as "a 25 year old man" and a "14 year old girl" came from the police. We consider it unlikely that the claimant would have been so specific about the ages since she would not have known their ages. From the handwritten and typed notes read together, we find that the claimant said that she had previously seen a black man in Tenant H's flat. She is not recorded as saying anything about his age. At that point, she said she asked who it was. The man was sat on the bed and he had hold of one of the girl's hands, and he was referred to as being a "uncle by marriage". The claimant said she had mentioned it "downstairs" but could not remember who she told. Lynn Collins understood at that time that the claimant was meaning that she had spoken to colleagues in the staff flat downstairs in 171. However, as became apparent in a further meeting on 19 March, the claimant had meant managers in the office next door. Lynn Collins asked the staff present at the meeting on 18 March whether anyone else had been aware of an older black male in Tenant H's flat and all staff present said no, they had not been aware of that.

23. Although it is not recorded in the notes of the meeting of 18 March, based on later notes, we find that Laura McKee, the claimant's manager, said she had heard "uncle by marriage" but could not recall from whom.

24. Following the meeting on 18 March, a notice was put up about visitors under 18. Previously there had been no instructions about this. It appears that such restrictions on visitors would be contrary to the tenants' rights to have such visitors as they wished.

25. Prior to speaking to the claimant again on 19 March, Lynn Collins took advice from an HR adviser about the claimant. We accept that Lynn Collins had genuine

concerns arising from what the claimant had said and the police visit. She was advised to speak to the claimant to investigate further.

26. On 19 March, the claimant and Lynn Collins met. Each wanted to meet with the other. The claimant wanted, in particular, to clarify what was meant by the police describing her as "ambivalent". She also wanted to raise some matters concerning safeguarding. This is reflected in a suggestion made by the claimant and recorded about having a keyworker. Lynn Collins wanted to meet the claimant because of concerns she had about what the claimant had seen and done. We find that the claimant said the things recorded by Lynn Collins in her handwritten notes taken during the meeting and then set out in more detail in the typed note. The claimant made no notes of the meeting at the time. We consider the best source of what was said at the meeting to be the notes Lynn Collins took at the time. We find, based on these notes, that the claimant said she had seen a man who was "clearly considerably older". She said he was holding one of the girls' hands. She thought this did not feel right. She did not feel it sounded right when he was described as an "uncle by marriage". Although this meeting was later described as an investigatory meeting, we find that Lynn Collins did not tell the claimant that it was an investigatory meeting, potentially for the purposes of disciplinary proceedings. However, she did ask the claimant to describe what the claimant saw and what she did.

27. In this meeting, it was clarified that the claimant's reference to the office "downstairs" was to the manager's office. The claimant said that she told "someone" in the manager's office. She could not remember who she spoke to but that she did share what she had seen. We accept that Lynn Collins reflected back to the claimant what the claimant had said to her about having seen a man in the flat who was clearly considerably older and her feeling having been that it was not right. Lynn Collins asked the claimant whether, on reflecting on the situation now, she would have done anything differently. The claimant responded that she did not know that the girl was 14 years old and that she had assumed the girl was older. This is consistent with the claimant's view, which she maintained throughout the internal process and these Tribunal proceedings, that there was nothing in what she witnessed in the flat to cause serious concern and any action other than the sharing of information, which she had done.

28. We accept the evidence of Lynn Collins that, if the claimant had said on reflection that she would now do something different, the matter would have ended there. We find they each ended the meeting with a different perspective. The claimant did not think that she had seen anything which should have caused serious concern at the time. We find she genuinely did not think that she should have done anything different and, indeed, that she had taken more steps than had been required by asking the visitor who he was and sharing information with a manager. Her view was formed in the context of the respondent's Tenants' Charter which set out that the tenants were free to have whichever visitors they wanted and that the tenants were adults.

29. We find that Lynn Collins, perhaps subconsciously influenced by the context of the police visit and their concerns about the Project and the possibility for reputational damage, left the meeting with a genuine concern that the claimant may have seen something which she should have flagged up more clearly as a safeguarding issue.

30. From the point of the meeting of 19 March, Lynn Collins accepted that the claimant had spoken to a manager on the day she saw the visitor. However, Lynn Collins did not do anything to question managers not in their team as to whether the claimant spoke to any of them and, if so, what she said, and what that manager did or did not do and why. People in the team meeting on 18 March had been asked if they had any knowledge of what the claimant had seen.

31. What the claimant had said about reporting to a manager could have raised a concern that a manager had failed to take appropriate action. However, there was no investigation into what the managers knew and whether they had done all that they should have done. Concern was focused on the claimant.

32. At some time between 19 March and 23 March 2015, Lynn Collins decided to take formal disciplinary action against the claimant. Lynn Collins reported to the Local Authority Safeguarding Team about Tenant H's visitors and there being an older man on the premises. She did not make a report to the CQC because she did not understand there to be an allegation concerning a tenant or the respondent's premises.

33. At some time around this time, Laura McKee asked two employees, other than the claimant, to view CCTV on certain dates and they filled in retrospectively tenants' diaries with records of visitors. At some time after they had done this, the police asked Tony Giddins for CCTV footage. Mr Giddins put this onto a DVD and gave it to the police. The police gave Mr Giddins a crime number but did not tell him what the alleged crime was. Later, the claimant requested that she view the CCTV footage and Mr Giddins refused because the police now had a copy of the footage and Mr Giddins did not see any need for any employees to spend further time viewing CCTV footage.

34. By a letter dated 23 March 2015, Lynn Collins informed the claimant that she was required to attend a disciplinary interview on 27 March. She wrote that Anna Edwards, HR Consultant, would chair the meeting and there would be a notetaker in attendance. She wrote:

> "I have now competed my investigations following an incident whereby the police attended the premises with concerns of an incident that occurred in a tenant's flat, it was highlighted that you were allegedly a witness. I am of the opinion that you have failed to follow Newbarn Limited's procedure and in doing so have put a tenant at risk of harm."

35. This was not accurate. The police did not attend the premises with concerns about what the claimant had witnessed in a tenant's flat. This paragraph conflates the matters the police came to investigate on 18 March and what the claimant had witnessed on an earlier occasion.

36. The alleged misconduct was stated to be:

- "Serious negligence, which causes or might cause unacceptable loss, damage or injury.

- Flagrant disregard of Newbarn Limited's rules, policies and procedures.

- An action which brings or may bring Newbarn Limited's reputation into disrepute."

37. The letter did not identify specifically what the claimant was alleged to have done which was potentially serious negligence, what part of the respondent's rules, policies and procedures the claimant was alleged to have flagrantly disregarded or what action, specifically, the claimant had done which was alleged to have brought or might have brought the respondent's reputation into disrepute.

38. Lynn Collins attached a copy of the typed notes related to the meeting on 19 March 2015, describing these as notes taken in the interview in respect of that allegation.

39. Lynn Collins wrote that, should the alleged misconduct be proven, then the possible outcome of the disciplinary interview may be dismissal. She advised the claimant of her right to be accompanied at the meeting. Lynn Collins did not suspend the claimant prior to the disciplinary hearing.

40. Lynn Collins handed this letter to the claimant on 24 March. The claimant was furious, angry and upset at receiving this letter and the notes from the meeting, which she had not understood to be an interview in respect of an allegation.

41. We note the different potential outcome to these disciplinary proceedings and that stated when the allegations were later resurrected in March 2016. In March 2016, the possible outcome was said to be a formal written warning. Lynn Collins was unable to explain why dismissal was threatened as a possible outcome in March 2015 but a lesser penalty was threatened in March 2016.

42. The claimant contacted Lynn Collins by text on 27 March about her tax. We were not shown this text. Lynn Collins replied to this by email on 30 March, referring back to their conversation at the end of January and that she had said she would pass on the claimant's accountant's details to their own so hopefully the matter could be resolved between them. She wrote that she was willing to help in any way possible as was Kiaran, and to let her know how they might help. She forwarded the claimant a copy of the email she had sent to their accountant on 29 January.

43. Lynn Collins sent the claimant a further letter dated 27 March 2015, rescheduling the disciplinary hearing, due to the claimant's trade union representative being unable to attend the original date. Lynn Collins wrote that, having reviewed the allegations stated in the original letter dated 23 March 2015, they had not included the procedure which the claimant had failed to follow and would, therefore, like to provide her with that information. She enclosed a copy of the Safeguarding Adults policy.

44. On 1 April 2015, a disciplinary hearing, conducted by Anna Edwards, with Tony Giddins present as a notetaker, began. This was adjourned part way through the meeting so that more investigation could be carried out, with a different investigator. Although Mr Giddins was there as a notetaker, we have not been shown any notes taken of the part of the hearing which took place. In evidence, the claimant agreed that going through a badly organised disciplinary process which was aborted was not because she had made a protected disclosure.

45. The claimant had prepared some documents for the disciplinary hearing. These included an account of the events of 18 March 2015 and the claimant's previous sighting of the man who might be the police suspect. The claimant wrote that she had been furious and upset when Lynn Collins gave her the disciplinary letter with notes of a meeting which Lynn Collins claimed to be the investigative interview. The claimant wrote that: "My gut feeling was to leave immediately as I felt that I was going to be scapegoated re whatever had allegedly happened and that my working environment was therefore not safe for staff but I did not want to act until I had sought advice." She wrote that all staff who work in the flats had said that they would have done the same thing and several had seen visitors including the young woman in question. She wrote that she had not witnessed an incident. She asserted that she risk assessed the situation and acted appropriately and shared information appropriately in the circumstances. The claimant wrote that, until the letter of 27 March, which she received on 30 March, she was not even aware which policy she was alleged to have "flagrantly" breached. She commented that the enclosed policy did not have a document attached which she later found in the policies titled "Protection of Vulnerable Adults, Policies, Procedures and Definitions", indicating that "All safeguarding alerts must be reported to CQC". She asked if this disciplinary proceeding and any allegations around her practice had been reported to CQC.

46. It appears that the claimant was referring to a document which refers to the respondent following the Rochdale Authority Procedures for Staff and Volunteers to follow in the Protection of Vulnerable Adults which refers to part of Rochdale MBC's Safeguarding Adults Policy as follows:

> "'Abuse and allegations of abuse involving people who use the service' – All safeguarding alerts must be reported to CQC using their table of notifications."

47. On 2 April 2015, the claimant began a period of sick leave which continued until 4 March 2016, at which point she was suspended. Her absence was certified as being because of stress at work.

48. On 7 April 2015, the claimant sent Lynn Collins a text about her tax. She wrote:

> "Hi Lynn, I will write to you regarding this but again it has come to my attention that my earnings for 2013-2014 have not been passed on appropriately to the tax office or to national insurance. I have today claimed my state pension and at the department for works and pensions they have not been made aware of my earnings for 2013-2014 or indeed this current year. They inform me that this is my employer's responsibility. None [sic] adherence to this responsibility has already meant that I have had a retrospective tax bill for £1,700 plus but now is preventing my getting an accurate forecast and getting any of my additional pension due until it is resolved. You said that you have spoken to your payroll people. Can you please resolve this issue asap. I am very concerned that my NI contributions appear not to have been dealt with in line with the proper procedures. Thanks in anticipation Sue."

49. The claimant also wrote letters to Lynn Collins on 10 April about the tax situation but it does not appear that Lynn Collins had received these by the time she wrote to the claimant about her text of 7 April on 16 April. The claimant agreed in

evidence that, at this point, she was concerned about resolving a private tax issue and this was not a matter of public interest.

50. On 15 April 2015, Anna Edwards had an investigatory meeting with the claimant. The claimant accepts the notes of the investigation meeting as accurate. The claimant handed in a draft grievance at the start of the meeting but agreed to continue with the investigation meeting. The claimant was asked to describe what had happened when she had seen the man in Tenant H's room. She said the man was in his early 20s. There were two girls there in addition to Tenant H. She did not know one was 14 years old. She said she asked who the person was. One girl replied, "uncle by marriage". Everything was calm. "willing to engage, everything hunky dory". The claimant referred to the Charter of Tenants' Rights which says that tenants can have visitors. The claimant said the man was loosely holding hands and let go of the hand. There was nothing untoward, "he was an older man, note it and log it in head. Concern of who is that being aware as a member. Flats registered all have individual tenancy so in someone's home. She's an adult with a private tenancy". The claimant said she thought they were going out, that they had told her they were going out but she was not sure. She said she had a recollection of going to the manager's office and saying something but did not know who was in there. She said she handed it over. When asked why she handed it over she said, "share it, passionate, interested". The claimant was asked about the communication books. The claimant said that was a daily thing, "need to know for next person". Anna Edwards asked what the claimant had shared. The claimant said she had seen a black guy, two girls in the tenant's room, holding hand and let it go. She said she spoke to someone or a group of people. The claimant said she had never been told or directed about logging visitors. This was a private tenancy. Anna Edwards asked if it happened again would she do anything different. The claimant said hindsight was wonderful but she did not think so.

51. In relation to her understanding of the Safeguarding Adult Policy, the claimant said that she would speak to Laura if there was a concern that something untoward was happening and Laura would speak to Lynn. She said if there were any safeguarding incidents on the property the CQC needed to be alerted. The claimant confirmed that she had done everything she thought she needed to do. If she had thought there was anything untoward going on, she would have raised it.

52. The claimant described meeting with Lynn Collins on 18 March. She said Lynn Collins asked to meet her to discuss Tenant H. The claimant said that Lynn Collins kept revisiting questions, saying "as a reflective practitioner". The claimant said that Lynn Collins did not say it was an investigation and no notes were read back or agreed.

53. The claimant said she was off sick not through her own fault. She said her tax was in a mess. She said she had been advised to contact the Fraud Team. She had no information on her national insurance contributions for 2013-2014 and 2014-2015 and wanted to know how it had disappeared.

54. It appears that the disciplinary process was put on hold because of the claimant's grievance and there was no outcome to the investigation begun by Anna Edwards. Anna Edwards ceased to be the respondent's HR adviser prior to the resurrection of disciplinary proceedings in March 2016.

55. On 16 April 2015, Lynn Collins replied to the claimant's text message of 7 April 2015. She said she had not at that point received the claimant's letter which the claimant had said she would be sending. She wrote that she had passed the claimant's request for clarification onto their accountant and he had responded:

> "Details of the salaries each month (for every employee), tax, national insurance etc. are submitted online by what is known as 'real time information' (RTI) to the Inland Revenue. So the Tax Office knows exactly the position for each employee including what tax code is being used on a monthly basis. For Sue this applies to both 2013-2014 and 2014-2015. The Tax Office also send an email each month confirming receipt of this information.
>
> We cannot come up with any reason therefore why the Tax Office are unable to obtain her records or are saying that the details have not been passed on appropriately."

56. Lynn Collins wrote that she could not throw any more light on why the Revenue had not received the information. She wrote that the claimant's national insurance and tax payments for 2014-2015 would be shown on her P60 which would be issued at the end of the month. Lynn Collins gave the details of their accountant. She concluded that the claimant should contact her if she needed any further information or clarification.

57. The claimant's grievance is dated 17 April 2015. The claimant said in her grievance that she had at all points in time followed Newbarn's policies, procedures and practices. She said she endeavoured at all times to meet tenants' needs whilst respecting and protecting their human rights. She referred to the statement of tenants' rights, noting that this included the right to invite whomever they chose into their home. She wrote that primarily her grievance had arisen from the way she had been treated by the respondent. She wrote: "I am aggrieved at the distress caused by a recently ill thought out and mismanaged attempt by management to scapegoat me regarding a serious safeguarding incident at Newbarn brought to managers' attention by the Sunrise child sexual exploitation team." She wrote: "I have worked for almost 40 years positively and proactively safeguarding vulnerable people. I have found the suggestion that I may have failed to safeguard anyone unacceptable and extremely distressing and insulting." She wrote: "working with vulnerable adults can be risky work and requires a supportive and enabling management style. The approach at Newbarn seems to be, just do it which staff do creatively and positively but it seems that if anything goes wrong in the slightest the first and seeming only response from management is formal discipline of the individual worker. I believe this leads to a blaming culture rather than a proactively safeguarding one for both staff and tenants."

58. The claimant also wrote about the tax and national insurance issue. The claimant said in evidence that she did not believe, at this point, that the respondent had done anything fraudulent with regard to tax.

59. The claimant concluded her grievance writing: "Unless management take some responsibility to adequately support and train staff and ensure that actual practice is in line with written policies I will continue to feel that this is an unsafe place to work for myself and colleagues. If staff are not supported and enabled then they will not be able to deliver quality service to tenants. Risky work requires a

holding managerial framework not a management style with only far end disciplinary procedures in the toolbox."

60. By a letter of 30 April 2015, Lynn Collins invited the claimant to a grievance meeting on 7 May to be chaired by Laura Drinkwater, an independent HR consultant. This was rearranged to 27 May. It appears from the grievance report of Laura Drinkwater that there were interviews with Lynn Collins and Tony Giddins on 6 May 2015. However, these notes have not been provided to us and no explanation has been provided by the respondent for failing to disclose these to the claimant.

61. On 7 May 2015, the claimant wrote to HMRC asking that they look into the situation on her behalf and advise her as to whether or not her employer has been paying national insurance contributions on her behalf.

62. On 12 May 2015, HMRC wrote to the respondent requesting information about the earnings of the claimant and requiring a reply by 26 May 2015. The respondent's accountant replied to the questions on 4 June 2015.

63. A grievance hearing chaired by Laura Drinkwater took place on 27 May 2015. The claimant handed in a document headed "Grievance with Newbarn Limited" which appears beginning at page 139 in the bundle. This noted that the grievance had four main strands:

- "I have been scapegoated as an individual in relation to the police investigation.

- The instigation and conduct of disciplinary proceedings against me were not conducted in line with Newbarn's own policies and procedures and were wholly unfair and without foundation. The disciplinary process, which has been recognised to have been incorrectly handled by Newbarn Limited, has resulted in me becoming sufficiently stressed and distressed to require medical leave of absence and thereby lose income.

- The mishandling of income tax and non-payment by Newbarn Limited of national insurance and income tax contributions in relation to my employment dating from 2013.

- A wider management approach by Newbarn Limited to the health and safety of tenants and staff which, together with the matters above, that has resulted in me feeling that Newbarn Limited is not a safe place for me to work and has completely eroded my trust in my employer."

64. The claimant's detailed notes about the allegation of unfair treatment in relation to the police investigation included an assertion that she had at all times followed the respondent's policies, procedures and practices around safeguarding and other matters. She made the point that each tenant was an adult and has an individual tenancy agreement. There was no policy or procedure to say that she must log visitors and she had never been instructed to do so. She wrote that, as a matter of good practice and information sharing, she did, on the specific occasion, share with management verbally that she had briefly seen a new visitor in Tenant H's flat. She referred to the statement of tenants' rights, including the tenant's right to invite whomever those chose into their home. She wrote:

> "Rather than having a full and thorough investigation within the organisation and awaiting the outcome of the police investigation, management chose to apportion blame to me alone when at all times I have followed Newbarn's policies and procedures and behaved as every other staff member has around visitors to tenants' homes."

65. She wrote that her actions were wholly in line with normal custom and practice on the site and the only circumstances in which visitors had been identified and logged by staff had previously related to damage to property, suspicious or disruptive behaviour. She wrote that none of these related to the visitor at the centre of the police investigation. However, on seeing a visitor she had not seen before in Tenant H's flat, she had queried his identity and verbally shared with management on the same day. She wrote that, following the police visit, at least two members of staff were given access to CCTV footage and directed to retrospectively log visitors during their shifts and amend diary logs, but she was denied this opportunity to view the footage when she witnessed them doing this.

66. In relation to the disciplinary procedure, points made by the claimant included that it had not been made clear to her what alleged wrongdoing was being investigated, and that, in the letters inviting her to the disciplinary hearing, there was no reference to the specifics of what she was being disciplined for. She wrote:

> "Throughout my 40 year career as a teacher, Education Manager, therapist and following retirement from full-time work most recently as a support worker, I have consistently prioritised the wellbeing, development and safeguarding of vulnerable individuals. As such the invoking of the disciplinary process against me represents a totally unwarranted attack on my personal and professional integrity which has significantly compounded my work-related distress."

67. The claimant wrote about the tax and national insurance matters, asserting that she believed that the respondent had not supported her effectively in resolving the issue.

68. The claimant raised what she described as "unanswered questions from aborted disciplinary" set out in a document with that title. These included questions about whether the incident brought to the respondent's attention by the Sunrise Team had been reported to CQC and Rochdale Adult Care by Newbarn and whether the aborted disciplinary procedure or any allegation around the claimant's practice had been reported to CQC.

69. On 10 June 2015, Laura Drinkwater sent by email to the respondent her grievance report. It is agreed by the parties that the attachment to this email did not include in the recommendations a recommendation that there be mediation between the claimant and Lynn Collins. Laura Drinkwater wrote that she would be issuing the grievance response the next day and asked to chat through it with Lynn Collins before then. Lynn Collins could not recall whether there was such a discussion.

70. By a letter dated 12 June 2015, the claimant was sent by Laura Drinkwater the grievance report. This differs from the version attached to the email of 10 June sent to the respondent in that it includes, at 6.9, a recommendation that the claimant and Lynn Collins enter into mediation to try and ensure that they are able to work

cohesively when the claimant was able to return to work. We have had no explanation as to why this appears in the version sent on 12 June but does not appear in the version of 10 June.

71. Laura Drinkwater did not uphold any of the claimant's grievances. However, she made a number of recommendations. These included that managers should receive training on the disciplinary process so that they were confident in each stage of the process and learned how to approach the issue sensitively and in a manner that caused minimum concern to the employee being investigated. As noted previously, the version sent to the claimant included a recommendation of mediation.

72. The grievance report noted, in relation to the question the claimant had posed about whether the incident brought to the respondent's attention by the Sunrise Team had been reported to CQC and Rochdale Adult Care, that the incident had been reported to the local authority care team and raised as a safeguarding concern and that there was no necessity to report the incident to CQC. The report noted that there had been no contact with CQC regarding the claimant's involvement in the disciplinary investigation or the allegations made.

73. The claimant appealed against the grievance outcome. The grounds of appeal included a section about financial matters in which the claimant wrote that she had, that day, 22 June 2015, been informed by HMRC that no NI contributions had to date been received by them in relation to the claimant's employment at the respondent from 2013 onwards, although deductions and employer contributions were clearly indicated on her payslips.

74. On 24 June 2015, the claimant wrote to HMRC, sending them a copy of her payslip. She wrote that she wanted to ensure that her employer had paid her national insurance appropriately and that she had been unable to claim her additional stage pension due to there seemingly being no payments showing for her employment with the respondent. She requested a statement of her national insurance contributions for 2013/2014 and 2014/2015.

75. The grievance appeal hearing was conducted by Nigel Finch, an external HR consultant. This took place on 16 July 2015. The claimant showed Mr Finch a letter dated 26 June 2015 from HMRC. This gave no details of pay and tax deductions by the respondent in the tax years ending 5 April 2014 and 5 April 2015. This showed no national insurance contributions for 2013-2014. The claimant thought that Mr Finch had taken a copy of this letter from HMRC.

76. Nigel Finch sent a letter dated 24 July 2015 with the outcome of the grievance appeal, which was upheld in part. The part which was upheld related to the tax matter, which Mr Finch stated still needed to be addressed. He recommended that the respondent fully investigate themselves with HMRC exactly what had or had not been reported. Mr Finch wrote that the disciplinary policy had been instigated due to an allegation that the claimant had not properly recorded an incident in the flat, writing that she should have recorded this in the tenant's diary. Mr Finch did not conclude that the claimant had been treated as a scapegoat. He wrote that he had no reason to believe that any other employee would have been treated any differently.

77. In relation to the allegation that other employees had been requested to retrospectively complete visitor logs, Mr Finch considered this not relevant as a potential disciplinary against the claimant was not in relation to the recording of visitors.

78. On 19 August 2015, Lynn Collins wrote to the claimant asking for a copy of the letter from HMRC which the claimant had showed to Mr Finch. The claimant never provided a copy of this to Lynn Collins. She thought Mr Finch had taken a copy. We accept that Lynn Collins did not see the letter from HMRC until these Tribunal proceedings.

79. The claimant had a telephone conversation with Laura McKee, saying that she was still awaiting action from the respondent regarding tax.

80. On 9 September 2015, Lynn Collins wrote to the claimant repeating her request for a copy of the letter from HMRC. Again, the claimant did not provide a copy of this letter. When asked in evidence why not, the claimant said she did not know why she had not provided it.

81. On 5 October 2015, the claimant obtained a fit note certifying her as not fit for work in the period 26 September to 31 October 2015. The claimant said she sent this to the respondent when she had received it. However, it appears it was not received by the respondent at this time; a copy was sent again at a later date.

82. By a letter dated 4 November 2015, Lynn Collins wrote to the claimant saying that her absence from work from 25 September 2015, following expiration of a sick note, was unauthorised absence. She wrote that they had tried to contact the claimant without success. She wrote:

> "Should we not hear from you by 23 November 2015, we shall have no alternative but to assume that you have resigned from your post."

83. The claimant obtained a further fit note on 11 November for the period 31 October to 30 November. The claimant wrote to Lynn Collins on 11 November enclosing what she said was a further copy of the sick note for the period 26 September onwards and saying that she had posted the sick note dated 11 November the previous day. She wrote that she hoped that, when she saw her GP at the end of November, she would be deemed fit for work. However, the claimant obtained a further fit note on 2 December 2015 for the period 30 November to 31 December, giving the reason for absence as stress at work.

84. We find, in relation to the fit notes, that there was no evidence of a deliberate attempt not to send the fit notes to the respondent in a timely manner. There is no evidence that, when Lynn Collins said she did not receive the fit note, that she had received it. Something appears to have gone awry in terms of fit notes reaching Lynn Collins. We note that, in a letter dated 18 June 2016, Lynn Collins referred to a delay in a letter found at 171 Drake Street (a property owned by the respondent) being passed to her, and asked the claimant not to post letters for her attention to that address, which was not the office address. The claimant gave evidence, which we accept, that her friend would often hand deliver her fit notes for her but, out of hours, shutters were down on the office address so mail could not be left there, so her friend sometimes left the mail at the other address.

85. By an undated letter received 8 December 2015, the claimant wrote to Lynn Collins enclosing a further fit note. She wrote that she was hoping to return to work in January. She asked whether they would put in place by her return to work the promised mediation following on from the grievance.

86. In a letter dated 22 December 2015, Lynn Collins wrote to the claimant requesting consent to obtain a report from the claimant's GP. She referred to the claimant's DBS certificate having expired. She wrote that she would address the issue of mediation once the claimant had confirmed a return to work date. We note that Lynn Collins did not express surprise at the mention of promised mediation, which could suggest Lynn Collins had been aware at the time that a recommendation had been made for mediation.

87. On 6 January 2016, Lynn Collins sent the claimant a DBS form to complete.

88. On 11 January 2016, the claimant obtained a further fit note for the period 1-31 January. The respondent says that this was not received until 14 February.

89. On 1 February 2016, the claimant sent a completed DBS form to Lynn Collins. This included a number of crossings out. Lynn Collins sent the claimant a note in response saying that the DBS form would not be accepted. We accept that this reflected Lynn Collins' view.

90. Lynn Collins wrote to the claimant on 3 February 2016 saying they could not process the DBS form because of errors. She wrote that the claimant had not responded to the request to contact her GP and there was no current fit note. The claimant accepted that Lynn Collins had not seen the fit note but denied that she was remiss in sending it.

91. On 12 February 2016, the claimant wrote to Lynn Collins enclosing what the claimant said was a further copy of fit notes. She referred to recommendations from her GP, including implementation of the recommendation for mediation following the grievance. She asked for a further DBS form and an indication of the mistakes made. She wrote that she wanted to return to work by 7 March.

92. A letter from Lynn Collins dated 1 March 2016 included an assertion that neither Laura [Drinkwater]'s investigation report nor Nigel [Finch]'s letter following the appeal meeting mentioned a need for mediation. Lynn Collins stated that she did not consider mediation was required at that time.

93. By a letter dated 4 March 2016 from Lynn Collins, the claimant was suspended, before she could return to work. Lynn Collins wrote that she was suspended "following allegations of misconduct on 18 March 2015, these allegations are related to an incident whereby the police attended the premises with concerns of an occurrence that took place in a tenant's flat, it was highlighted that you were allegedly a witness". As we noted in relation to allegations made in the previous disciplinary proceedings, this statement was incorrect in that the claimant was never alleged to have been a witness to an incident being investigated by the police.

94. Lynn Collins wrote that they were considering the following allegations:

- "Serious negligence which causes or might cause unacceptable loss, damage or injury.
- A flagrant disregard of Newbarn Limited rules, policies and procedures.
- An action which brings or may bring Newbarn Limited reputation into disrepute."

95. Lynn Collins wrote that they were re-instigating the investigation because the disciplinary process had been abandoned due to the claimant's grievance and her long-term sickness absence. She wrote in relation to the suspension:

> "Please be advised that this action is precautionary to allow a fair and impartial investigation to take place and will not prejudge the outcome of any subsequent action. Disciplinary action will not necessarily be the result."

She wrote:

> "If the investigation determines that an act or acts or misconduct have occurred, then you will be required to attend a disciplinary meeting."

96. She wrote that, if the allegations were not substantiated, the claimant would be reinstated and return to work as quickly as possible.

97. The allegations relate to the same matters as the disciplinary hearing before Anna Edwards, which was aborted for further investigation because of the claimant's grievance and her sickness absence. We note that the claimant had not been suspended on the previous occasion. When giving evidence and asked to explain why the claimant was suspended on this occasion, Lynn Collins' explanation included that she considered this was "kinder" to the claimant.

98. The respondent's disciplinary procedure states that, in some cases, it may be appropriate to suspend a staff member on full pay while investigations are carried out. The policy states:

> "Such cases are likely to include situations where a member of staff is alleged to have committed an act of gross misconduct and/or where there is any reason to suspect that the safety and wellbeing of service users, other members of staff or any other party is at risk."

99. By a letter dated 12 March 2016, the claimant was required to attend a disciplinary hearing. The letter stated that this would be chaired by Lynn Collins with Rebecca Dixon to offer support and advice. The hearing was to be on 16 March 2016. The allegations, as with those for the aborted disciplinary proceedings the previous year, did not clearly set out what the claimant was alleged to have done or failed to do. The claimant was warned in this letter that a possible outcome to the proceedings was a formal disciplinary warning. This was in contrast to the previous disciplinary proceedings, where the claimant had been warned that the outcome could be dismissal. Lynn Collins was unable to explain why possible outcomes had previously included dismissal but did not include dismissal on this occasion.

100. The claimant wrote on 14 March asking for clarification of the allegations and also for further time to allow her trade union representative to attend.

101. Lynn Collins, in a letter dated 15 March 2016, wrote that the disciplinary hearing would be postponed to 23 March in response to the claimant's request. Lynn Collins wrote that she had reflected that it was not appropriate for her to chair the meeting and the Chair would be Tony Giddins. She gave some clarification of the allegations. She wrote:

> "All three allegations centre around your failure to follow the Safeguarding Adults Policy, namely that you did not formally alert myself to the incident that you witnessed in a tenant's flat shortly before 18 March 2015, which was subsequently investigated by the police."

102. This was inaccurate, as we noted in relation to the similar wording of the respondent's letter of 23 March 2015. The police did not attend the premises with concerns about what the claimant had witnessed in a tenant's flat

103. Lynn Collins wrote that, under the Safeguarding Adults Policy, the claimant had a duty to report any concerns to Lynn Collins to evaluate the seriousness of the situation and assess whether it fell within the remit of the policy. Lynn Collins wrote that, although the claimant stated that she verbally shared the sighting of a new visitor as soon as possible with other staff members, she did not record the incident in the daily communication book. She wrote:

> "I would consider this to be negligence and a disregard of policy and procedure."

104. Lynn Collins continued:

> "As you are aware, when the police visited [address] on 18 March 2015, they described your manner as ambivalent. This attitude, and your failure to follow procedure, which could have potentially impacted upon a young woman's safety, has a direct impact upon the reputation of the organisation amongst other agencies."

105. Lynn Collins noted that the claimant had mentioned that she may wish to seek witnesses. She asked the claimant to inform her who she wished to contact and said she would notify them that the claimant would be in touch.

106. On 15 March 2016, the claimant wrote a letter to Lynn Collins headed "Without Prejudice Meeting". The claimant asserted that, when she saw three visitors in Tenant H's flat, there was no "incident" and there was at that time no reason to raise any safeguarding concerns. She wrote:

> "The fact that when I verbally shared with managers the presence of the three visitors I had not previously seen to the managers present, as good information sharing, at that time they indicated no reason to act, challenge or investigate the visitors' presence further confirms the above."

107. The claimant wrote that she was resolved to defend herself and her professional judgment in the context of the respondent's policies and agreements in

place at that time. The claimant reminded Lynn Collins of the recommendation by the HR professionals at her grievance that there should be mediation between the claimant and Lynn Collins in relation to her return to work. She wrote that this seemed to date to have been either overlooked completely or deliberately ignored.

108. The claimant wrote:

> "I genuinely question whether there is a way forward by which I can return to work at Newbarn in an environment where there is fairness and transparency at work and a genuine striving for the best outcomes for tenants and staff rather than a back covering, tick box, blaming culture which serves no-one well as outlined in the Munro Report.
>
> "On this basis I feel it may well be in the best interests of both myself as an employee and you as manager of Newbarn Limited to have a 'without prejudice' meeting where we can both openly and freely discuss a way forward that brings the current situation to a rapid mutually agreed resolution without further protracted disciplinary and legal proceedings."

109. The claimant wrote on 18 March 2016 to Lynn Collins and Tony Giddins in relation to the imminent disciplinary hearing. She requested various things, including stating that she wished to call Tenant H as a witness to her sighting visitors in her flat and sought advice on how to organise that. She also sought confirmation that the respondent did not report a safeguarding alert to CQC "around these circumstances".

110. Lynn Collins replied to this letter on 21 March. She refused the claimant's request for CCTV footage. She wrote that the disciplinary matter did not centre around whether the man in question was the gentleman that the police were investigating; rather it was about the claimant's response to seeing an older man in a tenant's bedroom i.e. her failure to follow a process and recognise the importance of communication. We accept the written reasons as being Lynn Collins' view at the time. She refused to allow the claimant to call Tenant H as a witness. She wrote that she did not consider it appropriate to ask a vulnerable young adult with a learning disability to become involved in the process and could not allow that. Lynn Collins wrote that, whether or not the respondent raised a safeguarding alert to CQC was "irrelevant to this matter". She wrote: "I reiterate that the disciplinary matter centres around your response to seeing an older man in a tenant's bedroom, i.e. your failure to follow process and recognise the importance of communication." Lynn Collins wrote that she would be willing to hold a "without prejudice" meeting immediately after the disciplinary hearing.

111. There were discussions between Tony Giddins, Lynn Collins and Laura McKee about calling staff as witnesses, around the issue of staffing and whether they could still run a service.

112. On 22 March 2016, the claimant wrote to her union, enclosing the letter about the disciplinary hearing and the enclosed notes from the meeting on 18 March. She wrote that this felt like the final straw in her needing to resign. She wrote that she felt that the respondent would make stuff up and there was no point in defending anything as Lynn Collins was on a mission to blame her for the police upset with the

project. The claimant wrote that this was much more about policies and procedures which were not fit for purpose.

113. On 23 March 2016, Lynn Collins wrote to the claimant, responding to her letter of 14 March which she wrote that she had received that day. She agreed to a postponement of the disciplinary hearing. The letter referred to the disciplinary hearing taking place on 23 March i.e. the date of that letter. However, subsequent correspondence confirmed that the hearing was to be on 29 March. The letter repeated the allegations as set out in the previous letter.

114. On 24 March 2016, the claimant's trade union representative emailed Tony Giddins, asking for a copy of the investigation outcome letter following Anna Evans' [sic] investigation. She also asked for confirmation that the claimant's tax and national insurance contributions had now been paid. It appears there was no reply to this email. As previously noted, there had been no outcome to the Anna Edwards investigation. Although the letter of suspension sent 4 March 2016 referred to the claimant being suspended whilst the matter was investigated, there appears to have been no further investigation by or on behalf of the respondent before the decision to require the claimant to attend a further disciplinary hearing and little, if any, further investigation by the respondent prior to that disciplinary hearing on 29 March.

115. The claimant sent questions to potential witnesses who were employed by the respondent. Only two of these replied before the disciplinary hearing. The claimant had only been given permission to contact the witnesses shortly before the Easter weekend and the disciplinary hearing was on the Tuesday following the Easter weekend.

116. Rebecca Dixon of Halo HR was advising and giving support in relation to the disciplinary proceedings. She gave evidence to this Tribunal and said she had spoken to Lynn Collins prior to the hearing but made no notes of this meeting. She said she had not seen notes of the grievance investigation meeting which Laura Drinkwater had conducted with Lynn Collins in May 2015 (notes of which were not disclosed in these proceedings).

117. The disciplinary hearing took place on 29 March 2016. Tony Giddins was the decision maker. Rebecca Dixon was present to advise and give support and to take notes. This was the first disciplinary hearing Tony Giddins had ever dealt with. He started the hearing by welcoming them to the appeal hearing. We accept this was a mistake. The claimant handed in a document headed "A straightforward and simply story" and a further typed statement. The handwritten document, "A straightforward and simple story" set out an account of what the claimant had seen in Tenant H's flat. It concluded:

> "Confabulations from Lynn Collins do not alter the facts."

118. At the start of the meeting, the claimant's trade union representative raised a concern that there was no outcome following the investigatory meeting held on 15 March 2015 and that no investigation had taken place this year.

119. The claimant and her representative referred to what the claimant had seen in Tenant H's flat. Tony Giddins said that not all visitors to tenants' flats are recorded but that staff are expected to safeguard tenants and be vigilant. He said that, whilst

visitors are allowed, there was an expectation that staff would use their common sense and gut feeling and communicate if a situation did not feel right. He said that staff would be expected to record any unusual situation in the communication book, the tenant's diary or on an incident form.

120. The claimant said she did not feel it was necessary to record what she saw in writing. Instead, she communicated it to the managers verbally. If they had thought it was necessary, they should have advised her to complete the diary. The claimant's trade union representative said that no abuse had taken place; therefore, there was no breach of the Safeguarding Adults Policy.

121. The claimant referred to responses received from two witnesses and a partial response from Laura McKee, her line manager. The claimant maintained that what she witnessed was not a safeguarding issue.

122. There is a dispute as to whether the claimant asked Tony Giddins to wait for further responses from witnesses or asked him for a quick outcome, not waiting for further statements. There is no discussion of this nature recorded in the notes of the meeting. We consider that, if there had been such a discussion, it would have been recorded in the notes. We find that there was no such discussion at the meeting. However, we find that Tony Giddins decided, after the meeting, to proceed on the basis of other witness statements being likely to give the same information. The statement from RC, which was one of the statements Mr Giddins had, was one of the most helpful to the claimant so it was helpful to the claimant for Mr Giddins to proceed on the basis that all witnesses would say similar things.

123. Mr Giddins concluded that the claimant's story about what she had seen had changed over time and been downplayed. We accept that Mr Giddins genuinely reached this conclusion based on differences between what the claimant said in the disciplinary hearing and what he had read that she had said in previous meetings.

124. Mr Giddins did not identify in the outcome letter or in his witness statement what parts of the Safeguarding Adults Policy he concluded that the claimant had breached. In evidence, when asked which part of the protection of the Policy he had concluded the claimant had breached, Mr Giddins referred first to "stranger abuse" (p.591). This states: "Stranger abuse will warrant a different kind of response than the response to abuse within an ongoing relationship or care setting. Protection and support procedures may still be appropriate to ensure that the victim of the alleged abuse receives the support and services they require." This appears to relate to abuse of a tenant by a stranger. There was no allegation about a tenant being abused by a stranger in this case. We cannot understand from this particular part of the policy any obligation on the claimant which she was accused and could have been found guilty of.

125. Mr Giddins also identified as parts of the policy he considered the claimant had breached, the second and third bullet points under the heading "All Staff and volunteers of NEWBARN have the responsibility to:" (p.587). These bullet points are as follows:

- "ensure the involvement and support of the NEWBARN manager"

- "refer promptly to the company's safeguard lead (Lynn Collins, Service Manager) who will liaise with Adult Services Department local office wherever abuse is suspected/identified."

126. The meaning of the first bullet point Mr Giddins has referred to is not clear, begging the question "involvement and support of the manager in what?"

127. The second bullet point Mr Giddins has referred to must, reading this in context, refer to suspected/identified abuse of a vulnerable adult. There was never an allegation that there was suspected or identified abuse of tenant H, the vulnerable adult in the scene the claimant witnessed in tenant H's flat prior to 18 March 2015.

128. We have not been taken to any other parts of the Safeguarding Adults' Policy which are said to be relevant to the allegation that the claimant breached this policy.

129. Mr Giddins said he concluded the claimant was in breach of the bullet points he identified in the policy because there was no communication in proper form, in writing, and discussion about what happened and nothing was passed to Safeguarding. He considered that a written communication was preferable but, at least, there should be a robust discussion where information was passed on clearly and concisely. He did not consider that walking into an office and saying a sentence was correct communication. A safeguarding issue should be passed on with more information and more discussion.

130. Mr Giddins expressed scepticism when giving evidence about whether the claimant had spoken to managers about what she had seen. He said he had been in the office all the time and had no recollection of this. He said he spoke to one of the other managers but did not recall speaking to the other manager. He thought, even if the claimant had spoken to managers, she had not reported the matter in the way required. Mr Giddins made no notes of any conversations with managers and did not put this information to the claimant or challenge her on whether she had spoken to any manager.

131. By a letter dated 29 March 2016, Tony Giddins provided the claimant with the outcome of the disciplinary process, which was that she was issued with a first written warning. This letter was, we are told, drafted by Rebecca Dixon for Mr Giddins. Mr Giddins wrote that:

> "The pertinent issue running through the entire investigatory and disciplinary process is that you state you didn't feel there was any cause for concern in the scene you witnessed in a tenant's flat, whereas the organisation is disputing this on the basis that your original informal description given to Lynn Collins on 19 March 2015 (albeit not as part of a formal investigation) was that 'something didn't feel right'. You have subsequently accused Lynn of 'confabulation' in relation to the conversation of 19 March 2015, an allegation which I feel is completely inappropriate given Lynn's level of experience of position as a respected Service Manager."

132. It is unclear what, if any, relevance Mr Giddins concluded that the claimant's allegation of "confabulation" had on the outcome. However, there is no evidence that Mr Giddins explored with the claimant what she meant by this allegation. His response to the allegation of "confabulation" is to consider the allegation

inappropriate by reason of the experience and position of Lynn Collins; a response which appears to be based on loyalty to the organisation and to Lynn Collins (with whom he had worked in a previous organisation), without considering any evidence relevant to the truth or otherwise of the allegation. This response suggests to us the possibility of a lack of impartiality on the part of Mr Giddins in his role as a disciplinary officer.

133. Mr Giddins wrote:

> "On balance of probability I think it is fair to say that the scene you witnessed was one which warranted further action, and as such it is appropriate to issue you with a first written warning for your failure to follow the Safeguarding Adults Policy."

134. He wrote that the negligence on the claimant's behalf could have potentially had far-reaching effects for the organisation and the individuals involved. Mr Giddins did not set out in his outcome letter what he concluded that the claimant had seen on the occasion prior to 18 March 2015 and what the breaches of the policy were which he had concluded the claimant had committed.

135. Mr Giddins advised the claimant of her right of appeal. He wrote about arrangements for the claimant's return to work.

136. The claimant had a return to work interview with Lynn Collins on 30 March 2016. Under the heading of "Required Workplace Adjustments," Lynn Collins recorded, amongst other things, "Mediation (as recommended in Anna's report)". She further recorded:

> "Mediation is very important to Sue as she feels that the trust between her and Lynn Collins is paramount to re-establishing mutual trust and a professional working relationship."

137. Lynn Collins is not recorded at this stage as expressing surprise at the suggestion that mediation had been recommended in the grievance report. This suggests to us that Lynn Collins was aware at this time that mediation had been recommended in the grievance outcome. No mediation was ever arranged.

138. The claimant appealed by a notice on 1 April 2016. She wrote that her trade union representative would furnish them with further details of her appeal after she had spoken with her.

139. On 1 April 2016, the claimant sent an email to the Care Quality Commission. This was framed as a Freedom of Information Act enquiry. She wrote:

> "I am aware of a police visit regarding an allegation by a visiting minor that she was sexually molested on the premises."

The claimant wrote that she believed management should have notified the CQC of this as a notifiable event as it potentially impacted on the tenant. The claimant asked the CQC whether the police investigation, which she said she had been aware of on 18 March 2015, had been reported by Newbarn Limited. She wrote: "I believe that

they do not report incidents as robustly as they should and they tell me they did not need to raise this issue with CQC."

140. The claimant had a telephone call with the CQC. She was given the option to be anonymous. However, she chose to give her details.

141. The claimant presented more detailed grounds of appeal on 4 April 2016.

142. Tony Giddins replied on 6 April 2016 requesting further information about the grounds of appeal.

143. The CQC contacted the respondent on 9 April 2016. They asked the respondent to make a report.

144. On 9 April 2016, Lynn Collins sent a notification to the CQC in relation to the incident on 18 March 2015. She sent her apologies for not sending in the earlier notification at the time of the incident but wrote that she had not understood this action to be necessary as it did not directly involve one of their service users.

145. On 11 April 2016, the claimant wrote to Tony Giddins that she would reply further after consulting her trade union.

146. The claimant had a further telephone call with the CQC on 14 April 2016 during which she was informed that the CQC had told the respondent they needed to report the incident, they had not known they had to report a visitor allegation and had then reported it.

147. By a letter dated 27 April 2016, the claimant was notified of her appeal hearing on 3 May 2016 and informed that Mr Hindle was to hear the appeal.

148. On 28 April 2016, Lynn Collins emailed the CQC asking whether there was any follow-up or anything else they needed. They replied on 3 May 2016 saying that there was nothing further they needed.

149. Lynn Collins later wrote to the CQC asking whether she would have failed in her statutory duty as a Registered Manager if she had not informed the CQC of the incident since it did not directly involve a service user. She received no reply to this letter.

150. The claimant sent in further grounds of appeal on 2 May 2016.

151. The appeal hearing took place on 3 May 2016. Mr Hindle, an independent HR adviser, conducted the appeal. Mr Giddins was present for most of the appeal hearing. The claimant's trade union representative asked if he could leave after giving evidence. However, Mr Hindle decided that Mr Giddins should stay. We accepted Mr Giddins' evidence that he stayed on the instruction of Mr Hindle; Mr Giddins did not ask to stay. Mr Giddins was asked by the claimant's trade union representative to produce the evidence he relied on. He left the meeting and came back with some documents. Very brief notes were made of the appeal hearing by Rujena Begum. If Mr Hindle made any notes, these have not been provided to us.

152. On 4 May 2016, Mr Hindle provided his appeal outcome on an ACAS form. This notified the claimant, without any reasons, that the decision to issue her with a written warning stood and that the decision was final.

153. Around 7 May 2016, Tony Giddins had a conversation with Lynn Collins about a comment the claimant had made in the appeal hearing about something she had overheard the respondent's accountant say to her accountant. By email dated 7 May 2016, Lynn Collins asked Tony Giddins to write an account of what the claimant said she had overheard.

154. Tony Giddins wrote to Lynn Collins on 7 May 2016 about things that the claimant had said in the appeal process about tax. He wrote that she said she had overheard her accountant say "it's to be hoped others don't have this issue", or words to that effect, and then the claimant said she heard the respondent's accountant stating "we don't pay anywhere near as much as we should". He wrote that these were the claimant's exact words. He wrote that he thought she then muttered "I hope no other colleagues have to go through such a hard time and that their contributions are correct".

155. Tony Giddins went on honeymoon after that email. Lynn Collins had told him to reflect while he was away but he still had concerns when he got back.

156. On 12 May 2016, the claimant's trade union representative wrote to Mr Hindle. She acknowledged the decision in the claimant's appeal and expressed disappointment with the lack of rationale. She also wrote that the union felt that the minutes of the meeting provided were woefully lacking in content and did not provide an accurate reflection of the conversations that were held in the appeal meeting. We have not seen any reply to this email from Mr Hindle.

157. At some point, Mr Hindle produced detailed reasons for his decision. These are dated 4 May 2016 but were not provided to the claimant until January 2017. Mr Giddins gave evidence that he was given a copy of the Hindle appeal report on his return from honeymoon. None of the respondent's witnesses have been able to explain the delay in providing the reasoned report to the claimant. Mr Hindle was not called to give evidence. Mr Hindle's reasons include a much more detailed account of the appeal hearing than appears in Ms Begum's notes. No notes from Mr Hindle have been disclosed. It is unclear on what basis Mr Hindle was able to produce such a detailed account if there were no detailed notes taken of the meeting.

158. The notes include a detailed review of the evidence. Mr Hindle recorded that there had been an allegation that the missing girl had been sexually abused in the flat of Newbarn tenant H by a 25-year-old man. Mr Hindle concluded that it was very clear that a safeguarding incident had occurred and there was a case for the claimant to answer. He wrote that his understanding was that the safeguarding requirement to report to the CQC was concerned with Newbarn's tenants, not visitors. Mr Hindle wrote that the claimant had been suspended pending an investigation, the further investigation never happened but this did not negate the previous investigations by the company. He concluded that another investigation after the suspension and reopening of the disciplinary process would not have added anything new to consider. Mr Hindle concluded, from documents he had seen, that the claimant was incorrect in alleging that she had been promised mediation in the recommendations from the grievance hearing.

159. Mr Hindle recorded that, at the appeal hearing, the claimant said that her problems with HMRC had been resolved but that she described an alleged overheard conversation between her accountant and the company's accountant who she reported as saying that Newbarn did not always fully pay taxes to HMRC. Mr Hindle wrote that he did not believe this issue to be within the scope of his remit to review the disciplinary penalty but he raised the issue as a matter of concern that need to be addressed by the respondent.

160. Mr Hindle concluded that there was a definite case for the claimant to answer. He wrote that it was clear from the evidence that she had failed to record the incident she had witnessed on 11 March 2015 and subsequently failed to report what she had seen to the company safeguarding lead, Lynn Collins. He agreed with the company's decision to impose a disciplinary penalty. He wrote: "SB failed to correctly carry out her duties and report potential danger to two 14-year-old visitors and a vulnerable young adult tenant. In my view it was a serious lapse and the company were justified in raising this with her in a disciplinary setting." He wrote that, considering all the available evidence, he found it inevitable that the claimant was found to be culpable in relation to the 1st and 3rd allegations. He wrote that both these allegations were listed in the company disciplinary procedure under definitions - gross misconduct leading to dismissal - and he believed the company had grounds to consider summary dismissal. In this light, he considered the penalty of a written warning to be fair and reasonable.

161. In a telephone call with HMRC on 13 May 2016, the claimant was told that the respondent had paid tax late.

162. On 25 May 2016, Lynn Collins wrote to the respondent's accountant. She informed the accountant that the claimant had said she had overheard a comment made by the respondent's accountant to the effect that "Newbarn Limited doesn't pay all of its taxes to HMRC." She asked the accountant to confirm whether or not a telephone conversation took place between him and the claimant's accountant regarding the claimant's tax/PAYE issues and, if so, what comment, if any, the accountant made in regard to Newbarn Limited not paying its full taxes.

163. The respondent's accountant replied to Lynn Collins on 25 May 2016, saying he recalled a telephone conversation with the claimant's accountant querying why the Revenue apparently had no trace of the deductions made from the claimant's salary. He wrote that he had told her that he could not understand this as they used a commercial payroll software to calculate the salaries and that Newbarn Limited paid all of its PAYE liabilities but not always by the due dates. He wrote that he did not have any written notes of the conversation.

164. Lynn Collins said in evidence that she was not aware the company had not paid over tax deducted for the 13/14 tax year until August 2015. However, from this email from the accountant, it appears she was made aware by 25 May 2016 that the company did not always pay its PAYE liabilities by the due dates.

165. On 27 May 2016, Tony Giddins sent to Lynn Collins an email which included allegations which formed the basis of later disciplinary allegations against the claimant. The claimant was not aware of this email at the time. Tony Giddins repeated what he had previously written about what the claimant had said she had heard the accountant saying. He added in this email: "I feel that her comment that

Newbarn Limited doesn't pay its contributions to HMRC is suggesting fraudulent activity. Other complaints and comments she made are allegations that you have not acted with integrity in relation to the handling of the disciplinary procedure that she has gone through, and also your handling of her DBS which she described as being deliberate bullying and harassment toward her." He wrote that he had now received a copy of Tony Hindle's appeal report and that the contents corroborated his concerns. He wrote that, in the appeal hearing on 3 May 2016:

> "Sue described a vulnerable adult [H] as having slight scale Aspergers and that she was capable of attending as a witness in her appeal hearing. My concern here is that Sue is prepared to put her own needs over those of a vulnerable adult and would be prepared to exploit a vulnerable adult for her own benefit and without any consideration for any distress and anxiety that this would cause [H]. It is concerning that Sue would diagnose a vulnerable adult whom she has not had any contact with for over 12 months. I believe that this is a breach of her professional boundaries and outside of her role as a support worker.
>
> "As mentioned above, in her comment that "we don't pay anywhere near as much as we should" (in regard to the company's HMRC contributions) she is accusing Newbarn Limited of fraudulent behaviour and has brought the company into disrepute.
>
> "She inferred that you lied when she said that you were the only person to use the "ambivalent". This is also the case when she has previously suggested that you have "confabulated" notes. I feel by using such a word she is undermining your character and position.
>
> "Sue also undermined your role and position as service manager by contacting CQC in regard to the safeguarding incident which took place on 11 March 2015; which is at the heart of Sue's disciplinary. I believe that this is further corroboration that she has no trust in your ability to follow CQC procedures and make decisions within the remit of your role as registered manager. This kind of behaviour also risks damaging the reputation of Newbarn Limited with CQC.
>
> "From comments made in the hearing it seems clear that Sue has no professional regard to the Leadership team at Newbarn in general. Stating the management is "rotten". It seems to me Sue holds little trust in either your character, skills and experience or the Leadership team in general."

166. On 28 May 2016, the claimant had a fall when at work. She completed her shift despite her injury. Her next working day was due to be 31 May. There is no allegation that the claimant did not report her absence appropriately on 31 May.

167. Lynn Collins drafted a letter dated 1 June 2016. Lynn Collins accepted in oral evidence that this letter was never sent and it was not seen by the claimant prior to these tribunal proceedings. It appears likely that it was not sent because of the claimant's sick leave. However, the contents of the letter shed light on the thought process of Lynn Collins at this time. She wrote that the organisation had decided it was necessary to conduct a formal investigation into the following comments made by the claimant at the appeal hearing on 3 of May 2016:

- "serious, spurious allegations regarding the company's financial conduct. Specifically, your claims that Newbarn Limited is knowingly not paying taxes to HRMC [sic]

- malicious, unfounded beliefs expressed when you describe the issues with your DBS forms as being caused deliberately and a type of "bullying and harassment".

- Intentionally seeking to discredit Newbarn by purposefully looking for a negative CQC report.

- Casting doubt on my integrity by repeated claims that I have "confabulated" facts relating to the events that took place on 18 and 19 March 2015.

- Unqualified judgement about a service user you described as being "slight scale Asperger's" which leads us to be concerned about your ability to recognise the vulnerability of the people we support."

168. Lynn Collins wrote further: "your extreme views and allegations which have the potential to bring the company into disrepute have resulted in a complete loss of trust and confidence in your professionalism and intentions towards the organisation." She wrote that there would be an investigation by an external adviser and, if it was found that there was a case to answer, the claimant would be invited to attend a formal disciplinary hearing. She wrote that the claimant would be suspended during the investigation due to the organisation's concerns regarding the undermining nature of her behaviour and the potential damage such conduct could cause to the business, colleagues, and clients.

169. The accusation that the claimant was making "serious, spurious allegations" regarding the respondent's financial conduct does not appear to be based on sound evidence. The claimant in the appeal hearing was quoting what she said she had heard from the accountant. Tony Giddins had not alleged that the claimant had, in the appeal hearing, made an allegation that the respondent was "knowingly" not paying its taxes. Although the respondent's accountant provided a different account to that of the claimant of what was said to the claimant's accountant, the accountant had written to Lynn Collins that he had told the claimant's accountant that Newbarn Limited paid all of its PAYE liabilities but not always by the due dates. This statement that the respondent did not always pay its PAYE liabilities by the due date did not support the underlying premise of the allegation, that it was clear that the respondent had in all ways complied with its obligations in relation to payment to HMRC of tax and NIC contributions deducted under PAYE.

170. Lynn Collins had not explored with the claimant what she meant by describing Lynn Collins as having "confabulated" facts.

171. We accept that Lynn Collins may have had some reason for some concerns. However, it appears to us that any concerns were exaggerated and magnified in this letter. Lynn Collins stated in her witness statement, in relation to this letter, that she intended to suspend the claimant because she considered her a "danger to the business". Lynn Collins was unable to explain in evidence why she took this view and there does not appear to be any sound basis for such a view.

172. Lynn Collins spoke with the claimant about the fall on 1 June 2016.

173. On 3 June 2016, the claimant wrote to Lynn Collins about issues to do with her payslips and income tax which needed to be resolved. The letter is in polite terms. It refers to errors being made by the respondent and seeks to reclaim the back tax from the respondent; the claimant stated that the reason she owed it was entirely down to the respondent's misadministration. The claimant does not accuse the respondent in this letter of knowingly not paying tax.

174. On 3 June 2016, the claimant spoke to Jill Kitching. The claimant said she anticipated being able to work on Monday 6 June. The claimant was asked to call on the Monday morning if she was not able to work. The claimant said she was asked to phone Jill who would be at work that morning. The respondent says that the claimant was asked specifically to ring the on-call phone number but the claimant disputes this.

175. On 6 June, the claimant did not feel fit to return to work. She tried ringing Jill Kitching's work phone and left a message on this. Unfortunately, Jill Kitching had left her phone at home. Jill Kitching tried ringing the claimant and left her a message. The claimant returned her call. There is a dispute as to the terms of the call between them. In the absence of evidence from Jill Kitching, we feel unable to determine what was said. We do not feel able to rely on Lynn Collins' notes as being an accurate record of what Jill Kitching said, in the face of the claimant disputing this record. We note also that Lynn Collins' letter of 6 June does not assert that the claimant was told to call the "on call" number, but, rather that it was the "practice" to ring that number to report absence, which the claimant disputes. Jill Kitching sent the claimant a text on 6 June giving the claimant the on-call number and asking her to call it on Wednesday before 8 a.m. if she was not going to be in. We note this text does not criticise the claimant for having rung Jill Kitching's mobile number that day.

176. On 6 June 2016, Lynn Collins wrote to the claimant. She began the letter: "On 28 May 2016, while at shopping for a service user you tripped and sustained an injury, which you felt was serious enough to prevent you from finishing your shift." Lynn Collins later wrote to the claimant that there was a missing "not" in this sentence and apologised for this. It was not obvious from the sentence that there was anything missing. The apparent statement that the claimant had not finished her shift, when she had done so, caused the claimant distress. We accept the evidence of Lynn Collins that there was an error in the letter in the omission of the word "not". Lynn Collins also wrote: "Despite your conversation with Jill on Friday last week, you failed to attend work as expected today. In your last exchange with Jill you explicitly stated that you would contact Newbarn this morning should you be unable to attend work as planned. You are well aware that practice dictates absence is reported using the on-call phone at the earliest opportunity to enable alternative arrangements to be put in place. Instead you left a voicemail on Jill's mobile phone. When Jill contacted you today after 11 am and asked why you had not used the on-call phone you stated that you do not have the number. I do not accept this as a reasonable explanation, and I'm disappointed by your lack of tenacity. Laura McKee or any one of your colleagues would have been able to provide the on-call number information if you had contacted them personally." Lynn Collins also reminded the claimant that, as her period of absence had now exceeded 7 calendar days, she was required to provide a fit note. She wrote that, without a valid fit note, the claimant's current absence was unauthorised. Since the claimant's first day of absence was 31 May 2016, it would

appear that the claimant was on her 7th day of absence at the time Lynn Collins was writing the letter.

177. We note that the respondent's sickness absence procedure requires employees to ring their manager within one hour of them starting work on the first day of sickness absence and on the 4th day of sickness absence if they are still unable to work. The policy does not make any reference to calling the "on-call" number.

178. The accusation of "lack of tenacity" caused the claimant particular distress. This accusation appears to us to be a strong allegation in circumstances where the claimant had made contact with the respondent by leaving a message for Jill Kitching.

179. The claimant wrote to Lynn Collins on 8 June 2016 in response to the letter of 6 June 2016. The claimant wrote that there were factual errors in Lynn Collins letter which she would address when recovered. She enclosed a fit note.

180. On 18 June 2016, Lynn Collins responded to the claimant's letter about tax and other matters. She reminded the claimant that they had previously offered support in resolving the tax issue and that she had requested a copy of the claimant's letter from HMRC that she produced at her grievance appeal hearing but the claimant had not responded to her request. She wrote that they wanted to help the claimant resolve this matter, but they were unable to do so without understanding fully all of the issues. Lynn Collins wrote: "In the 23 years that Newbarn Limited has been operating, I can assure you that it has always fulfilled its responsibilities to its employees and HMRC in terms of PAYE." Since the respondent's accountant had informed Lynn Collins less than a month before that he had told the claimant's accountant that they did not always pay deductions on time, it is difficult to see how Lynn Collins could have believed this statement to be completely true. Lynn Collins had not told the claimant of the accountant's response to her question. Lynn Collins wrote that she would endeavour to resolve the matters once she was in receipt of the letter from HMRC. For reasons that the claimant has been unable to explain to us, the claimant did not respond by sending a copy of the letter from HMRC.

181. On 29 June 2016, an employee, Ruby, wrote to Lynn Collins, informing her of a discussion she had had with the claimant. She informed Lynn Collins that the claimant had discussed with Ruby issues the claimant was having at work with the respondent. Ruby stated that the claimant had told her that "if her Union ship [sic] leader agrees that she has enough grounds then she is going to put in for constructive dismissal." Ruby wrote that she was aware that the claimant had previously mentioned this to her union but they had said she did not have enough grounds to go for constructive dismissal. Ruby expressed the opinion that the claimant had been planning to go for constructive dismissal for a very long time "and only returned to work on the basis of trying to make a stronger case." Ruby wrote: "when I met her when she came back to work after her sickness time before she said she was back to clear her name and will be leaving soon as she couldn't continue working for Newbarn."

182. Lynn Collins referred to an undated anonymous short statement as being received around the same time. However, from evidence we heard from Sam Moxham, it appears that this was produced at a later date, during the Sam Moxham

investigation, when Sam Moxham spoke to this employee at the suggestion of Lynn Collins.

183. On 1 July 2016, the claimant wrote to Lynn Collins. The claimant began by saying she wished to state her feelings regarding the tone and content of recent correspondence from Lynn Collins, to correct a number of factual inaccuracies in those letters and to share their impact upon her. She referred to the letters dated 6, 8 and 27 June 2016. She wrote that the letters were based on untruths, false statements and "confabulation". She asserted that reality, facts and truth were misrepresented. She wrote "the letters in style reiterate and repeat the sort of things which happened throughout my recent grievance, suspension, disciplinary hearing and appeal processes. Yet again untruths are repeatedly spoken by you as though they are confirmed facts. This style leaves me feeling attacked from day one of my sickness absence."

184. In particular, the claimant wrote that she found the accusation of lack of tenacity offensive and repugnant and wrote that she repudiated this. She also wrote that she repudiated what she described as a blatantly untrue accusation that she "chose" not to finish her shift on the day of her accident. She wrote that, contrary to Lynn Collins' assertion, she had completed her shift, despite being in considerable pain. She wrote that she had, throughout her absence, kept her line manager as fully informed as possible regarding her recovery, her healing process and her fitness for work. She wrote that she had hoped to be well on 6 June and had arranged to phone Jill that morning. Jill had told her that she was on-call that day so an early call would not be a problem and the claimant said she telephoned Jill soon after 8 am and left a message on her work's answerphone. She wrote that no request had been made to use the on-call phone. She stated that policy and practice had never been to contact the on-call phone in case of ongoing sickness absence and that, at a recent team meeting, all on-call staff made it very clear that the on-call line was for emergencies only and specifically mentioned staff using it regarding absences as not appropriate. The claimant wrote that Jill had left her work phone at home that day. The claimant stated that she did not have a work phone and she did not currently have the on-call number in her personal phone. She wrote that, of course, she had the on-call number as Jill gives it out on her work's phone message. The claimant commented: "the tangled web you weave Lynn is extremely difficult to navigate successfully or safely." The claimant wrote that she had kept Jill informed and would be clear regarding her return to work. She wrote that, in 3 years of working at the respondent, the process had always been to call one's line manager as soon as possible if unable to work. The claimant said she did this as soon as possible. She said she noted that the new contract issued in May 2016 stated the same regarding reporting absences. She wrote: "to suggest that the accepted practice is to contact the on-call number has never been relayed to me and feels like further confabulation. Make it up as you go along and shifting goalposts which fits with my experience regarding policies and procedures at Newbarn Ltd when in communication with you."

185. The claimant wrote: "The letters repeat for me feelings around the disciplinary proceedings where I was falsely taken to task and accused of breaking non-existent procedures. I feel yet again you are now continuing to needlessly and purposelessly, harass, victimise and use bullying tactics towards me." The claimant wrote that she enjoyed her work with tenants and her colleagues on the front line were second to none in commitment to tenants. She wrote: "the work with tenants can be edgy and

risky and I believe needs a good supporting management cradle as staff have to make difficult decisions minute by minute. Increasingly your managerial approach and style and my observations at work bring me to believe that Newbarn is not a safe space but an extremely risky one for both workers and tenants. I believe good management supports workers in their role thereby enhancing the service provided to clients."

186. Rebecca Dixon of Halo HR wrote to the claimant on 20 July 2016 in response to the claimant's letter to Lynn Collins of 1 July 2016. She wrote that, since much of the claimant's letter centred around her relationship with Lynn Collins, Rebecca Dixon felt it more appropriate that she should step in and address the claimant's concerns. She suggested arranging a meeting to discuss the claimant's feelings regarding Lynn Collins when she was ready to return to work. Rebecca Dixon referred to the claimant alleging that the respondent was not a safe space but an extremely risky one for both workers and tenants and referred the claimant to the respondent's whistleblowing policy and asked her to outline the nature of her concerns in writing, providing specific examples where possible, so that a formal investigation could be undertaken. Rebecca Dixon wrote another letter to the claimant on same day asking the claimant to reconsider giving permission for a medical report from the claimant's GP to be obtained; the claimant had previously refused a request for consent for the respondent to contact her GP.

187. By an email dated 27 July 2016, the claimant agreed to the respondent obtaining a report from her GP. The claimant also wrote that she was happy to attend a meeting with Rebecca Dixon to attempt to resolve the difficulties she had endured at work. She disagreed with the suggestion that this was a whistleblowing case but said it was a grievance she had regarding the tone, content and factual inaccuracies of recent correspondence to her from Lynn Collins which repeated previous patterns of unfair treatment she had experienced from her.

188. The claimant's GP wrote to Rebecca Dixon on 24 August 2016. The GP provided information regarding the claimant's condition following her accident. The GP wrote that, as the claimant was gradually improving, they would expect a return to work in the next couple of months but a definite date could not be given. The GP said they could not answer the questions about specific work-related adjustments and the job role and advised that a specialist occupational health physician be consulted.

189. Rebecca Dixon invited the claimant to a meeting to discuss the GP report. The claimant said that she was not well enough to attend in the near future and no meeting ever took place.

190. Sam Moxham of Halo HR was instructed by the respondent to investigate matters raised in Tony Giddins' email of 27 May 2016. She looked at the Hindle appeal report in relation to the allegations made by Mr Giddins.

191. Sam Moxham interviewed Lynn Collins in September 2016. The notes of this interview do not display the type of probing of the allegations and evidence relevant to the allegations which we would expect to see if this was a genuine attempt to see if there were sufficient concerns and likely evidence to justify disciplinary proceedings against the claimant. Sam Moxham asked Lynn Collins why she thought the claimant accused her of confabulation without anyone first having sought to

clarify with the claimant why the claimant made that accusation. Sam Moxham takes it as read that the claimant described a service user as "slight scale Asberger's" without investigating first whether the claimant agreed this was said. Sam Moxham asked Lynn Collins why it was important for employees to follow the absence procedure, without asking questions about what the procedure required and what the respondent considered the claimant had failed to do which the respondent considered she should have done. Sam Moxham took it as read that the claimant had claimed that the respondent was "knowingly not paying taxes" without investigating whether the claimant agreed this was said. This part of the investigatory meeting with Lynn Collins makes no acknowledgement that what Tony Giddins had taken issue with in his email was the claimant purporting to quote what the respondent's accountant had said. The question about why the respondent considered the claimant's comments "serious and spurious in nature" appears to have come directly from Lynn Collins as this appeared in her letter of 1 June 2016. Lynn Collins is not recorded as having volunteered the information that she obtained from the respondent's accountant that he had told the claimant's accountant that the respondent did not always pay over PAYE deductions on time.

192. The note of the investigatory meeting with Lynn Collins ended with Lynn Collins being noted as saying: "Sue has made repeated attacks on my integrity throughout the various processes that have taken place since March 2015. Consequently, I have lost trust and diffidence [sic] in her ability to safeguard vulnerable people and act with integrity." If this is a correct record of something said by Lynn Collins, it appears to us that she is asserting a causal link between the claimant allegedly making attacks on Lynn Collins' integrity and the claimant's ability to safeguard vulnerable people when there is no logical link between these matters.

193. At the suggestion of Lynn Collins, Sam Moxham interviewed an employee who Lynn Collins told her might have relevant information. That employee then wrote an anonymous statement in the following terms: "I am an employee at Newbarn and Sue Brennan has told me in person that she intends to take Newbarn to tribunal and is waiting until her union will back her, I do not want this to reflect on me." Lynn Collins also gave Sam Moxham the letter from Ruby. Sam Moxham spoke to Ruby but took no notes of their conversation. Sam Moxham did not share Ruby's letter and the statement from the anonymous employee with the claimant and seek her comments on what they had written.

194. The claimant provided a further fit note for her absence for the period 23 September to 7 October due to low back pain.

195. By letter dated 4 October 2016, Lynn Collins wrote to the claimant, informing her that: "after careful consideration, the company has decided it is necessary to conduct a formal investigation in relation to:

> "1. Your allegations at the appeal hearing held on 3 May 2016, specifically:
>
> - regarding the company's financial conduct, namely your claims that Newbarn Ltd is knowingly not paying taxes to HRMC [sic].
>
> - Your belief that the issues with your DBS forms have been caused deliberately and are a type of bullying and harassment.

- Your repeated claims that I have confabulated facts.

2. Your desire to involve a vulnerable service user, who you describe as being slight scale Asperger's, in the disciplinary process.

3. Your communication with the CQC regarding Newbarn's compliance with reporting procedures.

4. Your repeated failure to follow reasonable requests to comply with the company sickness absence reporting procedure."

196. These allegations are, in large part, in substance, repeats of the allegations in the letter of 1 June 2016 which was not sent to the claimant. The language has been toned down. There is a new allegation about repeated failure to follow reasonable requests to comply with the respondent's sickness absence reporting procedure. Sam Moxham informed us that, based on conversations Sam Moxham had had with Lynn Collins, she understood the allegation about the CQC communication to be that the claimant had not acted in good faith but contacting the CQC to spite the company.

197. Lynn Collins informed the claimant that Sam Moxham, an external adviser, would be in charge of the investigation. She wrote that, if it was found that there was a case to answer, the claimant would be invited to attend a formal disciplinary hearing.

198. By letter dated 7 October 2016, Sam Moxham invited the claimant to an investigation meeting on 14 October. The allegations to be discussed were as set out in the letter of 4 October 2016.

199. The claimant provided a further fit note dated 10 October 2016 covering the period 7 October to 7 November 2016. The reason for the claimant's absence from work changed on this fit note to being because of stress. Further fit notes for stress followed, covering the period 7 to 21 November and 5 December to 9 January 2017.

200. By letter dated 9 December 2016, Sam Moxham invited the claimant to arrange a meeting in January.

201. On 15 December 2016, the claimant obtained a retrospective fit note covering the period 18 November to 5 December.

202. Some time in January 2017, the claimant was given a copy of Mr Hindle's appeal hearing report.

203. In January 2017, the claimant informed her manager, Laura, by phone that her GP had said she was fit to return to work.

204. On 10 January 2017, the claimant was informed by telephone that she was suspended from work. This was confirmed by letter. Lynn Collins wrote that the company was suspending the claimant due to the serious nature of the allegations and that they could not let the matter pass, regardless of the timeframe and the claimant's absence.

205. An investigatory meeting with Sam Moxham took place on 23 January 2017. There are several sets of notes of this meeting in the bundle. There are the original notes taken by Zoe Bruce, the note taker. There is also a set of notes with annotations which appear to be largely, if not completely, those of the claimant. It does not appear that there was an agreed set of notes. Zoe Bruce's notes run to 10 pages and we pick out only some points which we consider of significance.

206. The claimant tried to submit a grievance at the meeting but Sam Moxham refused to accept this, saying that the claimant would have to go through the grievance procedure. The claimant's representative agreed that they could look at that separately but said it should be heard by somebody independent.

207. In relation to a number of allegations, the claimant asserted that the words used were those of Tony Giddins, rather than her words and phrases e.g. an accusation of bullying and harassment in relation to the DBS matter and the description of the tenant as having "slight scale Asperger's". The claimant expressed a concern that she could be disciplined for what she said at this investigation meeting. This was clearly a concern which had arisen because the matters now being investigated as potential disciplinary charges had arisen from things said in the appeal hearing with Mr Hindle. The claimant and her representative explained "confabulation" as being where things have been put together to make one thing that is not correct and other people making things up which you say. The claimant gave some examples of what she considered to be confabulation by Lynn Collins. If Sam Moxham went back to Lynn Collins after this meeting to address with her points made by the claimant, there is no record of a further investigatory meeting.

208. The claimant sought to share with Sam Moxham financial evidence. Sam Moxham refused to take this, stating: "the financial evidence isn't relevant to our meeting today as we are discussing the items on the letter. You need to raise this with them yourself." This was despite one of the allegations being that the claimant had said that the respondent was knowingly not paying taxes to HMRC, in relation to which it would appear to us relevant to look into not only what the claimant said but whether it was true. Sam Moxham said this would be something that she would have to discuss at her grievance but not in this meeting. The claimant referred to the respondent's accountant replying, in answer to a question about whether they paid tax, "not often enough". The claimant said she brought it up because of complications of her not being able to claim her pension and errors in the years 13/14 and 14/15 and it was causing a lot of problems. She said she did not make an accusation. Sam Moxham said in evidence at this tribunal that she did not recall looking at whether what the claimant said about the tax situation was true. She said she found the "tax thing" "confusing" and "perhaps I didn't want to look into it."

209. Sam Moxham asked the claimant in general terms about sickness absence reporting but did not address with her any specific instances where the respondent alleged that she had not complied with the required procedures. The claimant's trade union representative asked whether there were any particular dates the respondent was referring to. Sam Moxham replied: "yes these will be provided in the pack to Sue". This indicates to us that a decision had already been taken to go to a disciplinary hearing, even though the investigation had not been completed. Sam Moxham did not put to the claimant what Lynn Collins has alleged that Jill Kitching is reported by the respondent to have said to the claimant about reporting her absence.

210. Sam Moxham asked the claimant about reporting to the CQC, but did not ask her why she had delayed reporting, even though Sam Moxham told us that her view was she did not think the claimant had made the disclosure in good faith since disclosure was made more than one year after the event. The claimant volunteered that she had raised the matter about the CQC being alerted several times with the respondent and that she had been told it was being dealt with, it was not her business and also that it did not need reporting. The claimant said she doubted what Lynn Collins had said so she spoke to CQC. She said she felt she had a duty as a person and a member of staff.

211. We have been shown documents which Lynn Collins compiled regarding the claimant's sickness absence and the DBS matter. Sam Moxham relied on these documents in reaching her recommendation that there should be disciplinary proceedings. However, these documents were not shared with the claimant and Sam Moxham did not go through the matters on those documents with the claimant in detail. Sam Moxham agreed that the claimant was saying at the investigatory interview, in relation to sickness absence, that she had done everything she was required to do.

212. Prior to the outcome of the investigation, the claimant submitted a formal grievance on 29 January 2017. The grievances included lack of implementation by the respondent of the recommendations made by Anna Edwards, in particular the recommendation that Newbarn Limited arrange mediation between Lynn Collins and the claimant. The claimant complained about the way she had been treated by Lynn Collins since her return to work, specifically in relation to Lynn Collins' letter following her accident at work regarding her lack of tenacity, which the claimant stated was factually erroneous. The claimant wrote that she had been given a copy of an email from Tony Giddins a couple of days prior to the investigatory meeting. She described the email as inaccurate, uncorroborated by evidence and defamatory.

213. We have been shown an investigation report prepared by Sam Moxham. The report is undated. We have had no evidence that this was sent to the claimant. It was not noted as being enclosed with Kiaran Burke's letter of 24 February 2017 which notified the claimant of a disciplinary hearing.

214. Sam Moxham concludes in her report that the findings from the investigation show sufficient evidence that a disciplinary offence has been committed. However, she does not identify the disciplinary offence or give her reasoning for this conclusion. She states that the findings from the investigation support the allegation that the employee failed to follow the correct absence procedure. Again, she does not give her reasoning for this conclusion. She also states that the findings from the investigation demonstrate the employee undermining the employer. The report does not identify the ways in which the claimant is alleged to have undermined the employer and what, if any, disciplinary offence this may constitute. Again, Sam Moxham does not give any reasoning for this conclusion.

215. Sam Moxham gave evidence that she concluded that the respondent acted entirely reasonably and was very fair. When asked the reasons for this conclusion, she referred to the relationship she had with the respondent, the information she had seen, that she had worked with Lynn Collins and believed Lynn Collins to be very fair. She said that, from the investigation and the working relationship with the respondent, she had always found them very fair.

216. The respondent sent 2 letters to the claimant dated 24 February 2017. It appears these were sent by post and email. However, at the time, the claimant only had sporadic access to email. We accept that the claimant did not receive the letters until 2 March 2017 when she collected them from her neighbour. Her neighbour had signed for the letters on 1 March 2017.

217. One letter was from Kiaran Burke, notifying the claimant that she was required to attend a disciplinary meeting on 8 March 2017. Sam Moxham said she did not have any involvement in drafting this letter, that they were not working with the respondent at the time, although Kiaran Burke wrote that the disciplinary hearing would be at Halo HR offices. Lynn Collins also said that she had no involvement with this letter and that Kiaran Burke was very independent minded. Since Mr Burke sadly passed away before this tribunal hearing, we had no evidence from the respondent to explain the contents of this letter.

218. Mr Burke warned the claimant in this letter that, should the allegations be upheld, then she would be liable to disciplinary action which may include dismissal. The allegations were expressed as follows:

> "1. Your allegations at the appeal hearing held on 3 May 2016, specifically: regarding the company's financial conduct, namely your claims that Newbarn Limited is knowingly not paying taxes to HMRC. This may be construed as an action that brings Newbarn's good standing and reputation into disrepute with its own workforce.
>
> 2. Your communication with CQC regarding Newbarn's compliance with reporting procedures. This may be construed as a frivolous or malicious action made in bad faith with mischievous intent.
>
> 3. Your repeated failure to follow reasonable requests to comply with the company sickness absence reporting procedure. This may be regarded as a refusal to carry out a reasonable instruction from authorised personnel and a flagrant disregard of Newbarn Limited's rules, policies and procedures.
>
> 4. You informing a colleague of your intention to return to work so as to manipulate events to give cause for a constructive dismissal claim. This may be construed as a cynical attempt to dishonestly use the company sickness absence scheme to collect evidence against Newbarn Limited in order to support a contrived claim for constructive dismissal."

219. The fourth allegation is a new allegation that was not put to the claimant in the investigation.

220. Mr Burke wrote that the allegations fell within the remit of gross misconduct in the company's disciplinary procedure. He wrote that the disciplinary hearing would be chaired by him, with Rebecca Dixon in attendance to offer support and take notes. He advised the claimant of her right to be accompanied at the meeting.

221. The disciplinary hearing was scheduled for 8 March. However, following a request from the claimant, Mr Burke agreed to an extension of time to allow the claimant take advice from her trade union and a revised date for the disciplinary hearing of 15 March was agreed.

222. The second letter to the claimant dated 24 February 2017 was from Lynn Collins. This related to the claimant's grievance. Lynn Collins wrote that, as far as she was aware, there was no recommendation that mediation take place and that this was not documented in the report's recommendations. Lynn Collins wrote that the word "not" was omitted from her letter dated 6 June 2016. She apologised for the misunderstanding and distress that the omission of that word had caused. Lynn Collins asked for clarification of other points of the claimant's grievance. In relation to the tax matter, Lynn Collins wrote that, as the claimant had not provided any information she had requested, she did not see how she could help move the matter forward. She wrote that she had stated that they needed the letter that she produced at her grievance appeal hearing with Nigel Finch in order to understand and resolve her issues where possible. Lynn Collins wrote that, if the claimant was not satisfied with the responses in the letter, she should contact her to raise any questions or concerns and/or to request a formal grievance hearing.

223. By letter dated 14 March 2017, the claimant resigned with immediate effect. The letter runs to just over 3 pages. It includes an assertion that outcomes to processes at the respondent are decided unilaterally by management before the processes take place and, therefore, are not fair when scrutinised. She wrote:

> "The additional allegation against me and the language used in your letter 24.02.17 indicates to me your belief that I am without integrity and also demonstrates to me, your complete lack of trust in me. In the same letter you appear to make an only lightly veiled threat in my direction regarding any recourse I may choose to take with regards to finding a solution via employment law.
>
> "The response from Lynn Collins of the same date dismissing my recently submitted formal grievance and the genuine grievances within that added to the above leads me to believe that there has been a fundamental breach of my contract around mutual trust and support from management which would seem essential to me if as a support worker I am expected to successfully embark in risky and edgy work with vulnerable and damaged adults. This work clearly requires a positive and supportive holding role from management which I have found lacking at Newbarn Limited."

224. The claimant wrote of experiences with previous grievance and appeal meetings, stating:

> "I am because of that nervous of engaging with any internal processes within Newbarn Ltd as experience has taught me that just being engaged in processes has historically and repeatedly led to further disciplinary action. I anticipate that if I were to engage in the imminent disciplinary process there would inevitably be a further breach of contract as I anticipate that the outcome of that meeting is already predetermined by management at Newbarn Ltd.
>
> "Newbarn Ltd's actions historically and to date have destroyed any confidence and trust I held in them. Their behaviour during scapegoating, disciplinary, grievance and appeals procedures and the harsh and disproportionate treatment, different to that visited on colleagues dished out to me alone has eroded any trust I had in them and I fear that to engage again in any

> processes could potentially damage my professional reputation and career prospects.
>
> "I believe that Newbarn Ltd is making it very clear that they have no trust whatsoever in my abilities and I feel nothing I say will make any difference as my experiences as stated by me will be redesigned in the words of others as has happened historically during Newbarn Ltd's procedures."

225. The claimant wrote that the most recent allegations from the respondent had spurred her to resign from her post.

226. The claimant notified ACAS under the early conciliation procedure on 11 June 2017. The ACAS certificate was issued on 17 July 2017. The claimant presented a claim to the tribunal on 16 August 2017.

227. The respondent's representative spent some time questioning the claimant about her political beliefs. It is clear from the claimant's answers that she holds strong socialist beliefs. However, we were not satisfied that she had any wish to leave her job because of any mismatch between her political beliefs, including a belief that certain functions should properly be carried out in the public, rather than the private, sector, and the respondent organisation. We accept that she considered the work being done by the respondent to be worthwhile and was happy to be doing that work and working alongside colleagues whom she admired.

228. The claimant was also questioned about her wish to spend time with her grandchildren. We accept the claimant's evidence that her work pattern with the respondent enabled her to spend the time she wished to spend with her grandchildren.

Submissions

229. This case did not involve any novel points of law.

230. We do not seek to summarise the parties' submissions in relation to the evidence and the findings of fact they urged us to make. We set out in summary form the legal submissions made by the parties.

231. Mr Lewis, on behalf of the respondent, produced two sets of written submissions, one at the start of the hearing and further written submissions at the stage of submissions. He made brief additional oral submissions. We agreed with his analysis of the legal principles to be applied.

232. Mr Lewis's principal point in relation to the constructive unfair dismissal claim was that the legal test for a breach of contract is a demanding and high one and that it is an objective test. He submitted that the conduct relied upon by the claimant was not sufficient to cross the relevant threshold and/or the respondent had "reasonable and proper cause" for such conduct. Therefore, there was no repudiatory breach of contract and the claim must fail.

233. Mr Lewis submitted, in relation to the protected disclosure detriment claims, that these were all presented out of time and must fail for lack of jurisdiction. He submitted that the burden was on the claimant to say why it was not reasonably

practicable to present the claims in time and she had failed to discharge that burden. He also submitted that the disclosures were not genuinely made in the public interest but were made for private interest, so did not attract the protection of the legislation.

234. In relation to the s.103A unfair dismissal claim, Mr Lewis submitted that at least one proven protected disclosure must be the "principal" reason for the dismissal.

235. The claimant produced some written submissions and made some additional oral submissions. The written submissions were principally in relation to the protected disclosures, identifying disclosures and detrimental treatment. The written submissions also deal with the constructive "ordinary" unfair dismissal claim, identifying the "final straw" as being the issuing of a disciplinary hearing invitation dated 24 February 2017. The claimant's written submissions did not address the s.103A unfair dismissal claim. We do not seek to summarise the written submissions, which largely relate to the facts, but have referred to these to assist us in understanding the claimant's case when reaching our conclusions.

236. The claimant made brief oral submissions in which she submitted that her constructive dismissal arose because of making protected disclosures. She submitted that the disciplinary, grievance and appeal processes were deeply flawed. She said that this undermined trust but she continued working because she loved her work and because of her co-workers. She hoped to clear her name. She said the February 2017 letter left her no alternative but to resign.

The Law

237. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

238. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

239. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*, said that the tribunal must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

240. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited 1986 ICR 157 CA.* The last straw does not have to constitute unreasonable or blameworthy conduct, but it must

contribute, however slightly, to the breach of the implied term of trust and confidence: *Omilaju v Waltham Forest London Borough Council 2005 ICR 481 CA.*

241. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* the Court of Appeal reasserted the orthodox approach to affirmation of the contract and the last straw doctrine i.e. that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation. The Court of Appeal set out the questions the tribunal must ask itself in a case where an employee claims to have been constructively dismissed:

> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

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

243. In cases, such as this one, where the claimant has sufficient service to bring a claim of "ordinary" unfair dismissal, in relation to the claim of "automatic" unfair dismissal, the claimant bears an evidential burden to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason that the claimant is advancing. One the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, what was the reason or principal reason for dismissal.

244. Section 47B(1) ERA provides: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

245. What constitutes a protected disclosure is defined by sections 43A to 43H ERA. Section 43A provides: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

246. Section 43B(1) provides:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

247. Disclosures to the employer or to a prescribed person (as defined in s.43F) are included in the disclosures made in accordance with sections 43C to 43H. The Care Quality Commission is a prescribed person.

248. Section 48(2) ERA provides that in relation to a complaint including a complaint that the worker had been subjected to a detriment in contravention of section 47B: "On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

249. For a detriment claim to succeed, the protected disclosure need only be a "material factor" in causing the detriment; it does not have to be the only or principal reason for the detrimental treatment.

250. There may be circumstances where a distinction may be made between the fact that someone has raised a protected disclosure and the manner in which they have done so.

251. The time limit for presenting a complaint of protected disclosure detriment is set out in section 48:

> (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures , the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

252. If notification is given to ACAS of a potential claim within the primary time limit, the period of conciliation is added onto the normal time limit, subject to there being at least a month beginning with the date of the certificate to present a claim in time. If notification to ACAS is made outside the primary time limit, the period of conciliation has no effect on the normal time limit.

Conclusions

Constructive unfair dismissal

253. The claimant relied on the matters described as incidents 1-13 in the agreed list of issues as individually, or collectively, constituting a breach of the implied duty of mutual trust and confidence. The agreed list of issues refers only to the date of these incidents. To understand what is complained about, we need to refer to the schedule of incidents prepared by the claimant in response to the order made at a preliminary hearing on 30 November 2017 and further schedule prepared in response to orders made at a further preliminary hearing on 9 May 2018. As we note, in considering some of these alleged incidents, it is not always clear from the schedule exactly what the claimant is complaining that the respondent did or failed to do. The main theme is the claimant's belief that disciplinary action taken against her was not justified and was scapegoating her because of concerns the police raised about the respondent's operation.

254. Where we conclude that an incident can form part of a breach of the implied duty of mutual trust and confidence, we have concluded that the respondent acted without reasonable and proper cause.

Incident 1 – 19 March 2015

255. This relates to the meeting between the claimant and Lynn Collins on 19 March 2015, following the police visit on 18 March 2015, which the respondent later described as an investigatory meeting. The claimant alleges that Lynn Collins acted dishonestly and in bad faith at this meeting; that she did not, during the meeting, suggest it was an investigatory meeting, although she later did; and she produced notes from the meeting which were wholly false and did not reflect their discussion.

256. We found that Lynn Collins wanted to meet the claimant because of concerns she had about what the claimant had seen in tenant H's room prior to 18 March 2015 and what the claimant had done (see paragraph 25). We conclude that, at this stage,

there was something to be looked into as to whether what the claimant had seen should have been identified by the claimant as a potential safeguarding incident and reported in some way. We found that the claimant said the things recorded by Lynn Collins in her handwritten notes taken during the meeting and then set out in more detail in the typed note (see paragraph 26). Lynn Collins did not tell the claimant it was an investigatory meeting, although it was later described as such.

257. The claimant has not satisfied us, on a balance of probabilities, that Lynn Collins acted dishonestly and in bad faith at this meeting. Lynn Collins did not tell the claimant at the time that this was an investigatory meeting. Although Lynn Collins had received advice from an HR consultant to speak to the claimant to investigate further the concerns she had about what the claimant had done or failed to do, it is unclear to us whether Lynn Collins had it in mind herself, at the time, that this was a formal investigatory meeting which might lead to a disciplinary hearing. We do not consider that there was anything wrong in Lynn Collins speaking to the claimant to clarify what the claimant had seen in tenant H's flat and done on a date prior to the police visit. Our concern arises from the retrospective labelling of the meeting as an investigatory meeting and the adequacy of the investigation prior to commencing formal disciplinary proceedings. We deal with this as part of incident 2, rather than as part of incident 1. We do not consider the holding of the meeting itself or the way Lynn Collins acted in this meeting can form part of a breach of contract.

258. The claimant has not proved, on a balance of probabilities, that the notes from the meeting were wholly false; indeed, we made a finding that they reflected what was said at the meeting (see paragraph 26).

259. We conclude that this incident is not, in itself, a breach of contract, and cannot form part of a breach of contract.

Incident 2 –18 March 2015

260. Although the claimant gives the date of this incident as 18 March 2015 in her particulars, the substance of the complaint is that disciplinary proceedings were instigated against her following the police visit. The claimant alleges that this was a clear attempt to blame her for the concerns raised by the police about the respondent's lack of procedures around visitors and safeguarding.

261. The claimant was notified on 23 March 2015 that disciplinary proceedings were to be taken against her. The decision to take disciplinary action must, therefore, have been taken in the period 19-23 March.

262. We conclude that the investigation before deciding to take disciplinary proceedings was inadequate. Lynn Collins has accepted that, from 19 March 2015, she was aware the claimant was saying that she had spoken to a manager on the day she had seen the visitor in tenant H's room about what she had seen. Lynn Collins made no attempt to check with managers (other than those in the team meeting on 18 March 2015) about what the claimant had said and to whom.

263. There was no meeting with the claimant which could properly be described as an investigatory or fact finding meeting prior to the disciplinary hearing. The meeting on 19 March 2015 was retrospectively described as an investigatory meeting (see paragraph 38) but we conclude that it did not meet the requirements to constitute an

investigatory meeting as described in the ACAS Code of Practice on disciplinary and grievance procedures (the ACAS Code). The ACAS Code does not require the holding of an investigatory meeting with the employee before proceeding to a disciplinary hearing in all cases, although it states that, in some cases, the necessary investigations prior to a disciplinary hearing may require the holding of such a meeting. The ACAS Guide on Discipline and Grievances at Work (the ACAS Guide) states that, if an investigatory meeting is held with the employee, the employee must be given advance warning and time to prepare. The claimant was not given any advance warning that an investigatory meeting was to be held on 19 March 2015 and of potential disciplinary matters which were to be the subject of that meeting. We conclude that this was the type of case where an investigatory meeting with the claimant was required before a decision as to whether or not to take disciplinary action. The respondent needed to alert the claimant to what disciplinary offences they considered might potentially have been committed and to explore with the claimant what she saw and did and her understanding of the obligations the respondent considered might have been broken. An investigatory meeting of the type Anna Edwards held with the claimant on 15 April 2015, after the aborted disciplinary hearing, should have been held before the respondent decided to take disciplinary action.

264. The first paragraph of the letter of 23 March 2015 (paragraph 34) contains an allegation which does not reflect the true position. Nothing said on 18 or 19 March had suggested that the claimant was a witness to an incident the police were investigating. The allegations were not set out in sufficient specificity in the letter for the claimant to be able to understand what was alleged against her. The letter warned the claimant that a possible outcome was dismissal.

265. We conclude that the respondent was proceeding to a disciplinary hearing without a sound basis for doing so. This is supported by the fact that the disciplinary hearing on 1 April 2015 was aborted so that there could be a proper investigation by an independent person.

266. We conclude that proceeding to a disciplinary hearing on the basis of an inadequate investigation, without a sound basis for doing so, and without notifying the claimant in sufficient detail of the allegations she was facing means that this incident could form part of a breach of the implied duty of mutual trust and confidence.

Incident 3 – 1 April 2015

267. The claimant refers to the aborted disciplinary hearing on 1 April 2015. It appears that she does not complain about the disciplinary hearing being aborted (considering this to have been a correct decision by Anna Edwards), but about disciplinary proceedings being taken to that point, with a failure to hold an investigation or produce an investigatory outcome report. It appears to us that this, in effect, deals with the same matters we have addressed in incident 2, rather than being a separate incident.

Incident 4 – 27 May 2015

268. The date given is the date of the claimant's grievance hearing conducted by Laura Drinkwater. Many of the matters the claimant has included under this heading

are dealt with in incident 2. The claimant alleges, in addition, that the respondent was mishandling her income tax and National Insurance payments to HMRC.

269. On 7 April and 10 April 2015, the claimant wrote to Lynn Collins about her tax situation, telling her that she had discovered that tax and national insurance contributions had not been passed on appropriately to HMRC (see paragraphs 48-49). Lynn Collins replied on 16 April, saying she had contacted their accountant and passing on his response and concluding that the claimant should contact her if she needed any further information or clarification (see paragraphs 55-56).

270. The claimant raised the matter again in her grievance of 17 April 2015 (see paragraphs 57-58). The respondent arranged for Laura Drinkwater, an HR consultant, to deal with the grievance and a grievance hearing was held on 27 May 2015. Matters considered by Laura Drinkwater at the grievance hearing included the allegation that the respondent had mishandled income tax and not paid national insurance and income tax contributions in relation to the claimant's employment from 2013.

271. We conclude that, at this stage, there was nothing in the way the respondent was dealing with the questions the claimant had raised about her tax and national insurance that could constitute individually, or together with other matters, part of a breach of contract.

272. The tribunal is unclear what, if any, additional complaint was intended by the reference to "a wider management approach by Newbarn Ltd around health and safety which has eroded my trust in them" so we do not conclude that whatever was intended by this, if an additional matter, forms part of a breach of contract.

273. The claimant refers to Lynn Collins denying that mediation was recommended in the outcome to the grievance prepared by Laura Drinkwater. Mediation was recommended but never carried out. We deal with the denial of the mediation recommendation in a letter of 24 February 2017, in incident 13. We conclude that there is nothing in incident 4, which is not dealt with under the heading of other incidents, that could form part of a breach of contract.

Incident 5 – June 2015

274. The claimant raises a number of matters under this heading. One is that the claimant was not allowed to view CCTV footage.

275. Two other employees viewed footage before the police asked for footage and were given a DVD of this. When the claimant later asked to view footage, Tony Giddins refused. We found that Mr Giddins refused because the police now had a copy of the footage and Mr Giddins did not see any need for any employees to spend further time viewing CCTV footage (see paragraph 33). We conclude that the respondent had reasonable and proper cause for not allowing the claimant to view the footage at this point.

276. The claimant asked again to view footage in relation to disciplinary proceedings resurrected in March 2016. Lynn Collins refused the claimant's request for CCTV footage. She wrote that the disciplinary matter did not centre around whether the man in question was the gentleman that the police were investigating;

rather it was about the claimant's response to seeing an older man in a tenant's bedroom i.e. her failure to follow a process and recognise the importance of communication (see paragraph 110). We conclude that the respondent had reasonable and proper cause for not allowing the claimant to view footage. CCTV footage would not have proved anything relevant to the claimant's defence to disciplinary proceedings.

277. The claimant also refers to not being allowed to use tenant H as a witness. This relates to the disciplinary proceedings resurrected in March 2016 (see paragraph 109). We conclude that it was reasonable for the respondent to refuse the request, given the vulnerability of the tenant and the fact that, by then, nearly a year had passed since the events the claimant wanted tenant H questioned about.

278. We conclude that these matters cannot form part of a breach of contract.

279. The claimant also refers to tax issues and the mediation recommendation under this heading. These matters are dealt with under the heading of other incidents.

280. We conclude that there is nothing clearly raised in relation to incident 5 which is not dealt with elsewhere which could form part of a breach of contract.

Incident 6 – 3 May 2016

281. This is the date of the disciplinary appeal hearing conducted by Mr Hindle. The claimant complains that Tony Giddins, who was a witness, remained through the whole appeal, interjecting on all points, despite the objections of the claimant's trade union representative. The claimant also complains that no rationale was given for Mr Hindle's decision.

282. In relation to the presence of Mr Giddins throughout the disciplinary hearing, we found that this was Mr Hindle's decision. We have accepted Mr Giddins' evidence that this was not at Mr Giddins' request or instigation (see paragraph 151). We did not hear evidence from Mr Hindle so heard no evidence from the respondent to explain Mr Hindle's decision that Mr Giddins should stay. We conclude that this was inappropriate in the face of objections from the claimant's trade union representative. Once Mr Giddins had given his evidence, his role at the appeal hearing was over. His continued attendance whilst his decision was being scrutinised could give the appearance of unfairness. In fact, Mr Giddins' continued presence led to him raising concerns with Lynn Collins about things he alleged the claimant said in the appeal hearing which led to further disciplinary proceedings, although the claimant would not have been aware that this might happen at the time.

283. The claimant was given Mr Hindle's decision on an ACAS form, without any reasoning, following the appeal hearing. The decision and reasons had not been given orally at the hearing. Although the claimant's trade union representative wrote to Mr Hindle on 12 May 2016 expressing disappointment at the lack of rationale (see paragraph 156), the claimant was not provided with a copy of Mr Hindle's reasons until January 2017. This failure has been unexplained by the respondent. Although the ACAS Code states only that employees should be informed in writing of the results of an appeal hearing as soon as possible, the ACAS Guidance states that an employee should be informed of the results of the appeal and reasons for the

decision and this should be confirmed in writing. The claimant was not informed of the reasons for the decision until January 2017.

284. We conclude that these are matters which do not individually constitute breaches of contract but could form part of a breach of the implied duty of mutual trust and confidence.

Incident 7 – 27 May 2016

285. This is the date of Tony Giddins' email containing complaints about the claimant, arising from things said by the claimant in the appeal hearing with Mr Hindle (see paragraph 165). The complaints in this email formed the basis of subsequent disciplinary proceedings against the claimant. The claimant did not see this email until the Sam Moxham investigation. Mr Giddins was expressing concerns he had about the claimant following the appeal hearing. We conclude that this email itself cannot form part of a breach of contract. The substance of the claimant's complaint is rather what the respondent did, following on from Lynn Collins receiving this email. We deal with this later, in relation to incident 13.

Incident 8 – 29 March 2016

286. This is the date of the disciplinary hearing conducted by Mr Giddins. The claimant complains of the conduct of this hearing and procedural errors raised by the claimant's trade union representative and the outcome of the hearing, which was to issue the claimant with a written warning.

287. Mr Giddins began the hearing by welcoming them to the appeal. We have found that this was a mistake on the part of Mr Giddins who was inexperienced in dealing with disciplinary hearings (see paragraph 117). The claimant also complains that Mr Giddins did not wait for the evidence of other witnesses the claimant had written to, before making his decision. We have found that Mr Giddins made his decision, without waiting for this further evidence, on the basis that he assumed, in the claimant's favour, that the further evidence would be consistent with the evidence already obtained which was favourable to the claimant (see paragraph 122). We conclude that these two matters are not capable of forming part of a breach of contract.

288. We have found that there was no investigation outcome prior to the resurrected disciplinary hearing and there appears to have been no further investigation during the claimant's suspension, before the decision to require the claimant to attend a further disciplinary hearing and little, if any, further investigation prior to the disciplinary hearing (see paragraph 114). We conclude that this failure can constitute part of a breach of the implied duty of mutual trust and confidence.

289. The allegations the claimant was to face were not clearly set out in the letter requiring the claimant to attend the disciplinary hearing and the attempt from Lynn Collins to clarify the allegations contained an inaccuracy (see paragraphs 99 and 101-102). We conclude that this failure can form part of a breach of the implied duty of mutual trust and confidence.

290. In relation to the outcome of the hearing, Mr Giddins wrote: "On balance of probability I think it is fair to say that the scene you witnessed was one which

warranted further action, and as such it is appropriate to issue you with a first written warning for your failure to follow the Safeguarding Adults Policy." If Mr Giddins reached a reasoned conclusion, he did not explain his reasons for this conclusion. We do not consider that this outcome meets the requirements of the ACAS Code to set out the nature of the misconduct in that it fails to explain to the claimant what part of the Safeguarding Adults Policy she had been found not to have followed. We conclude that the failure to provide the claimant with a reasoned conclusion can form part of a breach of the implied duty of mutual trust and confidence.

291. As we noted at paragraph 132, Mr Giddins' response to the allegation of "confabulation" was to consider the allegation inappropriate by reason of the experience and position of Lynn Collins; a response which appears to be based on loyalty to the organisation and to Lynn Collins (with whom he had worked in a previous organisation), without considering any evidence relevant to the truth or otherwise of the allegation. This response suggests to us the possibility of a lack of impartiality on the part of Mr Giddins in his role as a disciplinary officer. We consider it possible that Mr Giddins was influenced, perhaps subconsciously, by his loyalty to the organisation and Lynn Collins, to reach a conclusion which was not soundly based on the evidence.

292. We dealt, at paragraphs 124-129, with Mr Giddins' evidence about what parts of the Safeguarding Adults' Policy he concluded the claimant had breached. We noted that Mr Giddins had not identified the relevant parts of the policy in his outcome letter or witness statement. We did not find his explanation as to what he concluded the claimant breached and why to have been persuasive. We consider it more likely than not that, if Mr Giddins had identified specifically at the time which parts of the Policy he considered the claimant had breached and why, he would have set this out in writing in the outcome letter and in his witness statement. We consider it more likely that Mr Giddins was, in oral evidence, retrospectively trying to identify breaches of the Policy. If he genuinely reached the conclusions at the time about the parts of the Policy the claimant breached, he has not satisfied us that this conclusion was soundly based.

293. The parts of the policies identified by Mr Giddins do not, on our reading of the polices, appear to have been breached by the claimant. We were not referred to any other parts of the policy which were said to be relevant.

294. We conclude that there was no sound basis for issuing the claimant with a warning in these circumstances. We conclude, therefore, that the issuing of the warning can form part of a breach of contract. It could, potentially, be a breach of the contract alone. However, had nothing else followed this on which the claimant could rely, there would be an issue of affirmation of the contract, given the time which passed before the claimant's resignation. However, in accordance with the authority in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation.

Incident 9 – 1 April 2016

295. This refers to matters dealt with in incident 13 so we do not address them under this heading.

Incident 10 – January to August 2015

296. This refers to an allegation that the respondent took no steps to assist the claimant in resolution of her tax and national insurance issues. Mr Finch said, in the grievance appeal hearing outcome on 24 July 2015, that the respondent needed to look into this. Lynn Collins then asked the claimant on a number of occasions to provide her with a copy of the letter from HMRC that the claimant had shown Mr Finch. For reasons the claimant was unable to explain to us, she did not provide Lynn Collins with a copy of this letter. We conclude that the respondent had reasonable and proper cause in this period for not looking into matters further, as they waited for the claimant to provide them with a copy of the letter from HMRC. We conclude that, in the period January to August 2015, the respondent's actions in response to the questions raised by the claimant are not capable of constituting part of a breach of contract.

Incident 11 – 28 May 2016

297. This refers to the letter dated 6 June 2016 sent by Lynn Collins, following the claimant's accident on 28 May 2016. Lynn Collins alleged incorrectly in this letter that the claimant had not completed her shift after the accident on 28 May. We found there was an error in omitting a "not" from the sentence for which Lynn Collins subsequently apologised (see paragraph 176). We conclude that this error cannot form part of a breach of contract, although we accept that the error caused the claimant distress.

298. Lynn Collins also accused the claimant of a lack of tenacity in relation to the efforts she made to report her absence. We consider the language used to be harsh and an inappropriately strong allegation, given the steps the claimant had taken to report her absence. We conclude that this allegation, whilst not a breach of contract by itself, was capable, together with other matters, of constituting a breach of the implied duty of mutual trust and confidence.

299. The claimant asserts that Lynn Collins incorrectly stated that the claimant's absence was unauthorised. Lynn Collins wrote on 6 June 2016 that the claimant had now been absent for more than 7 days so her current absence was unauthorised without a fit note (see paragraph 176). Since the claimant's absence began on 31 May, Lynn Collins was writing on the 7th day of absence and was mistaken in writing that the claimant had been absent for more than 7 days. We conclude that this incorrect statement, whilst not a breach of contract by itself, was capable, together with other matters, of constituting a breach of the implied duty of mutual trust and confidence.

Incident 12 – January 2017

300. This relates to the investigatory meeting conducted by Sam Moxham on 23 January 2017. The claimant complains that Sam Moxham informed her that she would not be able to present any evidence around the tax issues at this hearing.

301. As noted in paragraph 207, the claimant sought to share with Sam Moxham financial evidence. Sam Moxham refused to take this, stating: "the financial evidence isn't relevant to our meeting today as we are discussing the items on the letter. You need to raise this with them yourself." This was despite one of the allegations being

that the claimant had said that the respondent was knowingly not paying taxes to HMRC, in relation to which it would appear to us relevant to look into not only what the claimant said but whether it was true. We conclude that not allowing the claimant to present evidence that was clearly relevant to one of the allegations being investigated was capable of forming part of a breach of the implied duty of mutual trust and confidence.

302. The claimant also complains that Sam Moxham said that she could not accept a grievance she had prepared. Sam Moxham did refuse to accept the grievance, saying that the claimant would have to go through the grievance procedure. The claimant's representative agreed that they could look at this separately. We conclude that the respondent had reasonable and proper cause to say that grievances raised by the claimant should be dealt with through the grievance process rather than at the investigatory hearing which had been arranged to deal with disciplinary allegations. We conclude that the failure to accept the grievance at this meeting cannot constitute part of the implied duty of mutual trust and confidence.

Incident 13 – 24 February 2017

303. In her further particulars document, the claimant referred only to the letter from Kiaran Burke dated 24 February 2017 as the behaviour complained of. Her written submissions also refer to this letter as the final straw. However, we had understood during the hearing that the claimant complained about both letters of this date, the other being from Lynn Collins. We shall, therefore, consider both letters under this incident.

304. We deal first with the letter from Kiaran Burke. This letter notified the claimant that she was to attend a disciplinary hearing. As noted in paragraph 217, we had no evidence from the respondent to explain the contents of this letter. Kiaran Burke sadly died before this tribunal hearing. The matter the claimant particularly complains about is the inclusion of an additional allegation which had not been addressed in the investigatory process. This was the fourth allegation in the letter. We will deal with the four allegations in turn.

305. The first allegation in the letter was the allegation that the claimant had claimed at the appeal hearing that the respondent was knowingly not paying taxes to HMRC. This allegation was proceeded with, although the claimant had not been allowed to present evidence relevant to this allegation in the investigatory interview with Sam Moxham. The allegation was inaccurate in that the claimant had been reported by Tony Giddins as, at the appeal hearing, purporting to repeat a comment made by the respondent's accountant that the respondent did not pay anywhere near as much tax contributions as they should (paragraphs 154 and 165). He did not report that she had said the respondent was knowingly not paying taxes. We consider that proceeding with this allegation in these circumstances can form part of a breach of the implied duty of mutual trust and confidence.

306. The second allegation was about the claimant's communication with the CQC. Given the apparent delay in the claimant reporting the matter to the CQC and the timing, coming just after she was issued with a written warning, we consider there were some grounds for the respondent to consider this as a disciplinary allegation. We do not consider that proceeding with this allegation can form part of a breach of the implied duty of mutual trust and confidence.

307. The third allegation was that the claimant repeatedly failed to follow reasonable requests to comply with the company sickness absence reporting procedure. We have not been satisfied, on the evidence, that this allegation was firmly based. Sam Moxham, although supposed to be investigating allegations prior to a decision to take disciplinary action, had not put the specific detail to the claimant for the claimant to be able to comment on the allegations. We consider that proceeding with this allegation in these circumstances can form part of a breach of the implied duty of mutual trust and confidence.

308. The fourth allegation was as follows:

> "You informing a colleague of your intention to return to work so as to manipulate events to give cause for a constructive dismissal claim. This may be construed as a cynical attempt to dishonestly use the company sickness absence scheme to collect evidence against Newbarn Limited in order to support a contrived claim for constructive dismissal."

309. It seems likely that this allegation had its origins in the letter from another employee, Ruby, (paragraph 181) and the anonymous statement provided to Sam Moxham by another employee (paragraph 193). The claimant had not been informed about these documents or questioned about them in the investigation. The allegation put by Mr Burke went way beyond the information given by Ruby and the other employee. The documents put the respondent on notice that the claimant was considering a constructive unfair dismissal claim. This prospect may have upset Mr Burke and Lynn Collins. However, the documents do not, in themselves, provide evidence that the claimant was doing, or intending to do, anything that she was not entitled to do. If she returned to work and the respondent treated her correctly, she would not have any grounds for a successful constructive unfair dismissal claim. It is hard to see how the claimant, or any other employee, could "manipulate events" to give cause for a constructive dismissal claim. We do not understand what Mr Burke was alleging the claimant was doing, or was likely to do, in relation to the company sickness absence scheme which could gather evidence for a "contrived claim" for constructive dismissal. We consider that proceeding with this allegation, which does not appear to have any sound basis as a disciplinary offence and in circumstances where there has been no investigation of this with the claimant can form part of a breach of the implied duty of mutual trust and confidence.

310. We do not consider that the letter of 24 February 2017 from Lynn Collins in response to the claimant's grievance (paragraph 222) can form part of a breach of contract. The claimant's main complaint about this letter is that, in the letter, Lynn Collins denies that there was any recommendation for mediation in Laura Drinkwater's grievance outcome. There was such a recommendation, but a document sent to the respondent prior to the issue of the grievance outcome to the claimant did not contain this recommendation. In our findings of fact, we considered it likely that Lynn Collins had been aware of the recommendation at some stage, given the lack of surprise shown at the claimant's referrals to a recommendation for mediation e.g. in the return to work interview conducted by Lynn Collins. However, that had been some time prior to this letter and we give Lynn Collins the benefit of the doubt in concluding that, if we are right that she had known of the recommendation at one stage, she had forgotten this and the document to which she referred back confirmed a mistaken belief that no recommendation for mediation had been made. In relation to the other parts of the letter, whilst they gave a negative

initial response to points raised by the claimant, the letter left open the possibility of the claimant raising questions or concerns and/or requesting a formal grievance hearing. We conclude that this letter cannot form part of a breach of contract.

Conclusions on "ordinary" constructive unfair dismissal claim

311. We conclude that the allegations in Mr Burke's letter, other than the allegation about notification to the CQC, constituted a "last straw" and, together with the other matters which we have identified as capable of contributing to such a breach, constituted a breach of the implied duty of mutual trust and confidence. We conclude that this was a fundamental breach of contract. We conclude that the respondent, by the actions we have identified, without reasonable or proper cause, conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent.

312. The claimant resigned by letter dated 14 March 2017. We are satisfied, from the terms of that letter, (see paragraphs 223 – 224), and the claimant's evidence that the claimant resigned because of that breach of contract. It is clear from the claimant's oral and written submissions in the context of disciplinary and grievance procedures that she considered from an early stage that she was being unfairly accused of ill-defined disciplinary offences and that this began as an attempt to scapegoat her when the police were raising concerns about the respondent's policies and procedures. Her feeling of unfair treatment continued with the various matters referred to above which we have found to form part of a breach of contract.

313. We reject the submissions on the part of the respondent that the claimant left because she wanted to exit a company which did not fit well with her political beliefs or to spend more time with her grandchildren or to retire or semi-retire. The claimant's unhappiness arose from the way she was being treated by the respondent, which we have concluded was a fundamental breach of contract.

314. The "last straw" was Kiaran Burke's letter of 24 February 2017 which we found the claimant read on 2 March 2017. She resigned on 14 March 2017. We do not consider that the 12 day gap in time, or anything done by the claimant in the intervening period, indicates that the claimant affirmed the contract and lost the right to resign and claim constructive dismissal.

315. For these reasons, we conclude that the claimant was constructively dismissed.

316. No potentially fair reason has been put forward in submissions for the constructive dismissal and we conclude that the respondent has not shown a potentially fair reason for the constructive dismissal. We conclude that the dismissal was unfair under the "ordinary" unfair dismissal provisions in s.98 ERA.

317. We will address the issue of whether the constructive dismissal was automatically unfair under s.103A ERA after we have considered the complaints of protected disclosure detriment.

<u>Protected disclosure detriment claims</u>

The time limit issue

318. The claimant's written submissions asserted that Employment Judge Howard on 9 May 2018 had found the claim to be in time, referring to note 12 of the case management orders made on that day. It appears to us that the claimant has misunderstood this note. The note is a record of a discussion about a time limit issue raised by the respondent; it is not a decision as to whether any complaints were in time. Although this is not made explicit, it appears to us, from the dates referred to by the judge, that she was suggesting it appeared to her that the claim relating to constructive dismissal was in time. She makes no comment on the protected disclosure detriment claims. In any event, the judge directed that the respondent should raise any time limit issue in the amended response which they were to present. The amended response accepted that the resignation was in time but asserted that all alleged acts and omissions relied upon which predated 14 March 2017 (the date of resignation) were out of time and the tribunal had no jurisdiction. The time limit point in relation to the protected disclosure detriment claims had not been decided and it falls to us to decide it.

319. The last incident of detrimental treatment relied on is the letter of 24 February 2017, which the claimant read on 2 March 2017. The primary time limit (without any extension because of early conciliation), therefore, expired on 1 June 2017. The claimant notified ACAS under the early conciliation procedure on 11 June 2017 i.e. after the end of the primary time limit. The early conciliation period does not, therefore, have the effect of extending the time limit. All the complaints of detrimental treatment have been presented out of time. The tribunal will only have jurisdiction to consider them if it was not reasonably practicable to present them in time and they were then presented within a reasonable time thereafter.

320. The claimant has given no evidence on the basis of which we could conclude that it was not reasonably practicable to present the claims in time. We, therefore, conclude that we have no jurisdiction to consider these complaints which must fail.

The merits of the detriment complaints

321. Although we conclude that we have no jurisdiction to consider the complaints of detriment on the grounds of making protected disclosures, we go on to consider what we would have decided, had we had jurisdiction. The first matter we consider is whether the claimant made protected disclosures. This will be relevant to the complaint of s.103A unfair dismissal as well as to the detriment claims.

Did the claimant make protected disclosures?

322. Fourteen alleged protected disclosures have been identified, although these fall into three groups:

a. PD1 18 March 2015 – to the police.

b. PD2(a) –(d) – relating to the CQC referral

c. PD3(a)-(i) – relating to the tax matter.

PD1

323. The claimant told the police that the respondent had no visitor policy, that tenant L was living on the premises (tenant L being known to the police for domestic violence against his girlfriend) and that she had seen a black man with two young women visitors in tenant H's flat. The claimant relied on s.43B(1)(d) i.e. that the health and safety of any individual has been, is being or is likely to be endangered. We conclude that what the claimant told the police was not information which, in the claimant's reasonable belief, tended to show that the health and safety of any individual has been, is being or is likely to be endangered. We also conclude that the claimant did not have a reasonable belief at the time that the disclosure was made in the public interest. We conclude that this was not a protected disclosure.

PD2(a)-(d)

324. PD2(a)-(c) are explained in the claimant's written submissions as being all queries to the respondent as to whether the police investigation on 18 March 2015 had been reported. The claimant relies on section 43B(1)(a) – that a criminal offence has been committed, is being committed or is likely to be committed. We conclude that making such queries did not constitute disclosing information tending to show that the health and safety of any individual has been, is being or is likely to be endangered. We conclude, therefore, that PD(2)(a)-(c) are not protected disclosures.

325. PD2(d) was the disclosure to the CQC on 1 April 2016. The claimant sent an email to the CQC. She wrote:

> "I am aware of a police visit regarding an allegation by a visiting minor that she was sexually molested on the premises."

The claimant wrote that she believed management should have notified the CQC of this as a notifiable event as it potentially impacted on the tenant. The claimant asked the CQC whether the police investigation, which she said she had been aware of on 18 March 2015, had been reported by Newbarn Limited. She wrote: "I believe that they do not report incidents as robustly as they should and they tell me they did not need to raise this issue with CQC."

326. The disclosure is to a prescribed person.

327. It appears from the claimant's written submissions that she argues that the information tended to show that the respondent had failed in a legal obligation the claimant considered the respondent had to report the investigation under CQC regulations.

328. We have had some concern about the statement made by the claimant that the police visit was regarding an allegation of sexual molestation on the respondent's premises. We have found that the police did not say, when they visited on 18 March, that the alleged assault took place on the respondent's premises. However, we accepted that, over time, the claimant came to believe that this was the allegation (see paragraph 20). We conclude that, by the time of the report to the CQC, the claimant held this belief. We conclude that the claimant had a reasonable belief that the information she disclosed tended to show that the respondent had not complied with a legal obligation to report to the CQC. The fact that the CQC asked the

respondent to make a report, after the claimant had raised this, supports that the belief of the claimant was reasonable, whether or not, in fact, there was an obligation to report. We conclude that this was a protected disclosure.

PD3(a)-(i)

329. The claimant accepted in evidence that PD3(a) in January 2015 was not made in the public interest (see paragraph 14), so we do not consider this one further since, if the claimant did not believe the disclosure to be in the public interest, it cannot meet the definition of a protected disclosure.

330. PD3(b) relates to a text to Lynn Collins on 27 March 2015 about the claimant's tax. We were not shown the text but saw Lynn Collins' response, by email on 30 March 2015, to this text. Since we did not see the text, we do not know exactly what was said. The claimant has not satisfied us that information was disclosed which tended to show any of the s.43B(1) matters. We also conclude that, at this time, the claimant did not consider she was disclosing information in the public interest; she was trying to resolve her own private issue and had not given thought to whether there was a wider public interest. We conclude this was not a protected disclosure.

331. PD3(c) was identified by the claimant in her further particulars as relating to her grievance, which was submitted on 17 April 2015. Her written submissions refer to letters dated 10 April 2015. The claimant also sent a text to Lynn Collins about tax on 7 April 2015 (see paragraph 48) but the claimant did not refer to this in her particulars or written submissions. We consider the letters and grievance together. The claimant's evidence was that, at the point of the text of 7 April and letter of 10 April, she was concerned about resolving a private tax issue and this was not a matter of public interest (see paragraph 49). The claimant said, in evidence, that, at the point of her grievance, she did not believe that the respondent had done anything fraudulent with regard to tax (see paragraph 58). We conclude that, when the claimant raised matters with her employer relating to tax in April 2015, she was not making protected disclosures since we conclude she did not have a reasonable belief at the time that the disclosures were made in the public interest.

332. PD3(d) is identified in the agreed list of issues as being a disclosure made in May 2015. The claimant's particulars do not refer to a disclosure in this month. Her written submissions refer to the grievance hearing, which took place on 27 May 2015 and to a letter to HMRC. If the letter to HMRC is relied on as a protected disclosure (and this is not clear to us from the submissions which also refer to other events which are clearly not protected disclosures), we conclude that this was not a protected disclosure since it was not a disclosure of information tending to show one of the matters set out in section 43B(1). It was a request for information from HMRC (see paragraph 61). The claimant, in a document handed in at her grievance hearing, alleged the mishandling of income tax and non-payment by the respondent of national insurance and income tax contributions in relation to her employment dating from 2013 (see paragraph 63). We conclude that the claimant did not believe that she was disclosing information in the public interest; she was trying to resolve her own private issue. We conclude, therefore, that this was not a protected disclosure.

333. PD3(e) relates to disclosures in June 2015. The claimant refers in her particulars to her appeal against the grievance outcome and to a letter dated 24 June 2015 she wrote to HMRC regarding her concerns about her tax and national insurance payments. The grievance appeal letter included information that she had been informed by HMRC that they had not received any tax or national insurance payments in respect of the claimant from the respondent since 2013 (paragraph 73). The letter from the claimant to HMRC dated 24 June 2015 (see paragraph 74) states that she has been unable to claim additional state pension due to there seemingly being no payments showing for her employment with the respondent, although stated on her payslips. We conclude that the claimant did not believe that she was disclosing information in the public interest; she was trying to resolve her own private issue. We conclude, therefore, that the appeal letter and the letter to HMRC did not contain protected disclosures.

334. PD3(f) relates to a disclosure in July 2015. The claimant's particulars identify this as being at the appeal hearing with Mr Finch. The claimant gives the date as 24 July but the hearing was on 16 July (the outcome letter being 24 July). The claimant showed Mr Finch a letter dated 26 June 2015 from HMRC which showed no pay and tax deductions or national insurance contributions by the respondent (see paragraph 75). We conclude that the claimant did not believe that she was disclosing information in the public interest; she was trying to resolve her own private issue. We conclude, therefore, that the appeal letter did not contain a protected disclosure.

335. PD(3)(g) relates to a disclosure in August 2015. The claimant identifies this in the particulars as being informing the respondent that she was still struggling to resolve her tax and national insurance issues. In her written submissions, she refers to the letter of 24 June 2015 to HMRC. The only reference we have found to any possible disclosure in August 2015 is a reference (see paragraph 79) to a telephone conversation between the claimant and her manager, Laura McKee, in which the claimant stated that she was still awaiting action on the respondent's part in relation to her tax and national insurance problem with HMRC. We are unable to discern from this that there was any disclosure of information which would tend to show any of the matters set out in section 43B(1) ERA. Even if there was, we conclude that, at this time, the claimant did not believe that she was disclosing information in the public interest; she was trying to resolve her own private issue. We conclude that there was no protected disclosure in August 2015.

336. PD3(h) refers to a disclosure on 24 June 2015. We have dealt with this in relation to PD3(e), concluding that this was not a protected disclosure.

337. PD3(i) refers to disclosures at various dates to HMRC by telephone. The claimant's written submissions, in relation to this alleged protected disclosure, refers to the claimant speaking to HMRC on 13 May 2016 who confirmed that the missing tax and national insurance were paid in August for 2013/2014 (16 months late) and in September for 2014/2015 (9 months late). This is HMRC giving the claimant information rather than the claimant disclosing information to HMRC. We conclude that this was not a protected disclosure.

Whether the claimant was subjected to detriment on the ground she had made a protected disclosure

338. We have concluded that only one of the disclosures relied upon was a protected disclosure as defined in the ERA: PD(2)(d) - the disclosure to the CQC on 1 April 2016.

339. The detriments relied on for the protected disclosure detriment claims are the same matters relied on for the "ordinary" constructive unfair dismissal claim. We refer back to the section of our conclusions on these detriments for identification of the detrimental treatment alleged.

340. The claimant in her written submissions identifies the detriments relating to the CQC disclosure as being the investigation letter on 4 October 2016 including an allegation of "communication with the CQC", the disciplinary hearing investigatory meeting in January 2017 and subsequent disciplinary hearing invitation letter of 24 February 2017 with the allegation "your communication with CQC regarding Newbarn's compliance with reporting procedures. This may be construed as a frivolous or malicious action made in bad faith with mischievous intent." The January 2017 investigation was identified in incident 12 and the 24 February 2017 letter as incident 13. The 4 October 2016 was not identified in the incidents said, in the list of issues, to be detrimental treatment.

341. The complaints of detrimental treatment in incident 12 related to Sam Moxham's refusal, in the investigation meeting in January 2017, to accept evidence about the tax matter and refusal to accept the grievance.

342. We conclude that the claimant was subjected to a detriment by not being allowed to present financial evidence relevant to an allegation against her i.e. that the claimant had said that the respondent was knowingly not paying taxes to HMRC.

343. There is no obvious link between this treatment and the claimant having made the disclosure to the CQC in April 2016. However, the burden is on the respondent to show the ground on which the act or deliberate failure to act was done. We conclude that the respondent has shown, by the evidence of Sam Moxham, that Sam Moxham's refusal to take the financial evidence was done through lack of understanding as to the potential relevance of the evidence. Her evidence that she found the "tax thing" "confusing" and "perhaps I didn't want to look into it," supports this conclusion. If we had had jurisdiction to deal with this complaint, we would have concluded that the complaint of detriment in incident 12 on the ground of making a protected disclosure was not well founded.

344. We conclude that the claimant was not subjected to a detriment by Sam Moxham refusing to accept her grievance at the investigation meeting. The claimant was able to submit the grievance separately. If we had had jurisdiction to deal with this complaint, we would have concluded that the complaint of detriment in incident 12 on the ground of making a protected disclosure was not well founded.

345. Incident 13 is the letter of Kiaran Burke dated 24 February 2017. The letter required the claimant to attend a disciplinary hearing and set out four allegations, one of which was "Your communication with CQC regarding Newbarn's compliance with reporting procedures. This may be construed as a frivolous or malicious action made in bad faith with mischievous intent."

346. We conclude that having to face further disciplinary charges was subjecting the claimant to a detriment. The burden is on the respondent to show the ground on which the act or deliberate failure to act was done. The allegation has an obvious relationship with the claimant's communication with the CQC. The allegation suggests that issue was being taken with the motivation for the communication. Due to the death of Mr Burke, the respondent has been unable to provide any evidence as to why Mr Burke wrote what he did, beyond the terms of the letter itself. We conclude that the framing of the allegation is not enough, by itself, to satisfy us that the making of the protected disclosure (as opposed to the manner in which it was done) was not a material factor in the detrimental act. Had we had jurisdiction, we would have concluded that the complaint in relation to incident 13 was well founded.

s.103A unfair dismissal claim

347. For the reasons given above, we have concluded that only one protected disclosure was made PD(2)(d) - the disclosure to the CQC on 1 April 2016.

348. For the reasons given above, we have also concluded that the claimant was constructively dismissed.

349. For the purposes of the s.103A unfair dismissal claim, we have to decide whether the reason or principal reason for the dismissal was the making of the protected disclosure.

350. Where, as here, the dismissal is a constructive dismissal rather than an actual dismissal, this requires a somewhat tortuous analysis. We have to consider the acts or omissions of the respondent which, together, constituted the fundamental breach of contract and decide whether the reason or principal reason for those acts or omissions was the making of the protected disclosure.

351. The incidents which we concluded, for reasons explained above, together constituted a breach of the implied duty of mutual trust and confidence were incidents: 2, 6, 8 (in part), 11, 12 (in part) and 13 (in relation to the letter from Kiaran Burke).

352. Some of the incidents forming part of the breach of contract pre-dated the protected disclosure. The theme of the claimant's case has been that, from March 2015, the respondent treated her unfairly, scapegoating her because of concerns raised by the police about the respondent's operation. The way the claimant has put her case is not consistent with a belief that the disclosure to the CQC was the reason or principal reason for the respondent's actions which led to her resignation, although it is consistent with this disclosure being a contributory factor to some of the treatment relied on.

353. We conclude that the sequence of events which ultimately resulted in the claimant's resignation was triggered initially by the police visit on 18 March 2015 and what the claimant said she had seen in tenant H's room on a previous date. We conclude that the claimant's report to the CQC was a contributory factor in some of the treatment which led to her resignation, in that the communication to the CQC was the subject of an allegation in Kiaran Burke's letter of 24 February 2017. However, the picture is a much broader one than of the respondent taking action against the claimant because of her making that protected disclosure. We conclude

that the making of the protected disclosure was not the only or principal reason for the treatment which constituted a fundamental breach of contract. We, therefore, conclude that this complaint is not well founded.

Breach of contract – failure to give notice

354. For the reasons given above, we have concluded the claimant was constructively dismissed. The claimant was entitled to notice of termination in accordance with her contract. No notice was given. We conclude that this complaint is well founded.

Remedy

355. Although Mr Lewis made some submissions relating to *Polkey* and contributory conduct, we have decided to defer dealing with these arguments until the remedy stage, when the parties may make further submissions in the light of the tribunal's findings of fact and conclusions as expressed in these reasons.

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Employment Judge Slater

Date: 17 May 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 May 2019

FOR THE TRIBUNAL OFFICE