Case Nos: 1300128/2018
1300132/2018

EMPLOYMENT TRIBUNALS

Claimants: Mr M Tarrant
Mrs J Tarrant

Respondents: 1. 3L Care Limited
2. Peter Stock
3. Brian Higgins

Heard at: Manchester **On:** 23, 24, 25, 26, 29 and 30 April; 1, 2, 7, 15, 16, 17, 23, 28 and 29 May, and in chambers on 30 and 31 May 2019

Before: Employment Judge Franey
Ms L Atkinson
Ms B Hillon

REPRESENTATION:

Claimants: Mr D Northall, Counsel
Respondents: Mr B Gardiner, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. In relation to the claims brought by **Mr M Tarrant** against **3L Care Limited**:

   (a) The complaints of detriment in employment on the ground of a protected disclosure under section 47B Employment Rights Act 1996 and of "automatic" unfair dismissal because of a protected disclosure under section 103A of that Act fail and are dismissed.

   (b) The complaint of "ordinary" unfair dismissal under section 98 of that Act is well founded. Mr Tarrant was unfairly dismissed.

   (c) The complaint of breach of contract in relation to notice pay succeeds. Mr Tarrant was dismissed in breach of his contractual entitlement to notice.

(d) The complaint of unlawful deductions from pay in relation to reimbursement of tax paid by Mr Tarrant on director's loans is well founded.

2. In relation to the claims brought by **Mrs J Tarrant** against **3L Care Limited**:

(a) All complaints of detriment in employment on the ground of a protected disclosure are dismissed upon withdrawal by the claimant.

(b) The complaint of "automatic" unfair dismissal because of a protected disclosure contrary to section 103A Employment Rights Act 1996 is dismissed upon withdrawal by the claimant.

(c) The employment of the claimant was terminated with effect from 12 October 2017.

(d) The complaint of unlawful deductions from pay fails and is dismissed.

(e) The complaint of unfair dismissal is well founded. Mrs Tarrant was unfairly dismissed.

(f) The complaint of direct discrimination because of marital status contrary to section 13 Equality Act 2010 fails and is dismissed.

(g) The claimant was from 17 August 2017 a disabled person by reason of anxiety.

(h) The complaint of harassment relating to disability contrary to section 26 Equality Act 2010 fails and is dismissed.

(i) The complaint of a breach of the duty to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010 succeeds only in relation to the failure to postpone the investigatory and disciplinary meetings in August and October 2017.

(e) The complaint of breach of contract in relation to notice pay succeeds. Mrs Tarrant was dismissed in breach of her contractual entitlement to notice.

3. As a consequence of paragraph 2 (i) above, the complaint of a breach of the duty to make reasonable adjustments succeeds against the third respondent **Mr Higgins** in relation to the failure to delay the disciplinary hearing. All other complaints against him personally, and all complaints against the second respondent **Mr Stock** personally, fail and are dismissed.

4. In relation to the question of remedy in each case,

(a) there shall be no reduction in the basic or compensatory awards for unfair dismissal by reason of contributory fault;

(b) there shall be no reduction or limitation of the compensatory awards on account of the principle in **Polkey v AE Dayton Services Ltd [1988] ICR 142**;

(c) the compensatory awards for unfair dismissal against 3L Care Limited in each case shall be increased by 25% by reason of the unreasonable failure of 3L Care Limited to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures;

(d) the compensatory awards shall not be reduced on account of any failure by the claimants to follow that Code of Practice, and

(e) any remaining issues in relation to remedy will be addressed at a further remedy hearing in due course if the parties are unable to reach agreement.

REASONS

Overview

1. This is a lengthy decision because the Tribunal had to make extensive findings of fact in both cases, and then analyse a significant number of different legal complaints.

2. In summary, Mr and Mrs Tarrant were respectively Chief Executive Officer and Managing Director of a company running a small number of residential care homes. Mr Stock became the principal external investor in 2016. There were disputes between the claimants and Mr Stock about how the business should be run. In August 2017 both claimants were suspended and subsequently dismissed, ostensibly by Mr Higgins, at the end of a disciplinary process in which they faced allegations of misappropriation for personal use of domestic items purchased by the company for its care homes. In Mr Tarrant's case there were also allegations about a failure to refurbish to a safe standard a care home in Atherton. The Tribunal found that the real reason for the dismissals was not misconduct but the conflict about how the business should be run, rendering both dismissals unfair, but rejected the contention that Mr Tarrant had made protected disclosures or that Mrs Tarrant had been dismissed because of her marital status.

3. We also concluded that Mrs Tarrant had been dismissed when her solicitors received the termination letter, and that there had been a breach of the duty to make reasonable adjustments for her disability in the failure to delay investigation and disciplinary meetings. Mr Tarrant succeeded in a complaint of unlawful deductions relating to reimbursement of tax on his director's loans.

4. Finally, the Tribunal found that neither claimant had been guilty of gross misconduct, so notice pay claims succeeded.

5. These reasons are structured as follows:

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Introduction

The Claim Forms

6. By two claim forms presented on 11 January 2018 with common grounds of complaint the claimants, who are married to each other, brought a number of complaints arising out of their employment by the first respondent (which we will call "3L" or "the company") as Chief Executive Officer (Mr Tarrant) and Managing Director (Mrs Tarrant) respectively, including complaints arising out of the termination of their employment in Autumn 2017. They had both been suspended

whilst on annual leave in August 2017, and dismissed at the conclusion of a disciplinary process. The disciplinary allegations included health and safety issues at a recently opened Care Home at Atherton (Mr Tarrant), and financial irregularities (both claimants).

7. Mr Tarrant maintained that the treatment was a consequence of a series of protected disclosures made by him in July and August 2017. He alleged that the disciplinary proceedings were a sham to get him out of the company. He brought complaints of detriment and of automatic unfair dismissal because of protected disclosures, as well as "ordinary" unfair dismissal

8. Mrs Tarrant alleged that she was dismissed by reason of the fact she was married to Mr Tarrant. She also complained that she was a disabled person by reason of anxiety and high blood pressure and that the handling of the disciplinary proceedings amounted to harassment and a breach of the duty to make reasonable adjustments.

9. Both claimants claimed notice pay. Mr Tarrant also claimed that some monies were due to him at the termination of employment.

10. Additionally, Mrs Tarrant argued that her employment had never been effectively terminated because the way in which dismissal was notified failed to meet the requirements of her service agreement. If that argument proved to be well-founded she would claim arrears of pay by means of an unlawful deductions complaint.

11. Both claimants also brought proceedings against the second respondent, Peter Stock, who was the principal investor in the company at the time of the events with which we were concerned, and Brian Higgins who was a director of the company.

The Response

12. The respondents presented their response forms (with common grounds of resistance) on 12 April 2018. They denied that any protected disclosures had been made but said that in any event the disciplinary proceedings and dismissals had nothing to do with those matters. They were said to be fair dismissals for gross misconduct. It was not accepted that Mrs Tarrant was a disabled person, but even if she was that had played no part in the treatment that she received. It was also denied that her marital status had influenced the decision to dismiss her. All complaints were denied.

Case Management

13. The matter came before Regional Employment Judge Parkin at a preliminary hearing on 22 May 2018. He ordered that both parties provide additional information and made Case Management Orders leading to a ten day liability only hearing between 23 April and 8 May 2019. It was confirmed at that hearing that Mrs Tarrant did not pursue any complaints based on protected disclosures.

14. By additional information provided on 12 June 2018 the claimants clarified that they brought the whistleblowing detriment and Equality Act claims against Mr

Stock and Mr Higgins on the basis that they were acting as agents of the company. The respondents provided further particulars of the same date clarifying the allegations about overspending in the Atherton refurbishment were not part of the reason for dismissal. An amended response form of 7 August accepted that Mr Stock and Mr Higgins were agents of the company but any liability on their part was denied.

15. Following further disputes about disclosure there was a preliminary hearing before Employment Judge Ross on 1 March 2019. An amendment of 9 August 2018 providing further information about the reasonable adjustments complaints was permitted.

Issues

16. The parties had been directed to agree a List of Issues and a draft list was provided to the Tribunal at the start of our hearing. It was discussed at the outset of the hearing and some amendments were made in the following days. The agreed List of Issues was as follows (with some details about the alleged disclosures appearing as an Appendix to this Judgment):

TERMINATION OF EMPLOYMENT

1. **Did the First Respondent provide the Second Claimant with notice of termination of her employment in compliance with clause 17.6 of her Service Agreement?**

2. **If not, has the Second Claimant's employment terminated?**

3. **If so, what is the effective date of termination of the Second Claimant's employment?**

UNFAIR DISMISSAL: SECTION 98(4) ERA

Reason for dismissal

4. **What was the reason or, if more than one, the principal reason for the Claimants' dismissal? The Respondents rely upon the Claimants' conduct.**

Reasonableness

5. **Did the First Respondent act reasonably in treating the reason as sufficient for the Claimants' dismissal. In particular:**

   5.1. **Did the First Respondent hold a genuine belief in the misconduct of the Claimants?**

   5.2. **Was its belief reasonable, following a reasonable investigation?**

   5.3. **Did dismissal fall within a range of reasonable responses?**

Remedy

6. **In the event the dismissal of either Claimant is found to be procedurally unfair, would a fair procedure have resulted in either Claimant's dismissal in any event?**

7. **If so, what are the percentage prospects of dismissal in such circumstances?**

8. **Should either the basic or compensatory award of the First or Second Claimant be reduced to reflect their contributory conduct, if any.**

9. **If so, what percentage reduction ought to be applied?**

10. **Did the First Respondent fail unreasonably to comply with a provision of the ACAS Code of Practice on Disciplinary and Grievance Procedures?**

11. **If so, ought the compensatory award of either the First or Second Claimant be increased to reflect the failure(s)?**

12. **If so, what is the appropriate percentage increase?**

13. **Did the First or Second Claimant fail unreasonably to comply with a provision of the ACAS Code of Practice on Disciplinary and Grievance Procedures?**

14. **If so, ought the compensatory award of either the First or Second Claimant be reduced to reflect the failure(s)?**

15. **If so, what is the appropriate percentage reduction?**

AUTOMATIC UNFAIR DISMISSAL: SECTION 103A ERA

16. **Did the First Claimant make disclosures of information (as asserted in the Appendix) in the course of the following communications, whether taken individually or cumulatively (the First Claimant shall rely on the totality of any written communication for its meaning and effect):**

    16.1. **An email from the First Claimant to the Second Respondent sent at 1247 on 20 July 2017 - "PD1";**

    16.2. **An email from the First Claimant to the Second Respondent sent at 1751 on 20 July 2017 - "PD2";**

    16.3. **An email from the First Claimant to Allison Murphy, the Second Claimant and the Third Respondent sent at 1753 on 20 July 2017 - "PD3";**

    16.4. **An email from the First Claimant to the Second Respondent sent at 2139 on 20 July 2017 - "PD4";**

    16.5. **An email from the First Claimant to the Third Respondent, Second Claimant, and Allison Murphy at 0858 on 21 July 2017 - "PD5";**

    16.6. **An email from the First Claimant to the Third Respondent, Second Claimant, Allison Murphy and Val Williams at 0909 on 21 July 2017 - "PD6";**

    16.7. **An email from the First Claimant to the Third Respondent, Allison Murphy, Second Claimant and Val Williams at 1107 on 21 July 2017- "PD7";**

    16.8. **A conversation (at a management meeting attended by the Claimants, Allison Murphy and the Second Respondent at 2pm on 24 July 2017) - "PD8" - in which:**

        (i) **the First Claimant informed the Second Respondent that his, and the Third Respondent's, actions were depriving the First Respondent of the necessary working capital required to provide for contingencies as prescribed under the CQC regulations, were jeopardising patient safety and amounted to a regulatory breach; and**

        (ii) **the Third Respondent should be dismissed from his role due to his ongoing failures in reporting.**

16.9. A letter from the First Claimant dated 18 August 2017 addressed to the directors of the First Respondent - "PD9", and

16.10. The First Claimant's grievance letter dated 24 August 2017 - "PD10".

17. Did the First Claimant reasonably believe that the disclosure(s) were made in the public interest?

18. Did the First Claimant reasonably believe that the disclosure(s) tended to show one or more matters falling within s.43B(1)(b) and (d) ERA?

19. Was the reason or, if more than one, the principal reason for the First Claimant's dismissal his making the protected disclosure(s) set out at paragraph 16, above?

DETRIMENT

20. Did the First, Second or Third Respondent subject the First Claimant to the following detriments:

20.1. His suspension on 18 August 2017; and

20.2. The failure to conduct a fair and objective disciplinary investigation?

21. Were the detriments because of the First Claimant making the protected disclosures set out at paragraph 16, above?

DISABILITY DISCRIMINATION

Disability (Section 6 EqA)

22. Was the Second Claimant a disabled person by reason of the mental impairment of anxiety and/or the physical impairment of hypertension in the period 18 August 2017 to 17 November 2017?

Failure to make reasonable adjustments (Section 20 EqA)

23. Did the First Respondent know, or ought it reasonably to have known, that the Second Claimant was a disabled person at any material time?

24. Did the First, Second or Third Respondents apply the following provisions, criteria or practices ("PCPs") to the Second Claimant:

24.1. The requirement to attend an investigation meeting on 18 August 2017;

24.2. The requirement to: (a) attend a disciplinary hearing; (b) in person; (c) at the offices of BC Limited; (d) on 5 October 2017.

25. Did the PCPs place the Second Claimant at a substantial disadvantage in comparison with persons who were not disabled; specifically enhanced mental distress, thereby affecting the Second Claimant's ability to participate in the disciplinary process?

26. Did the First Respondent know, or ought it to have reasonably known, that the Second Claimant was likely to be placed at a substantial disadvantage?

27. Was it reasonable for the First, Second or Third Respondents to take the following steps to avoid the disadvantage:

27.1. Providing the Second Claimant with advance notification of the matters to be discussed at the investigation meeting;

27.2. Postponing the investigation or disciplinary meeting;

27.3. Amending the format of the investigation or disciplinary hearing to enable the Second Claimant's participation and/or reduce her mental distress, such as conducting the meeting by telephone;

27.4. Amending the venue of the investigation or disciplinary hearing to enable the Second Claimant's participation and/or reduce her mental distress, such as to conduct the hearings away from the offices of the Respondents' legal representatives or otherwise at a neutral venue?

28. Can the Second or Third Respondents, as the agents of the first respondent, be personally liable under section 110 EqA for a failure to make reasonable adjustments where the allegation is not that they have "done" something but that they have failed to do something?

Harassment (Section 26 EqA)

29. Did the First, Second or Third Respondents subject the Second Claimant to unwanted conduct through its continued correspondence with her concerning the disciplinary process up to and including the appeal outcome letter of 17 November 2017, despite their being aware from, at the latest, 18 August 2017 that she was certified sick with anxiety.

30. Was the conduct related to the Claimant's disability?

31. Did the conduct have the purpose or effect of violating the Second Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

MARRIAGE DISCRIMINATION (Section 13 EqA)

32. Did the First, Second or Third Respondents treat the Second Claimant less favourably by suspending her and dismissing her? (The Second Claimant relies upon the actual comparator of Allison Murphy).

33. Was the treatment because of the protected characteristic of being married (to the First Claimant)?

WRONGFUL DISMISSAL

34. Did either Claimant commit a repudiatory breach of the contract of employment, entitling the First Respondent to terminate their employment without notice?

35. If not, to what sums would each Claimant have been entitled during the period of contractual notice?

UNAUTHORISED DEDUCTIONS FROM WAGES

36. Subject to the claim for wrongful dismissal, what wages as defined in section 27 ERA 1996 were properly payable to the First Claimant on termination of his employment?

37. Did the First Respondent make deductions from such wages?

38. Subject to the tribunal's determination of issues 1 – 3 inclusive, above, what wages were properly payable to the Second Claimant in the period from 12 October 2017 to date?

39. Did the First Respondent make deductions from such wages?

TIME LIMITS

40. Have the respondents consented to the jurisdiction of the Tribunal in a way which obviates the need for the Tribunal to consider time limits?

41. If not, in relation to any complaints of detriment contrary to section 47B ERA made by the first claimant which occurred more than three months prior to the presentation of the claim, allowing for the effect of early conciliation against each respondent, can the claimant show that the act or deliberate failure to act which caused detriment formed part of a series of similar such acts or failures ending within three months of presentation?

42. If not, in relation to any allegations of a contravention of the EqA made by the second claimant which occurred more than three months prior to the presentation of the claim, allowing for the effect of early conciliation against each respondent, can the claimant show that they formed part of conduct extending over a period which ended within three months of presentation, or in the alternative that it would be just and equitable for the Tribunal to allow a longer period for presenting a claim?

Progress of the Hearing

17. The hearing had originally been listed for ten days to determine liability. That included time for deliberations and judgment. Unfortunately, it did not prove possible to conclude matters within that time. The Tribunal was unable to sit on Wednesday 8 May due to a regional judicial meeting. Approximately one and a half days of oral evidence were lost due to the late disclosure of documents and its consequences (see below).

18. It was also apparent that the original time estimate of ten days may have been too short. There were over 50 allegations of misconduct made against Mr Tarrant and although not every allegation needed to be considered during oral evidence, it was appropriate in the interests of justice for a significant number to be considered as part of cross examination.

19. The consequence was that at the end of the oral hearing on Tuesday 7 May 2019 the respondent's case had not yet closed. The Tribunal resumed for three days between 15 and 17 May 2019, and completed the oral evidence on 23 May 2019. After reading written submissions, the Tribunal heard oral submissions on 29 May 2019 and the Tribunal reserved its decision, deliberating in chambers for the rest of the hearing.

Witness Evidence

20. We heard from seven witnesses in person, each of whom had prepared a written witness statement. It was agreed that we could hear from the respondents' witnesses first.

21. Mr Stock and Mr Higgins both gave evidence, together with Mr Stock's daughter Rachel Collister, who carried out the disciplinary investigation, and Allison Murphy, who was the Director of Care and Nursing for the company.

22. Mr and Mrs Tarrant both gave evidence together with Mrs Tarrant's father, Michael Kelly, who attended the disciplinary hearing with Mr Tarrant.

Documents

23. The parties had agreed a bundle of documents in four lever arch files to which a number of documents were added during the hearing. In total the Tribunal had access to approximately 1700 pages.

Late Disclosure

24. On the morning of Friday 26 April 2019 (day four) the Tribunal was informed that the respondents had disclosed further material the previous evening. There were approximately 178 pages which formed the file of papers before Mr Higgins when the dismissal letters were issued. The documents were plainly relevant and should have been disclosed earlier. The Tribunal ordered that a witness statement explaining these circumstances be provided. It transpired that Mr Higgins had passed the documents to his solicitor at the appropriate time, but due to a change in the identity of the solicitor dealing with the matter the documents had erroneously been identified as duplicates and therefore not disclosed. Some of the documents in that file were indeed duplicates of documents already disclosed, but most were not. Because of this late disclosure by the respondents, no oral evidence was heard on 26 April 2019. The Tribunal used part of the day to read those new documents.

Application for Privileged Material

25. As a consequence of that disclosure a further issue arose on Monday 29 April. Amongst the documents disclosed were two which appeared to be drafts prepared by the respondents' lawyers, Beyond Corporate ("BC"), one a script for a meeting and the other a draft of a letter to Mrs Tarrant. For the claimants Mr Northall argued that the respondents had waived privilege in respect of those matters. Mr Gardiner did not dispute that proposition.

26. Mr Northall then applied for further disclosure from the respondent of other material which formed part of that "transaction". He argued that seeing only part of the material would lead to the Tribunal potentially being misled or only having a partial picture. Mr Gardiner opposed that application on the basis that the two privileged documents which had been disclosed were self-contained: they did not refer to any other documents and they formed individual transactions between the respondents and their lawyer. He argued that the Tribunal should bear in mind that privilege had inadvertently been waived; this was not a case where the respondent had been engaged in "cherry-picking". The advocates made oral submissions by reference to a printout from the electronic version of the third edition of *Passmore on Privilege*, a standard text. Having heard those submissions, the Tribunal considered the matter in chambers.

27. In our considerations we took account of the overriding objective in rule 2 of the Tribunal Rules of Procedure, and the principle of fairness as articulated by the Employment Appeal Tribunal in **Brennan & Others v Sunderland City Council & Others [2009] ICR 479** in the following terms:

> **"In our view the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially**

> **misleading understanding of the material. The court must not allow cherry-picking, but the question is: when has a cherry been relevantly placed before the court?"**

28. A prior question, however, is to identify the "transaction" to which the disclosed material relates. It is only once this question is answered that it will become clear whether disclosure has been partial or complete. Both advocates took us to the decision of Mann J in **Fulham Leisure Holdings Ltd v Nicholson Graham & Jones [2006] EWHC 158**. The court reviewed the authorities and considered how the court or tribunal should proceed:

> **"(i) One should first identify the 'transaction' in respect of which the disclosure has been made.**
>
> **(ii) That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion.**
>
> **(iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.**
>
> **(iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed."**

29. Applying these principles, the Tribunal concluded that the transaction represented all draft meeting scripts and draft letters to the claimants prepared by BC in relation to the disciplinary investigation and proceedings against the claimants between 26 July 2017 and 17 November 2017.

30. Our reasons were as follows. Firstly, it is trite law that in an unfair dismissal complaint the Tribunal has to look at the whole of the process beginning with the commencement of the investigation, the disciplinary proceedings, the dismissal and any appeal. Secondly, a central core of Mr Tarrant's case was the proposition that the real reason for the commencement of the investigation, his dismissal and the rejection of his appeal was one or more protected disclosures that he had made in July or August 2017. In effect he was arguing that there had been a campaign to get rid of him from late July onwards. Thirdly, it was clear that the respondents had an ongoing relationship with BC which was not limited to discrete instances where assistance was sought with drafting. We had already heard oral evidence from Mrs Collister by this point and she had said on a number of occasions that she had done as "instructed by the lawyers". We were satisfied from all the material we had read and the oral evidence we had heard that there was an ongoing retainer for assistance from BC in the disciplinary matters involving the claimants. Fourthly, although Mrs Tarrant was not pursuing any protected disclosure complaint it was still her case that the decision to pursue disciplinary proceedings and to dismiss her was influenced by the fact she was married to Mr Tarrant.

31. We concluded that the "transaction" in question represented all drafting of meeting scripts and letters done by BC in the relevant period. Only part of that material had been (inadvertently) disclosed and it was necessary for the Tribunal to see all those documents in order to have a complete picture.

32. As a consequence we ordered that the respondents should disclose as soon as practicable such of the following documents arising out of the investigation,

suspension and disciplinary proceedings against each claimant between those dates as were in their possession or control:

(a) Draft scripts provided by BC for meetings with either claimant; and

(b) Draft letters provided by BC to be sent to either claimant with confirmation of the date and time those drafts were provided to the respondents.

33. We excluded from our order, however, any advice given by BC to the respondents.

34. The respondents provided further documents in compliance with this order and they were inserted into the bundle.

Legal Principles

35. This section of our reasons summarises the main principles of law applicable to the issues which we determined. It will be necessary to consider some aspects in more detail in the discussion and conclusions sections below.

Part One: Protected Disclosures

36. Protected disclosures are governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: 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.**
>
> **s43B(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) …**
>
> **(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) ...**
>
> **(d) That the health and safety of any individual has been, is being or is likely to be endangered…"**

37. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**

> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

38. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

39. In **Chesterton** Underhill LJ observed (paragraph 30) that the belief that the disclosure is in the public interest need not be the predominant motive for making the disclosure.

40. In this case it was accepted that all the alleged disclosures had been made to the employer in accordance with section 43C.

Part Two: Detriment in Employment

41. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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."**

42. Section 47B(1A) makes an agent of the employer personally liable if he contravenes section 47B(1); section 47B(1B) makes the employer also liable for the actions of its agent.

Part Three: Unfair Dismissal

43. Section 103A of the Act deals with protected disclosures and reads as follows:-

> **"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".**

44. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

45. That requires the Tribunal to make a finding about who took the decision to dismiss.

46. An employer with grounds to dismiss for a fair reason, such as misconduct, might still be found to have dismissed for an impermissible reason if the latter is the reason operating on his mind: **ASLEF v Brady [2006] IRLR 576.**

47. If the reason or principal reason is not one rendering dismissal automatically unfair, section 98 applies:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

48. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

49. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

50. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

51. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

52. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

Part Four: Disability Discrimination – Equality Act 2010

53. Section 6 defines a disability as follows:

> **"A person (P) has a disability if**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

54. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial". The EAT gave some guidance on how to approach this in **Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19.**

55. There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months, and that

> "**If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

56. Under paragraph 5 of Schedule 1,

> **"an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect."**

57. On the question of such "deduced effect", the EAT indicated in **Fathers v Pets at Home Ltd UKEAT 0424/13** that common sense suggested that a person taking a high dose of antidepressants would suffer a serious effect on her ability to carry out day to day activities if the medication stopped (see paragraph 39).

58. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011. Section D of the guidance contains some provisions on what amount to normal day-to-day activities. The guidance also includes an appendix which sets out an illustrative and non-exhaustive list of factors which, if experienced, it would be reasonable to regard as having a substantial adverse effect.

59. Part 5 of the Equality Act deals with work cases. By section 109(2) a principal is liable for the actions of its agents:

> **"Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal."**

60. An agent who does something which means that his principal contravenes the Act is also liable: section 110(1).

61. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

62. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable…**
>
> **(2) …**

> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

63. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis [2003] IRLR 96** which deals with circumstances in which there will be an act extending over a period.

64. Section 39(5) applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

65. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

66. Section 20(3) provides as follows:-

> **"the first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".**

The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632.**

67. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP under the predecessor provisions was considered by the Employment Appeal Tribunal in October 2012 in **Nottingham City Transport Limited –v- Harvey UKEAT/0032/12** in which the President Mr Justice Langstaff said in paragraph 18:

> **"Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might**

> **be concerned, would relate to matters of more general application than simply to the individual person concerned."**

68. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Those circumstances include the prospect that the adjustment will avoid the disadvantage. It need not be guaranteed to succeed. The Court of Appeal put the matter this way in **Griffiths v Secretary of State for Work and Pensions [2017] ICR 160**:

> **"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."**

69. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**

70. Chapter 7 of the EHRC Code deals with harassment.

Part Five: Marital Status Discrimination – Equality Act 2010

71. Section 8 of the Act protects persons with the protected characteristic of marriage and civil partnership:

> **"(1) A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner."**

72. Employers are prohibited by section 39(2)(c) from discriminating against a person by dismissing her. That includes direct discrimination which is defined in section 13 as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

73. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

74. The effect of section 23 is to ensure that any comparison made, actual or hypothetical must be between situations which are genuinely comparable. As the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to the protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

75. The case law on marital status discrimination includes conflicting decisions at EAT level: **Dunn v Institute of Cemetery and Crematorium Management [2012] ICR 941** and **Hawkins v Atex Group Ltd [2012] IRLR 807.** In **Hawkins** the EAT was referred to an authority not before the appeal tribunal in **Dunn,** and the correctness of the approach in **Dunn** was doubted. We preferred to follow the **Hawkins** approach, and Mr Northall did not seek to argue otherwise. The test is therefore whether the fact the claimant is married to the other person, instead of in an unmarried but equally close relationship (for example as a common law spouse), is a material factor in the decision.

Part Six: Termination of Employment/Estoppel

76. The question of when a contract is terminated is one to be decided in accordance with contractual principles, imported into the unfair dismissal provisions of the Employment Rights Act 1996 by section 95(1)(a). In **Newcastle-upon-Tyne Hospitals NHS Foundation Trust v Haywood [2018] IRLR 644** the Supreme Court noted that a contract may make express provision as to how notification of termination may be given, citing its earlier decision in **Societe Generale, London Branch v Geys [2013] IRLR 122.** If that provision is mandatory, notification given some other way will not generally be effective to bring the contract to an end.

77. Mr Gardiner did not argue to the contrary but instead relied on the principle of estoppel. He cited **Rock Advertising Limited MWB v Business Exchange Centres Limited [2019] AC 119,** a decision of the Supreme Court in a dispute over interpretation of a property licence, as an example of when an estoppel might prevent reliance on strict contractual rights. The issue was whether an oral agreement to vary licence fee payments could be effective when the contract contained a "no oral variation" clause. Recognising the risk that injustice might ensue if a party relied on an agreed oral variation which turned out to be unenforceable, Lady Hale said (paragraph 16):

> **"In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped**

> **from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself…."**

78. The current online 33rd edition of *Chitty on Contracts*, paragraph 4-087, summarises the position as follows:

> **"For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on his promise."**

79. The test for whether there has been a promise not to insist on strict legal rights is an objective one: it is enough if it induces the recipient reasonably to believe that is the case. It must be clear and unequivocal, although it can be made by implication as well as expressly.

Part Seven: Notice Pay

80. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

81. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 Employment Rights Act 1996 if that is longer) unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Part Eight: Unlawful Deductions from Pay

82. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by it. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

Part Nine: Unfair Dismissal Remedy Issues

83. There were three remedy issues which it was agreed could be determined in this hearing if they arose.

84. The first arises out of the nature of a compensatory award for unfair dismissal under section 123(1) of the 1996 Act:

> **"(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

85. It has been established since **Polkey v A E Dayton Services Limited [1988] ICR 142** that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. Although this inherently involves a degree of speculation, Tribunals should not shy away from that exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of **Software 2000 Limited v Andrews [2007] IRLR 568** remains of assistance, although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1).

86. The second is a reduction by way of contributory fault. It can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 respectively:

> **"Section 122 (2): Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly….**
>
> **Section 123 (6): Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

87. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

> **"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

88. The third remedy issue related to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. An unreasonable failure to follow the Code by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992. An unreasonable failure by an employee can result in a reduction in compensation also limited to 25%.

Findings of Fact

89. This section of our reasons sets out the broad chronology of events necessary to put our decision on the issues into context. Any disputes of primary fact central to our conclusions will be addressed and resolved in the Discussions and Conclusions sections below.

Before July 2016

90. The company was established by Mr and Mrs Tarrant in 2011 and is a regulated nursing and social care provider supplying residential care services and weekly respite breaks to individuals living with serious medical conditions including acquired brain injury, complex health needs, learning and physical disabilities. The company employed approximately 113 people according to its response form.

91. By the start of 2016 Mr Tarrant was Chief Executive Officer and Mrs Tarrant Managing Director. The Director of Care and Nursing was Allison Murphy. The company had two Residential Care Homes in Winsford, known as “Chapel” and “Crook”. It also had a small Head Office in Congleton known as “Meadowside”.

92. Each home had a Registered Manager. The roles and responsibilities of a Registered Manager with the CQC were set out in a document that appeared at pages 1254-1256. It recorded the “fundamental standards” which had to be met. The premises where service users received care and treatment had to be “clean, suitable, and looked after properly”. The CQC also required there to be a “Responsible Person” for the company who supervised the management of the regulated activity.

93. When the business was founded there were eight investors. One of the investors was Rickitt Mitchell, a firm of Corporate Financial Advisers. Mr Higgins of Rickitt Mitchell had introduced Mr Tarrant to some of the other investors and some shares were taken by his firm. The other investors took very little part in the running of the business: it was run by Mr and Mrs Tarrant and Ms Murphy.

94. During 2014 and 2015 the company had some cashflow difficulties and Mr Tarrant agreed to take payment by way of loans to him as a director rather than by way of salary. The intention was that the loan accounts would be cleared when the company’s financial position improved so that he would not have to repay the money. As a consequence of receiving loans from the company, however, he incurred a tax liability which required him to pay approximately £2,400 per year.

New Investment July 2016

95. In early 2016 the company was looking for further investment to enable it to grow. Mr Higgins introduced Mr Tarrant to the second respondent, Peter Stock, and

a plan developed for Mr Stock to buy out all the previous investors. That plan was formalised in a series of transactions completed on 20 July 2016.

96. As part of the process of disclosure leading to the completion of the agreement Mrs Tarrant disclosed that she had fibromyalgia. Her disclosure did not mention anxiety.

97. The investment agreement appeared at pages 93-129. It set up a new company to act as a holding company for 3L. The holding company was the sole shareholder of shares in 3L. The claimants and Ms Murphy were allocated a limited number of "B" shares in the holding company, but the vast majority of preference shares and "A" shares were held by the trustees of the Peter Stock 1997 Life Interest Settlement, a trust of which Mr Stock's daughters, Rachel Collister and Suzanne Gauge, were beneficiaries. Mrs Collister was also a trustee. The remaining preference A and B shares were held by Rickitt Mitchell and a related vehicle, Centurion Ventures.

98. The investment agreement provided for Mr Higgins and Mrs Tarrant to become directors of the new holding company in addition to Mr Tarrant and Ms Murphy.

99. There was also provision in the Articles for an "investor director" to be appointed, but that power was not initially exercised. Instead Mr Stock would attend Board meetings as a non-voting observer under the provision which entitled an "investor representative" to do so.

100. The investment agreement also recorded the intention of the parties to develop the business so that within four years there would be a management buyout, enabling Mr Stock to get a return on his investment and enabling Mr and Mrs Tarrant to regain control of their company. An obligation to use reasonable endeavours to complete such a buyout would be triggered when the value of the company hit a predetermined level.

101. The transaction resulted in new Articles of Association for the company. They appeared at pages 164-189. They adopted with some modifications the model articles for private companies contained in Schedule 1 to the Companies (Model Articles) Regulations 2008.

102. Mr Higgins was appointed as a non-Executive Director ("NED") pursuant to the investment agreement by means of a letter of appointment at pages 190-194. He was on the Board of both the company and the holding company in that capacity. Under clause 2.1 (page 190) his time commitment was anticipated to be approximately four days per calendar month. He was also expected to devote such other time as may be necessary for the effective discharge of his duties as a NED.

103. The first Board meeting of the holding company occurred on the day of completion, 20 July 2016. The minutes appeared at page 780i-780o. They recorded the mechanism by which the previous investors would be repaid. The allotment of shares pursuant to the investment agreement was approved.

Service Agreements July 2016

104. Service Agreements for the claimants were executed the same day. They were in effectively identical terms.

105. The Agreement for Mr Tarrant appointing him as Chief Executive Officer of the company appeared at pages 130-146. The Agreement provided for dismissal without notice in the event of gross misconduct or gross incompetence (page 141) and gave the company the right to suspend him on full pay pending any disciplinary investigation (clause 12.1 and 12.2 on page 141). Clause 15 made reference to disciplinary rules and procedures (page 144).

106. The Service Agreement appointing Mrs Tarrant as Managing Director appeared at pages 147-163. It contained the same provisions about disciplinary action, suspension and disciplinary procedures.

107. Clause 17.4 of each contract provided that no variation to the Agreement would be of any effect unless agreed in writing and signed by or on behalf of both parties, including the Board on behalf of the company. It also provided that any notice to be given under the Agreement must be in writing and be delivered by hand or courier or sent by first class prepaid post to the employee's last known home address or by fax to that address. If sent by post it would be deemed to be delivered two clear days after posting.

108. Both contracts also contained an obligation to ensure that the Board was made aware as soon as practicable of any misconduct on the part of the employee or any other employee (clause 4.2.7(a)).

Policies

109. The company had some existing disciplinary procedures from 2012. They appeared at pages 203a-203p. Clause 13.5 (page 203g) provided for the appeal to be a complete re-hearing or a review of the fairness of the original decision at the discretion of management depending on the circumstances of the case. There was also a grievance procedure at pages 277a-277b.

110. At some point an employee handbook was produced (pages 204-277) which contained new versions of the disciplinary policy (pages 247-252) and the grievance procedure (pages 253-255). Once again the appeals procedure in the disciplinary policy could be by way of a re-hearing or a review.

111. The handbook also contained a policy on Dignity at Work (pages 256-262), a policy on Equality and Diversity (pages 263-270), and a Whistleblowing policy. The Whistleblowing policy provided for any wrongdoing at work to be communicated to a director. It referred to the statutory protection against being subjected to a detriment because of having made a protected disclosure.

Late 2016

112. It was the intention of Mr and Mrs Tarrant that the new investment from Mr Stock would not change the way in which the company had been running. They expected to be involved in the day-to-day management of the business together with

Ms Murphy, and for the investors to take a back seat. As a NED Mr Higgins took responsibility for providing a financial overview of the business to Mr Stock. That happened, for example, at a Board meeting on 12 September 2016 recorded at pages 195-198.

113. That Board meeting also discussed the proposed purchase of a third Care Home at Atherton. The purchase of the property was to be undertaken by one of Mr Stock's companies, and the site would then be leased to 3L. There was a substantial amount of refurbishment and refitting of the site required before it could open and generate income. Because there was no main contractor controlling the various subcontractors, Mr Tarrant came to be in charge of that project and heavily involved in it over the months that followed.

114. In the meantime Mr and Mrs Tarrant had some work done on their bathroom at home. In an email of 11 November 2016 (page 1613) Mrs Tarrant referred to it being "mid re-furb".

The Cashflow Issue

115. The company was performing well, but a recurring theme in the months that followed was tension caused by different opinions on whether cash generated by trading profits should be used to increase liquid cash reserves or used to make overpayments on debts owed to the Bank, thereby reducing interest costs. In broad terms Mr and Mrs Tarrant favoured retaining cash in the company's Bank accounts so as to ensure that operational requirements could be met without additional borrowing, whereas Mr Stock favoured using cash to pay down Bank debts and reduce liabilities. We will refer to this as the "cashflow issue".

116. In the documents we saw this first surfaced in October 2016. Mr Stock had been in touch with a Bank about refinancing certain loans. Mr Higgins forwarded to Mr Tarrant an exchange of emails between Mr Stock and the Bank. His email suggested that Mr Stock seemed to be doing good work. Mr Tarrant responded (page 291b):

> **"Yeah, had a nice chat with him on Friday. Just wanted to get reassurance that we are not having to run business on knife edge with cash."**

117. There was a further email about the cashflow issue from Mr Tarrant on 8 December 2016. It was sent to Mr Higgins and to the Financial Manager, Val Williams. He had spoken to Mr Stock about paying down the Bank loan and expressed the view that it would leave the business exposed if so much was paid off. He said his view was shared by Mrs Tarrant and Ms Murphy. They thought approximately £200,000 was needed as cash to meet operational requirements and to provide a buffer in case of additional expense if a resident in one of the Homes passed away.

118. The cashflow issue was raised at a Board meeting on 16 December 2016. As well as the four directors, Mr Stock and Mrs Collister were present. The minutes (pages 199-200) recorded the following discussions about financial matters:

> **"[Brian Higgins] confirmed that a further £20k had been paid off the current Bank debt. [Peter Stock] advised that he wished to pay off a further £59k debt right away. [Marcus Tarrant] confirmed that there was a reluctance from other members of the Board to do**

> **so as we are protective of our cash position. It was agreed that this was a healthy attitude towards cash. [Peter Stock and Brian Higgins] to discuss the further pay down and revert back to the rest of the Board. [Marcus Tarrant] highlighted the three month debt reduction with the Bank by £128,372 which was positively received by the Board."**

119. The minute also recorded that the Head Office at Meadowside would be closing (it shut on 23 December 2016) and that a pay review for nurses was critical for retention and recruitment purposes. That pay increase had been well received by the nursing staff.

120. The Bank debt was reduced by a further payment of £50,000 on 20 December, four days after the Board meeting. That was actioned by Mr Stock and Mr Higgins. They did not go back to the rest of the Board before taking that step.

January 2017

121. Over the Christmas period Mr and Mrs Tarrant were having some renovation work done on their kitchen at home. It had been damaged by a flood and they had received an insurance payout of £9,500. On 3 January 2017 (page 1379) Mr Tarrant mentioned in an email copied to Ms Murphy that they had had no cooker until New Year's Eve.

122. On 11 January 2017 (page 316) Mr Stock sent an email to Mr and Mrs Tarrant and Ms Murphy. He sought an update on progress with Atherton. In the email he also included a section which was specifically addressed to Mr Higgins asking where they were up to with the Bank and whether some more could be paid off the loan. Mr Higgins replied the same day saying he would rather see how January progressed and what the costs for Atherton were going to be before making another advance payment on the Bank loan. Mr Tarrant emailed an update on progress with Atherton the same day (page 321).

123. A further £20,000 was paid off the Bank loan at the end of January 2017 (page 332).

February 2017

124. There were further exchanges of emails about the Atherton project in February 2017. On 7 February (page 348) Mr Higgins emailed Mr Tarrant and Mr Stock about the December accounts to say that there was a strong performance. The additional repayments to the Bank had been made from cash from that overperformance; cash was still held for the Atherton project.

125. On 15 February (page 339) Mr Tarrant updated his fellow directors and Mr Stock by saying the total cost of Atherton was going to be approximately £200,000 plus VAT. Attached to his email was an email from Mr Higgins the same day which said that the proposed salary increase would bring matters in line with levels anticipated, and as long as the company was able to implement price increases to cover it they would remain ahead of plan. The following day he provided Mr Stock with detailed information about the salary increases for carers (pages 341-343).

126. On 17 February (page 344) Mrs Tarrant emailed Mr Tarrant to say that a member of staff was leaving to get a job at a much higher salary. Her email said she was extremely uncomfortable with the way in which it had been handled by Mr Stock.

We inferred that was a reference to the resistance on his part to increasing staff salaries. This was another area of tension between Mr and Mrs Tarrant and Mr Stock.

127. On 28 February 2017 (page 360) Mr Stock emailed Mr Higgins. His email was copied to his private wealth management adviser, and to his two daughters (Mrs Collister and Suzanne Gauge) who were beneficiaries of the Life Trust. It was not copied to the claimants. The subject was the loan made to 3L. His email included the following:

> **"…I am a firm believer in reducing Bank debt as fast as possible and trust this is going to continue albeit once Marcus [Tarrant] starts spending money will be at a reduced rate…I realise your nervousness to my approach to paying back so quickly and admire the fact that you do not want to have to come to us cap in hand so to speak, but without definitive figures from Marcus, which I doubt we will ever get, it is difficult to be exact with the cash requirement. If you run tight for cash as a result of overspends at Atherton we will loan 3L money as required. We are fully committed shareholders who will do what is required to make the plan succeed. We are, however, not a bottomless pit and my worry is that if Marcus knows there is further money available he will be inclined to use it so I would appreciate it if you keep this email to yourself."**

128. The email ended with the following:

> **"You will note who is copied into the email. We are all of a mind to make this work in all our interests. Let me know if you need any more comfort."**

129. The message was plain. Although Mr Stock was concerned at the delay and overspend on Atherton, which had prevented repayment of Bank debt as swiftly as he would have liked, he was committed to the project and was prepared to inject further money if necessary to keep the cash flowing. However, Mr Tarrant was not to know of this assurance.

March 2017

130. In early March there was an exchange of emails between Mr Higgins and Mr Tarrant (page 370) suggesting that there might be a discussion about the management buyout being done earlier than had been planned in the investment agreement. Mr Tarrant said he had had a "good chat" with Mr Stock at that stage.

April 2017

131. On 5 April 2017 Mr Tarrant emailed Mr Stock providing a summary of capital expenditure for Atherton. He confirmed he was looking for ways to keep costs down, although not by compromising on any care related aspect.

132. A Board meeting took place on 21 April 2017. The minutes appeared at pages 202-203. In addition to the directors, Mr Stock, Mrs Collister and Suzanne Gauge all attended. During the financial review Mr Higgins confirmed that the business was performing better than the plan agreed in the summer of 2016, but was behind schedule on Atherton and therefore overall behind plan.

133. After the meeting the Finance Manager, Val Williams (who had not been present), emailed Mr Tarrant saying that they needed "to put the brakes on spending if possible" until it was clear that there would be enough cash to meet the payroll run

at the end of the month (page 386). Mr Tarrant responded saying that he had spoken to Mr Stock after the Board meeting:

> **"Called Stocky after the meeting and said that we wanted to confirm that we could draw on his funds if needed as I didn't want us to have the stress of that with knowing that we are spending at Atherton which he said was absolutely fine."**

May 2017

134. The internal debate about the cashflow issue continued during May. On 5 May there was an exchange of emails at pages 391-392a. Mrs Tarrant expressed concern about the effect of paying off Bank loans and said that the business was "living on a knife edge". More purchasing was required to complete Atherton by the end of May. Her email said:

> **"At the Board meeting in December both Allison [Murphy] and I said that we felt uncomfortable with this and were told that Peter [Stock] would make funds available. Can you please confirm when this will be as we have absolutely no wriggle room at all?".**

135. Mr Higgins responded. He said he agreed he would rather bear more Bank interest and have a "nice comfy mattress of cash". Mr Tarrant was looking at ways to keep the business running without getting more money from Mr Stock. In an email the same day (page 392a), however, Mr Higgins confirmed to Mrs Tarrant that he had spoken with "sugar daddy Peter" earlier this week and that Mr Stock was happy to put money in "without any documentation nonsense".

136. These efforts to avoid a further cash injection by Mr Stock were unsuccessful, because on 10 May (page 395) Mr Higgins confirmed that he had asked Mr Stock for £100,000 by the end of the month. Part of this was driven by the need for Atherton to be ready for a CQC inspection on 2 June 2017. As part of the preparation for that inspection efforts were being made to get the relevant building, utilities and electrical certificates (page 398).

137. On 22 May and 23 May 2017 Mr Higgins and Mr Stock exchanged emails about the cash position (pages 403 and 404). The CQC inspection had been delayed and so had some consequent equipment purchasing. That meant that there was enough cash in the business for the month end payroll. Mr Stock asked for a firm budget for Atherton with the labour requirements so that the cash requirement could be accurately predicted.

June 2017

138. On 20 June 2017 Mr Higgins sent an email to Mr Tarrant (page 436) saying that he had held back on completing a change of Bank arrangements because of the increased repayments that would involve. He said he wanted an updated view of Atherton costs re salaries and other matters before committing to the higher repayments.

139. On 23 June 2017 (page 437) Mr Higgins emailed the external accountant updating him on a number of matters. This included the director's loan account for Mr Tarrant. There had been a period prior to the July 2016 transaction where Mr

Tarrant had taken payment out of the business by way of a loan rather than payment of salary, which helped cashflow because tax was thereby deferred. The email said:

> **"As discussed when we met, we want to clear out the director's loan account and any related tax."**

Early July 2017

140. On 5 July 2017 Mr Higgins emailed saying that profit for April was just over £71,000. The cash position was about to improve by £7,000 per month as some debenture instalments were ending.

141. Nevertheless, on 13 July 2017 (page 450) Ms Williams emailed Mr Higgins to warn him that cashflow was not good. She said she would let him know nearer the end of the month what the shortfall would be for payroll. Mr Higgins forwarded this email to Mr Stock the same day (page 450). This was the first indication Mr Stock had that there was a cash problem that month. Four days later (page 451) she emailed Mr Tarrant to confirm that there was not enough cash to pay wages at the end of the month. Her email said:

> **"I hope you weren't in trouble over the cashflow – had we not made the additional payments to the Bank we would have been able to pay for this whole refurbishment ourselves without any interruption to the business (which would have been a great achievement to showcase to future investors)."**

19 July 2017

142. Following a successful inspection by the CQC the previous day (page 452) there was an open day at Atherton on 19 July. A signing-in book for Atherton was used from then onwards. Previously there had only been some sign-in sheets for contractors and other visitors whilst renovation work was still being done.

143. After the open day there was a meeting at which the cash position was discussed. It was attended by Mr and Mrs Tarrant, Allison Murphy, Mr Stock, Mrs Collister and Val Williams. There were no notes of this meeting, and the evidence as to exactly who was present during the different parts of the discussion differed, but on balance the Tribunal preferred the account given by the claimants that there were two meetings. The first was a meeting of Mr and Mrs Tarrant, Ms Murphy and Mr Stock where the increase in the wage bill was discussed in isolation. That was not a significant discussion, although Mr Stock was frustrated that this spike in wages had not been predicted in the management financial information. He formed the view that none of the Executive Team could explain why there was suddenly an increase in wages which was causing a cash problem.

144. Mr Higgins was not present during this meeting because of another commitment, but when he arrived around 3.30pm he had a discussion with Mr Stock on his own.

145. These meetings led to a flurry of emails over the next three days which included seven of the alleged protected disclosures, and to a management meeting on 24 July 2017 at which it was alleged the eighth protected disclosure was made. Because of the importance of these email exchanges it will be necessary to record

them in detail. Where one of the alleged protected disclosures is addressed it will be marked as "**PD1**" etc.

20 July 2017 **PD1 – PD4**

146. Mrs Tarrant and Allison Murphy had an exchange of text messages at around 9.30am (pages 456-456a). Mrs Tarrant said her heart was "jumping out of my chest" and she thought it was anxiety. Ms Murphy suggested that she take lorazepam or diazepam. Mrs Tarrant said that Mr Tarrant had come home stressed, partly about payroll and partly having been locked in at Atherton by the contractor, Ian Brown.

147. At 09:41 Mr Tarrant emailed Mr Stock (page 454) to say that he was sorting out the wages problem; the April figure appeared to be due to Bank Holidays and supernumerary nurse training.

148. He sent a further email at 12:47 (page 455). This email was said to be **PD1**. His email compared the last quarter of 2016 with the first quarter of 2017 in relation to staffing costs. The gross salary bill in the quarter had gone from £325,000 to £386,000, and the average percentage of turnover which went to salary had gone up from 54% to 61%.

149. Mr Stock replied at 17:23 (page 460). His email said:

> **"When we agreed the salary increases it was on the understanding that the increases in care would more than compensate for the increased cost of labour. You seem to be ignoring this in your calculations. If we are not going to achieve what was promised you need to find savings elsewhere."**

150. At 17:36 Allison Murphy emailed Mr Stock direct to provide some details about the wages issue. She did not copy her email to any of the Executive Team.

151. Mr Tarrant replied to Mr Stock at 17:51 (page 459). This email was said to be **PD2**. He denied having ignored anything and said the increased staff costs had been analysed by Ms Murphy and Mr Higgins. Care charges had risen but were effective immediately only for new patients: for existing patients the increase would take effect at the annual review. The gap to the pay increases which took effect in April would narrow over time. His email included this paragraph:

> **"Running as close to bone as possible on everything else and cutting back further would seriously jeopardise the quality of the business, staff and most importantly patients. I wouldn't be comfortable putting profit before people's wellbeing."**

152. Mr Tarrant forwarded that exchange of emails two minutes later to Ms Murphy, Mrs Tarrant and Mr Higgins (page 458a). This was said to be **PD3**. In forwarding the email he simply said:

> **"This is an example of differing priorities!!!"**

153. Mr Stock replied to Mr Tarrant at 21:07 (page 459). His email began as follows:

> **"No-one is asking you to put profit before patient care and I am disappointed that you have chosen to make such an inflammatory statement. What you are being asked to consider is to do what you said you would do. How many of the existing patients are on new rates? Will you cover the wage increase with increased charges? If you are**

> **happy that you can achieve it all I am asking that you show it will happen. I have managed many businesses in my time and have never found one that savings could not be made [in].”**

154. His email went on to give an example: a banking document due for signature in April had only been signed by Mr Tarrant and Mr Higgins a week earlier, meaning that the business had been paying more interest than it should have done for a couple of months.

155. Mr Tarrant replied to this email at 21:39 (page 458). This email was said to be **PD4**. He said that savings were being made everywhere and went on as follows:

> **“Not able to comment on the banking point you mentioned as it was never discussed with me, Jules [Tarrant] or Allison [Murphy] and the only input I had was being asked to sign docs last week by Brian which I did. I understand that this will put further cash pressure on us so we as a team would certainly like to understand what discussions were held.”**

156. The arrangement was made for there to be a meeting on Monday 24 July at 2.00pm (page 466c).

21 July 2017 **PD5-PD7**

157. The email exchanges continued the following day. At 08:58 Mr Tarrant emailed Mr Higgins (page 462). This was said to be **PD5**. He forwarded the email from Mr Stock which referred to the inflammatory statement. He copied his email to Mrs Tarrant and Ms Murphy. His email to Mr Higgins said:

> **“How come I am being accused of making a decision on something I wasn’t even involved in? Allison, Jules and I will be meeting with Peter on Monday afternoon as we need to deal with this. Peter has made wrong decisions without consulting any of us and now wants to throw shit our way? Not happening!!!”**

158. Mr Higgins was not going to be at the meeting because he was on leave for two weeks from 22 July.

159. At 09:09 Mr Tarrant emailed Ms Murphy and Mrs Tarrant, copying it to Mr Higgins and Ms Williams. His email appeared at page 463. It was said to be **PD6**. It said:

> **“We need to meet with Peter on Monday now as I am taking flak over this payroll and he is now on one about the pay increases.**
>
> **On top of that he made decisions on banking with no consultation with us which will put even more pressure on our cash. Then accuses me of losing money by delaying when I wasn’t even involved.**
>
> **Could do with the traffic light reports being updated as we are being told that we need to make more savings – which I am not in agreement with.**
>
> **It’s disappointing that all our hard work and sacrifice should result in this situation but I will not allow someone to drive down quality and care for the sake of making himself more money.”**

160. Mrs Tarrant responded at 09:40 (page 463). She said she was concerned about banking arrangements being made without their knowledge or input. She

proposed that no changes to banking were made without the input of the whole management team following a full financial update from Val Williams.

161. Mr Higgins responded to this chain of emails at 10:28 (page 464). His email went to Mr and Mrs Tarrant, Ms Murphy and Val Williams but not to Mr Stock. He made the following points:

- Mr Stock was talking about saving cost on interest charges which was Mr Higgins' responsibility.
- It did look as though the staff cost ratio had gone through the roof and the accounts did not explain why that was.
- When Bank overpayments were made it was clear to Mr Stock that he might need to "fill a gap".
- The delay in signing the Bank document until July was a consequence of poor communication between him and Mr Stock.
- He thought that Mr Stock's input this week had been "close to ideal" for a NED. He was right to demand timely and accurate management accounts.
- Mr Higgins accepted some responsibility and ended his email with the phrase "mea culpa".

162. Mr Tarrant responded at 11:07 (page 465). This was said to be **PD7**. He set out clearly his perspective on the issues:

> **"Ok, chill pill taken.**
>
> **Still utter crap though.**
>
> **(1) Peter [Stock] made decision to give all our cash back to Bank despite our valid concerns. Leaves us in the position of being [beholden] to him now through no fault of our own.**
>
> **(2) Peter chose not to involve or consult with any of us and made decision himself on committing the business to increase payments on loans having just given them all our cash.**
>
> **(3) On the other side we were courteous enough to provide a full business proposal for the pay rises and consult over it which led to him having a strop. He now decides to make up his own version of what we proposed and throw it back in our face.**
>
> **(4) At no point did I make a decision to withhold the loan docs of which he is accusing me. I expressed my concern over his decision and the effect on the business. Your decision after discussion with Val ref Debentures was absolutely the right thing to do. Especially considering Atherton and cash pressure that brings. I had assumed you discussed with him as I nor the team was not involved in decision making.**
>
> **(5) He has chosen to ignore the overperformance of the business and higher profit delivery as well as budgetary savings that have been made to date which far outweigh everything else. Instead he is demanding further cost cutting.**

> **Could go on but just getting more pissed off with it now. Fact is he has made unilateral decisions which have not been in best interest of 3L and are designed to increase business value to line his own pocket.**
>
> **I am not prepared to push myself to breaking point and be away from my family or see the rest of management team driven into the ground and then he chastised for not making Peter more money.**
>
> **This is not what 3L is about and not what we wanted from investor.**
>
> **Dress him up and put him on his pedestal as much as you want but I'm not buying it. It's time to stop pandering to this crap."**

163. At just after noon Mr Tarrant emailed Allison Murphy and Mrs Tarrant to confirm that they should meet at Atherton at 12 noon to discuss matters before meeting Mr Stock. He wanted them to gather as much information as possible about spending and the budget. He also said that they needed to prepare for Mr Stock not covering the cash deficit dependent on the outcome of the meeting.

164. At 17:45 Mr Higgins emailed Mr Stock to update him on the accounts position (page 467). He said that his review of the payroll issue did not find any errors and suggested that the April result was unusual for the reasons previously identified.

24 July 2017 – **PD8**

165. This meeting was attended by Mr and Mrs Tarrant, Ms Murphy and Mr Stock. Mr Higgins was away on holiday. There were no notes kept of the meeting.

166. It was Mr Tarrant's case that in the course of this meeting he made **PD8** by telling Mr Stock that his and Mr Higgins' actions were depriving 3L Care of the working capital necessary to provide for contingencies as prescribed under the CQC regulations, and were jeopardising patient safety and amounted to a regulatory breach, and that Mr Higgins should be dismissed due to his failures in financial reporting.

167. Mr Stock did not think it appropriate to discuss removing Mr Higgins whilst Mr Higgins was away on leave. He agreed that there was discussion of the payroll issue and the cash position overall. However, Mr Stock denied that Mr Tarrant said anything about the cashflow issue affecting the quality of the business or any breach of CQC regulations.

168. We will return to that issue in our conclusions.

169. After the meeting Mr Tarrant sent an email at page 474 to those who had been present, and to Val Williams. He identified the steps needed to ensure that the recent situation did not occur again. His email made no mention of any discussion about possible breach of CQC regulations.

Late July 2017 – Ms Murphy's Concerns and Investigation

170. On 25 July Mr Stock injected a further £52,000 into the business (page 1476).

171. On 26 July Mr Stock and Ms Murphy had a meeting with the Bank. They had a coffee after the meeting. In her witness statement (paragraph 19) Ms Murphy said

she instigated the meeting away from Atherton because she was concerned that some of the contractors at Atherton would listen and report back to Mr Tarrant. Her witness statement said that she told Mr Stock she did not trust Mr Tarrant any more because of financial issues, and that she suggested that he look at the accounts.

172. In cross examination she gave a slightly different account, which was that Mr Stock suggested the meeting, and that Mr Stock asked her uninvited whether she trusted Mr Tarrant.

173. Mr Stock's witness statement said that Ms Murphy said she had a few things she would like to talk to him about and in that discussion suggested he look at Head Office expenses. In cross examination he said that he had asked Ms Murphy whether she trusted Mr and Mrs Tarrant but thought that was after she had told him of some of her concerns. He said she mentioned quite a few specific things but he could not recall what they were.

174. After this discussion Mr Stock asked Mrs Collister to speak to Val Williams and look into the accounts. In her oral evidence Mrs Collister recalled having been told that numerous things purchased for the three care homes were not there, the implication being that Mr and Mrs Tarrant were using them at their own home. The main example was a throw purchased at Dunelm in June 2017. This was effectively the start of the disciplinary investigation but there was no documentation recording any of this.

175. On 27 July 2017 Mr Stock copied the management team into an email to the Bank (page 477) in which he confirmed that the Bank had agreed to backdate the reduced rate to 1 April despite the late signature of the relevant documents, and that he was seeking a repayment holiday to balance the start-up costs of Atherton.

Atherton Preparations

176. On 28 July 2017 Ms Murphy emailed to say that Atherton would open on Thursday 3 August 2017.

177. On 30 July 2017 (page 480) Mr Tarrant emailed the "House Book" for Atherton (pages 480-521) which contained a range of CQC, building regulations and other certificates. He and Mrs Tarrant were due to start their holiday on Tuesday 1 August. That same day he created a task list showing the schedule of works needed at each of three Care Homes (pages 277c-280), a document shared on SharePoint and accessible by all the management team.

178. On Monday 31 July Mr Tarrant met at Atherton with Ms Murphy. Mr Tarrant and Mr Stock had an exchange of emails that day in which Mr Tarrant referred to his meeting with Allison Murphy (page 522). Having heard oral evidence from Ms Murphy and Mr Tarrant we concluded that there had been a partial walkaround of Atherton with the two of them discussing what needed to be done. Mr Tarrant told us that they did the downstairs only. They had a discussion in the dining area off the lounge. During that discussion Mr Tarrant gave Ms Murphy a calendar on which he had written where the various contractors were due to be working each day during his annual leave.

179. That same day Mrs Collister emailed Allison Murphy to ask if she could come and meet her (page 521b). Her email did not say what the meeting would be about.

1-6 August 2017

180. Mr and Mrs Tarrant were away abroad on holiday with their children from Tuesday 1 August. Despite that Mr Tarrant emailed three action points for Atherton in an email to Ms Murphy shortly before 11.00am (page 524). A heating engineer was needed for one of the boilers.

181. Mrs Collister met Ms Murphy on 1 August too. No notes were kept. According to Mrs Collister's witness statement (paragraph 12) Ms Murphy said she was worried that the claimants were taking money out of the business.

182. On Wednesday 2 August Mrs Collister went to Atherton accompanied by her husband, who had his own building business. Mr Collister subsequently prepared a report on the general condition of the building at Atherton for the period August-October 2017 (pages 282d-282o). It began by saying that Allison Murphy had asked him to inspect the building for what she suspected was a poor standard of previous workmanship. His report recorded a very poor standard of work in the interior painting and decoration, and in plumbing and hygiene work in residents' bedrooms and bathrooms. His report also said:

> **"Mr Tarrant has also left the building handover to Allison (Murphy) with statutory items not in place that she could not have known about immediately and that could have caused injury and possibly death to persons within the building."**

183. According to Mrs Collister's oral evidence, around this time there were two meetings with external HR advisers, Spectra, about the disciplinary investigation. They provided some advice on the suspension of Mr and Mrs Tarrant but were not involved on an ongoing basis. Instead Mrs Collister (and subsequently Mr Higgins) were advised by BC. They were not the company's usual lawyers. They were instructed by Mr Stock. One of the lawyers at BC had advised him on corporate matters for some years. Mr Stock told us that he first spoke to BC about the claimants on 9 August 2017.

184. Atherton opened for business on Thursday 3 August 2017. There was one service user in residence. However, he did not stay that evening but returned to hospital. His first day there overnight was on Friday 4 August. It was found that the shower was not working.

185. There was a meeting at Atherton on Saturday 5 August about a number of concerns held by the service user's family. The notes appeared at pages 1596-1601. The family were critical of the staff, the medical equipment available and the organisation of the Home. These were all matters that fell under Ms Murphy's remit However, they were also unhappy that the building was not ready. It was "not finished and not clean enough". The shower had not been working. These were matters which were the responsibility of Mr Tarrant as project manager for the refurbishment.

186. On 4 August Mr Stock emailed Mr Higgins, who was still on holiday. The email appeared at page 526b. It said:

> **"We have very large problems at 3L which I need to discuss with you as a matter of urgency. If you pick this email up before Monday I suggest you call me on my mobile to arrange to meet. I am anxious to have a face to face with you some time on Monday."**

187. Mr Higgins saw the email when he flew back from holiday on Saturday 5 August. He also received an email from Mr Stock the same day forwarding the draft accounts to him and Mrs Collister (page 525a).

188. On Sunday 6 August Mr Stock emailed Mr Higgins to give him a better idea of what needed to be discussed. His email appeared at page 526. It said:

> **"I want to update you on the situation with 3L and to discuss what action I am proposing in relation to the Tarrants in view of the massive overspend on Atherton but more importantly the financial irregularities that Rachel [Collister] has unearthed. I would also like to clarify how we are going to deal with the control of finances going forward."**

7-14 August 2017

189. On the morning of Monday 7 August 2017 Mr Stock and Mr Higgins met to discuss matters. In cross examination Mr Higgins told us that he and Mr Stock then went to Atherton and had a meeting with Allison Murphy there. It became clear to Mr Higgins that Allison Murphy had significant concerns so the matter had to be treated seriously. He could not recall if the suspension of Mr and Mrs Tarrant was discussed at that stage. Mr Stock told us that most of the talking had been done by Ms Murphy and that she expressed how she felt and her concerns about having "blown the whistle" on Mr and Mrs Tarrant.

190. That same day Mrs Collister arranged to obtain copy documents from Val Williams as part of her investigation into finances. She told us in cross examination she copied at least 100 invoices relating to Atherton and then passed them to BC. There was a list of the concerns which resulted from that discussion but it was not produced to our hearing. She was only looking at financial irregularities, not the alleged massive overspend in relation to Atherton.

191. That same day or the next Mrs Collister produced a document headed "Evidence of Fraud/Theft at 3L Care Ltd" (pages 1291-1293). It was a document subsequently seen by Mr Higgins, although it was never shown to Mr and Mrs Tarrant. It recorded the following matters:

- Items suitable for a domestic property had been purchased and booked to the refurbishment of Atherton but could not be found at any of the three Homes and were suspected to be at the home of Mr and Mrs Tarrant where a new kitchen and bathroom had been fitted between October 2016 and January 2017;

- There was an invoice for a "Load and Go" service from Congleton to Atherton which would not be for the Atherton refurbishment even though it had been booked to that;

- There had been over £270 spent on personal meals, including a manager's Christmas dinner to which none of the managers had been invited;

- A Samsung tablet and cover had been purchased for over £500 just before Christmas;

- There had been van hire and fuel purchased through the business when mileage claims for travel in personal vehicles was also being claimed;

- Invoices for "Forces Regroup" for general maintenance had changed since 10 November 2016: they had become very vague and there were discrepancies of £3,500. Work had been claimed which had not been done and the invoices signed off by Mr Tarrant;

- There were similarly false invoices for Luke Pearson who worked on maintenance tasks;

- Mr Tarrant had withdrawn cash on his credit card and told Val Williams not to post that to his director's loan account;

- Mr and Mrs Tarrant had taken out mobile phone contracts for their two children at a cost to the business of over £1,000 per year;

- A3 paper and printer ink cartridges had been purchased when the Homes did not use A3 paper;

- No Council Tax had been paid on Chapel for four years.

192. The report ended with a section headed "Evidence of Incompetence". This included overspend on Atherton and failure to meet deadlines. It also referred to the employment by Mrs Tarrant of her son's then girlfriend, Abi Cooper, without a contract of employment or job description, the purchase of expensive laptops and an A3 printer, and the lack of contact from Mr and Mrs Tarrant whilst they were away on holiday save in relation to payment of their expenses.

193. On Friday 11 August 2017 Hayhurst Electrical Contractors did an inspection at Atherton and provided an estimate for the work required to remedy problems which came to £1,900. The documentation appeared at pages 1348-1351.

194. On Monday 14 August a member of staff at Atherton emailed the manager, Claire Jones, to say there had been an awful smell on the ground floor which may be due to the drains. The email appeared at page 1355.

15 August 2017: Mr Stock's Director Appointment

195. Although Mr Higgins had referred to Mr Stock as displaying ideal behaviour for a NED in his email of 21 July (page 464), in fact Mr Stock had not been a director. He had attended Board meetings only as an investor representative.

196. On 8 August 2017, however, Mr Stock and his wife as Trustees of The Life Trust exercised the right under clause 6.1 of the Articles of Association to appoint Mr Stock as an investor director (page 531). This was communicated by Mr Stock to the other directors (Mr and Mrs Tarrant, Ms Murphy and Mr Higgins) by email of 15 August 2017 (page 531). Later that day there were email exchanges between Mr

Higgins, Mrs Collister and Mr Stock about whether there had been any contact from Mr and Mrs Tarrant about this (pages 532-533).

197. Mr Tarrant did respond to that email from his holiday at just after 5.30pm on 15 August 2017 (pages 527-528). His email was addressed to Mr Higgins not to Mr Stock. He referred to the tense meeting on 24 July before they went on holiday but acknowledged that Mr Stock had been right to challenge him in some respects. His email said:

> **"We did air concerns around decisions to pay too much cash back to Bank and timing of loan implementation etc…Ultimately feels like business has become very disjointed with everyone making own decisions with no-one at the helm – not a comfortable and somewhat worrying place to be which has caused me to consider whether the corporate and CQC responsibility I carry is too risky if we were to continue like this. Had long chats with Jules on hols and feel like we need to 'regroup' and understand exactly what we want and how we move forward in more controlled way."**

198. His email went on to say that he assumed Mr Stock and Mr Higgins had discussed Mr Higgins' role, given the Investment Director appointment. He suggested a change in role for Mr Higgins to be discussed on his return.

199. Mr Higgins forwarded this to Mr Stock (page 527).

Suspensions – 16 August 2017

200. On Wednesday 16 August 2017 the claimants were suspended. Mr Pearson heard from 3L staff that this was the case and communicated it to Mr Kelly, who in turn rang Mr Tarrant abroad to break the news.

201. The suspension was confirmed by two emails sent just after 10.30am at pages 534-534b. They came from Mr Higgins. The claimants were each invited to an investigation meeting with Mrs Collister on 18 August.

202. Where the emails differed was in the introductory paragraphs. The email to Mr Tarrant read as follows:

> **"I am contacting you to let you know you are suspended from the business with immediate effect pending the outcome of an investigation into some serious matters that have recently come to light both in respect of the Atherton Care Home's safety and readiness for trading but also in respect of what appeared to be some financial irregularities.**
>
> **In short, some serious issues concerning the premises at Atherton became apparent whilst you have been away which have required input from Allison, Peter and Rachel in order to ensure the health and safety of the staff and resident. These issues then led Rachel to make further investigations into the works that are being carried out at the property and this led to a wider review of the business's finances."**

203. The email to Mrs Tarrant instead said the following:

> **"I am contacting you to let you know that you are suspended from the business with immediate effect pending the outcome of an investigation into some serious matters that have recently come to light following an initial investigation by Rachel into the works at Atherton, which subsequently led to a wider review of the business's finances."**

204. The emails did not give an accurate account of how the investigation had begun. They made no mention of the meeting between Mr Stock and Ms Murphy on 26 July at which Ms Murphy conveyed her suspicions about the accounts to Mr Stock. Instead the emails gave the misleading impression that the concerns about financial irregularities had arisen out of an investigation into the works at Atherton.

17 August 2017

205. On 17 August Mrs Collister emailed Mr Higgins to say that he should not speak to either of the Tarrants before he had spoken to her (page 535).

206. Even before her holiday there had been the text exchanges of 20 July between Mrs Tarrant and Ms Murphy about anxiety (see paragraph 146 above). On 17 August Mrs Tarrant saw her GP and was certified unfit for work to 31 August on account of anxiety (page 538). She texted Mr Higgins that same day saying she would not be attending the meeting and that Mr Tarrant would bring the sick note to his meeting.

207. That day BC supplied a number of draft documents to Mrs Collister. They included two drafts of the suspension letters which were to be issued (pages 1462-1464) and a draft script for each investigatory interview (pages 1457-1460).

Investigation Meeting – Mr Tarrant 18 August 2017

208. At just after 7.30am on 18 August Mr Tarrant texted Mr Higgins noting that the meeting was to be at BC's offices and asking who would be present. He was told that Rachel Collister would conduct the investigation and Dave Collister would be there to take notes. Mr Higgins later confirmed that Allison Murphy had notified the CQC regarding the situation. This exchange of text messages appeared at page 539.

209. Mr Collister's notes of the investigation meeting appeared at pages 540-544. Mr Tarrant later prepared his own note at pages 562-567. Mr Tarrant had received no information about the subject of the meeting or the matters that would be raised saved for what was in the email suspending him. Mrs Collister said that matters had come to light following her investigation into the readiness of Atherton. She made no mention of the concerns Ms Murphy had raised with her father. She then proceeded to ask a number of questions of Mr Tarrant and the gist of his answers was recorded. These included questions about the heating, hot water and shower at Atherton when the first resident arrived, and other issues about the refurbishment at Atherton. Mr Tarrant said he had left a list with Allison Murphy of what needed to be done and he queried why she had not been suspended. There was a brief discussion about other issues including the exterior of the building, the absence of a fire plan, and the smells in the dining room due to a soil pipe having been left uncapped. It was also suggested that there was no electrical certification for the building.

210. The discussion then moved on to financial irregularities. Mr Tarrant was asked about the following matters. He was not shown any documents or given any details. This was the first time these allegations had been put to him:

- Five packs each of wall tiles, oak effect flooring and whitewash pine laminate had been purchased for Atherton but were not there;

- On 25 June 2017 a meal at the Robin Hood pub had been paid for;
- A van had been hired for six weeks during the Atherton refurbishment.

211. A common theme of Mr Tarrant's response was that he needed access to his emails in order to consider these matters and respond. His email access had been removed on suspension. Some items had been used to set up an office at home once the Meadowside office closed in December 2016. He said that he had learned of his suspension through his father-in-law and confidentiality should have been maintained. Mrs Collister said she anticipated her investigation would conclude in the next two weeks.

Suspension Letters 18 August 2017

212. The terms of suspension were confirmed in letters of 18 August to Mr Tarrant (pages 545-546) and Mrs Tarrant (pages 547-548). They were identical save that Mr Tarrant was suspended not only for serious financial irregularities but also concerns about safety and trading readiness at Atherton. The letters also suggested that since the email there had been contact with various members of staff. This was prohibited.

213. The letters confirmed that the email account and access to company bank accounts and the computer network had been suspended. The disciplinary procedure was enclosed. Each letter contained the following paragraph:

> **"If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible. If you require access to the premises of computer network for this purpose, please let me know as we may agree to arrange this under supervision."**

214. As Mrs Tarrant had not been well enough to attend the investigation meeting work was being done to produce a list of questions for her.

Board Meeting 18 August 2017

215. There was a Board meeting that day as well (page 549). It took place after the investigation meeting. The claimants did not attend. Rachel and David Collister were there as well as Mr Stock, Mr Higgins and (by telephone) Allison Murphy.

216. Mr Collister reported on the current status of Atherton. There were now gas certificates for the two boilers but the electrical safety certificate situation was unclear. The site was safe for occupancy. Mrs Murphy confirmed that the current resident's family were happy with their response to the issues which had been raised. It was agreed that she should contact the CQC.

Mr Tarrant's letter – 18 August 2017 – **PD9**

217. After the investigation meeting Mr Tarrant prepared a letter to the other directors which appeared at pages 551-552. He maintained that this amounted to **PD9**.

218. He said he was concerned to learn that whilst he had been on holiday there had been a serious breach of the duty of care owed to the business and service users. The outstanding works required at Atherton had been communicated to

Allison Murphy but it was clear that she had failed to ensure the necessary work was carried out. She was the responsible person in relation to regulatory obligations whilst he was on leave, and he expressed his extreme surprise that she had not been suspended at the same time. She had only just contacted the CQC. He asked for full details of the report that had been made. He went on to express concerns about lack of confidentiality. He emphasised the importance of maintaining compliance with regulatory requirements. He said:

> **"I now have serious concerns [at] the manner in which the business has been run in my absence. It is clear from what I have seen since my return from holiday and heard this morning that there is a serious risk that actions that are detrimental to the wellbeing of staff and service users are being taken."**

21 August 2017

219. Mr Higgins responded on behalf of the Board on 21 August 2017 (page 553). He assured Mr Tarrant that the Board was aware of its duties and responsibilities. He was not required to contact the CQC because he was suspended. As a shareholder he was not entitled to a copy of any communication with the CQC. The minutes of the investigation meeting were enclosed.

220. That same day Abi Cooper was dismissed by the Chapel Road manager, Janet Potter (page 554).

Questions for Mrs Tarrant

221. On 21 August Mr Higgins wrote to Mrs Tarrant (page 555) enclosing a list of questions for her (page 556). His letter began as follows:

> **"Further to the email sent to you on Wednesday 16 August 2017 inviting you to an investigation meeting this morning, we note that you did not attend due to the fact that you are currently signed off by your GP with anxiety. We are informed that this is unrelated to work and that you were diagnosed by your GP before you went on your recent holiday.**
>
> **As you are currently off sick, we do not propose to invite you to an investigation meeting. However, you will appreciate that we cannot halt our investigation due to the seriousness of the allegations and so attached to this email are a list of questions we would like you to respond to. Please send your responses to Rachel Collister by email…by no later than 5.00pm on Tuesday 29 August 2017. In addition to the questions posed, if you have any other information you wish to disclose that would help us with our investigation, please feel free to do so.**
>
> **Please be aware that if you fail to respond, we will have no choice but to continue the investigation and ultimately make decisions without your involvement which is not our preference so your cooperation would be appreciated.**

222. The list of questions included questions about the following:

- Food and drinks purchased at Shrigley Hall Hotel on 23 December 2016;
- The expenses claim for £19.99 for the throw purchased at Dunelm in June 2017;
- A mileage claim from 3 May 2017;

- The purchase of a Samsung tablet;
- The two mobile phone numbers;
- The purchase of A3 paper.

Claimants' Grievances – 24 August 2017 – **PD10**

223. On 24 August grievances were submitted by Mr Tarrant (pages 558-561) and Mrs Tarrant (pages 560-571). Although it did not say so, Mrs Tarrant's grievance had been drafted by her solicitors, HRC Law LLP ("HRC"). We inferred that Mr Tarrant's grievance had also been drafted by them.

224. The grievance from Mr Tarrant was said to be **PD10**. It was addressed to Mr Higgins. He enclosed his own notes from the investigatory meeting with Mrs Collister. He said that the employee handbook had not been attached to the letter of 18 August confirming suspension. The points raised were in summary as follows:

- The allegations were not serious enough to warrant suspension, and the procedure was a sham in response to issues raised at the end of July relating to governance and safety of the patients;
- Mr Stock had not honoured the agreement that he would not be involved in day-to-day running and had interfered in a number of matters including decisions on repayment of Bank loans, refusing to sanction proposed salary reviews, discussing banking issues without involving the Board;
- Mr Higgins had himself failed to provide timely accounts and accounting information;
- The suspension was a consequence of Mr Tarrant raising genuine and reasonable concerns about such matters;
- There had been a breach of confidentiality because others were aware of suspension before he had been told;
- There had been no formal notifications to the CQC;
- Allison Murphy should have been suspended;
- Peter Stock's daughter and son-in-law (i.e. Mr and Mrs Collister) had been appointed to conduct the investigation and were not independent;
- No arrangements had been put in place for access to the computer systems and email to enable him to rebut the accusations against him;
- The decision of any investigation was predetermined due to termination of the Office 365 licence, removal from access to social media administration and blocking him from the company's Facebook page.

225. Attached to this letter were copies of various emails between the claimant, Mr Higgins and Mr Stock together with a further copy of his letter of 18 August 2017.

226. Mrs Tarrant's grievance letter raised the following points:

- She was concerned to note that Mr Higgins had been informed that her current ill health was not work related and asked for the source of that information: her ill health was very much work related and had been severely exacerbated by the suspension;
- If Rachel Collister was investigating, why had Mr Higgins sent the questions to her?
- She queried the appointment of Rachel Collister;
- No details about how to gain access to the company's systems had been provided;
- The decision to suspend her was because she was married to Mr Tarrant and after both of them had raised legitimate concerns about the running of the company: there had been unlawful discrimination due to the protected characteristic of marriage;
- Allison Murphy should also have been suspended and investigated;
- There had been a breach of confidentiality about her suspension.

227. Mrs Tarrant also provided some limited responses to the questions raised. She made the point that she was too ill to deal with it properly and did not have access to any company accounts or records. However, she said that:

- The stay at Shrigley Hall had included a strategy discussion with Mr Tarrant at the end of a long year;
- The throw purchased for Atherton was still intended to be used and was stored in her garage at home along with other items which would have been taken to Atherton had she not been suspended whilst on holiday;
- She needed copies of expenses claims and associated documents to deal with a number of other points;
- She had had no involvement with mobile phone contracts.

228. She also made a series of allegations about the way Mr Higgins and Mr Stock had made decisions on cash management without the input of the Board, reiterating some of the concerns also raised by Mr Tarrant. She ended by requesting access to the company's systems and sought proposals about how her grievance would be addressed.

<u>Late August 2017</u>

229. On 25 August Mr Higgins emailed Mrs Tarrant to acknowledge receipt of her grievance (page 572), copying it to the lawyer at BC providing advice on the investigation. He also emailed the lawyer (page 573c) saying that they needed to agree an approach for her to have access to the system as it had been offered, and

suggested that a response to the letter was required making it clear that Mr and Mrs Tarrant had been treated individually. His email said that "if Peter agrees" the lawyer should draft a response.

230. Mr Tarrant sought to call a Board meeting on 7 September (page 573).

Rachel Collister's Investigations

231. Mrs Collister's investigations continued in this period. She had an exchange of emails about an ongoing payment to a law firm (pages 573a and 573b), and on 29 August she received from Val Williams a copy of a Facebook posting from the Shrigley Hall visit on 16 December 2016 which showed that it had been a birthday celebration for Mr and Mrs Tarrant's son. The email and these postings appeared at pages 578-580.

232. On 30 August 2017 Ms Collister interviewed Mrs Murphy on the telephone. Notes signed by both of them appeared at pages 575-576. Mrs Murphy told Mrs Collister that Mr Tarrant had not reviewed outstanding works at Atherton before he left for his holiday. He had given her a diary planner for the contractors and had mentioned that the boiler might need looking at but did not say which one. She had decided to have both boilers inspected. There was no written documentation but she had put right anything that was found to be wrong and did not consider that there was any risk to health and safety of staff and the service user. As all issues had been rectified within 24 hours there was no need to inform the CQC. She did not believe she had failed in her duties as Registered Manager or as a director. These notes were not provided to Mr Tarrant during the disciplinary process.

233. There appeared in the bundle between pages 528a and 528l a series of undated signed witness statements by various members of staff dealing with different aspects of Atherton. Some of them identified items that were missing or problems with the premises. They were typed statements into which the witness had written his/her name before signing them. In paragraph 31 of her witness statement Mrs Collister said she took statements as part of the investigation process and referred us to these documents. Astonishingly, however, it transpired that these were documents actually prepared in 2018, long after the dismissals in this case. There had been no written record kept at the time of these enquiries. None of these documents could have been shown to Mr and Mrs Tarrant during the disciplinary process as they did not yet exist.

Response to Grievances 31 August 2017

234. The response to the grievance letters came on 31 August in two letters from Mr Higgins to Mr Tarrant (page 483) and Mrs Tarrant (page 585). They were based on drafts provided by Beyond Corporate. The letters were identical and said:

> **"As the substance of your grievance is about your suspension and the allegations raised against you, it is not necessary to hold a separate grievance hearing; the issues you raise are inextricably linked to the on-going investigation.**
>
> **Please be assured that the issues raised in your grievance letter will be addressed as part of the investigation.**

> **Rachel Collister, the investigating officer, will write to you separately with an update on your suspension and the investigation. In the meantime, you should now have received a copy of the handbook from me by post."**

235. That same day Mrs Tarrant was certified unfit for work by her GP to 14 September on account of "work related anxiety" (page 688b).

236. On 31 August Mr Stock was appointed a director of 3L Care Limited.

4 September 2017 – Further Allegations against Mr Tarrant

237. On 4 September Mr Higgins responded to Mr Tarrant's attempt to call a Board meeting. His letter appeared at page 588. He said that as Mr Tarrant had been suspended he was not able to exercise the duties or powers of a director. There were further attempts by Mr Tarrant to call a further Board meeting but this never happened.

238. Having received drafts from BC, on 4 September 2017 Rachel Collister wrote to Mr Tarrant (pages 595-601) and to Mrs Tarrant (pages 589-592) about the investigation and the grievance.

239. In her letter to Mr Tarrant she confirmed that suspension would continue and that there was no link between the investigation and the communications with Mr Stock in late July. She defended the fact Allison Murphy had not been suspended and explained that she was investigating matters, not her husband. She said he was not conducting any part of the investigation. No mention was made of the report he did into the premises at Atherton.

240. Her letter addressed suspension of IT access. She said it was standard. She said:

> **"At no time have you suggested that access to any of the IT systems has been necessary to allow you to cooperate with the investigation. Should that change, please let me know and I will make arrangements for you to have supervised access to any relevant documentation you require to allow me to conclude my investigation as quickly as possible."**

241. Her letter then offered an update on the investigation. She said that further investigations had shown that the answers given by Mr Tarrant did not stack up against the evidence. She gave examples including the hire of the van and mileage claims. She said that he had purchased a boiler on 16 May 2017 but that was not at Atherton. Mention was made of the wall tiles, oak flooring, pine laminate and the meal at the Robin Hood pub.

242. Mrs Collister's letter then raised a number of additional allegations of financial irregularities. She said this was because of further enquiries since the investigation meeting. There were 27 allegations relating to various purchased items and invoices, including:

- Plumbing items;
- Domestic bathroom items;
- Photo paper and a printer;

- Six sets of shelves;
- Towels and a bath and pedestal mat;
- Waterproof Bluetooth speakers and a case;
- A Tassimo coffee machine;
- Load and Go invoices for waste removal;
- A wi-fi enabled video doorbell.

243. The letter also raised allegations about invoices from Forces Regroup. It suggested the invoices were actually being prepared by Mr Tarrant on the Sharepoint system, and there were numerous discrepancies between the dates of the work done on the invoices and the sign-in books for Chapel and Crook. It was suggested that these were alleged fraudulent invoices exceeding £3,500.

244. It was also alleged that Luke Pearson's invoices had also been prepared by Mr Tarrant and that he had been paid for work he had not done.

245. Finally there were allegations about the council tax arrears on Chapel, the purchase of two extra mobile phones and the Samsung tablet.

246. Mr Collister asked Mr Tarrant to respond by 11 September to explain these items. She said a decision would also be taken as to whether the police would be invited to investigate theft from the company.

4 September 2017 – Further Allegations against Mrs Tarrant

247. The letter for Juliette Tarrant was broadly similar in its introduction, dealing with suspension and some points raised in the grievance. It said that Mrs Collister was not aware that any work-related anxiety had been disclosed to the company prior to suspension. The letter said that she would make arrangements for Mrs Tarrant to have supervised IT access. The letter denied that Mrs Tarrant had only been suspended because she was married to Mr Tarrant or that there had been any discrimination on the grounds of marital status. There was no evidence to support the suggestion Allison Murphy should have been suspended.

248. Mrs Collister's letter than addressed the range of allegations to which written responses had been provided. It included the following:

- Mr Tarrant had reclaimed the Shrigley Hall money in respect of a managers' Christmas dinner but no other managers had attended and it was their son's 16th birthday celebration;
- Other purchases for Atherton had been delivered but the throw had not been and it made no sense for it to have been retained for over two months;
- Mr Tarrant had purchased a Samsung tablet but Mrs Tarrant had not offered any information about that;

- Mrs Tarrant had been aware of who had been using the two mobile phone numbers but had offered no information.

249. Five additional matters were then raised: four mileage claim issues and one point about the employment of Abi Cooper without a contract of employment, job description or DBS check. Mrs Tarrant was asked to respond by 11 September 2017.

Claimants' Letters – 5 September 2017

250. Mr Tarrant replied to Mrs Collister on 5 September (pages 677-678). He had still not had the notes of the investigation meeting on 18 August. He had not been provided with any further information or evidence to allow him to consider the allegations. He suggested that the additional allegations were just an attempt to find sufficient grounds to justify his removal from the business. He would not be able to respond until he had received the necessary company records/documents. He suggested that a meeting would be better than dealing with matters on paper.

251. Mrs Tarrant also responded the same day (page 679). She said she was not well enough to deal with the investigation. There were no enclosures with Mrs Collister's letter. She could not provide answers until well enough to do so and once she had all the relevant information. She reiterated her view that this was because she was married to Mr Tarrant.

6-7 September 2017

252. On 6 September Mr Higgins forwarded to the lawyer at BC the further fit note from Mrs Tarrant. His email said:

> **"Revised sick note from Jules clarifying that her anxiety is work related. Personally, I see this as a direct and tactical response to her suspension, rather like the grievance letter. Again, rather than try to clear their names they are just trying to create cost and difficulty for the company that they had fiduciary duties for.**
>
> **If they do not come to a settlement we should consider a specialist to review Jules' condition."**

253. By email of 6 September (page 688) Mr Higgins invited Mr Tarrant to resign as a director from the trading company and the holding company with immediate effect. Mr Tarrant did not resign.

254. On 7 September Mrs Collister wrote to Mr Tarrant (page 691) and Mrs Tarrant (page 689) saying that the documents had been omitted in error from her letters of 4 September, and were being sent by post "today". The deadline for a response was extended to 18 September. No index or list of the documents sent was provided and no-one was sure in evidence before our hearing what had been sent or received. Mr Tarrant denied having received anything. He said that the documents that he had been able to supply at the disciplinary meeting on 5 October were documents which he had gathered from copies kept at home. Mrs Tarrant told us that she recalled having received the credit card receipt for Shrigley Hall and the receipt for the Dunelm throw but did not recall having received anything in the post. Given that the HRC letter of 11 September 2017 said that no documents had been received, we concluded that no documents were provided by post to the claimants.

Solicitors' Correspondence – September 2017

255. At some point in late August Mr and Mrs Tarrant had instructed HRC to advise and represent them. On 11 September 2017 (pages 698-709) HRC wrote a lengthy letter on behalf of both claimants setting out the history of events in some detail and intimating a number of legal claims, including whistleblowing detriment and (for Mrs Tarrant) discrimination because of marital status and disability. The letter sought a lifting of the suspension and asked that a truly independent third party be appointed to review the situation and to investigate the issues raised, including the grievances.

256. The request for an independent third party was reiterated in a letter from HRC on 19 September (page 710). The reply from BC on behalf of the company came on 19 September 2017 (page 715). It was a brief letter which said an independent third party investigator was not necessary, and that Rachel Collister would continue with the investigation.

257. Mrs Collister provided an update to Mr and Mrs Tarrant by letters of 20 September. The deadline for their responses was extended to 25 September. The letter said the information had been sent by recorded delivery and by normal post. If any further documents were required they should be identified as soon as possible.

258. HRC responded to BC on 20 September (pages 721-722). The request for an independent third party was reiterated. Rachel Collister was the daughter of Peter Stock, she stood to benefit from the actions taken to date, and she told Mr Tarrant at the investigatory meeting that Mr Higgins was conducting the investigation.

259. There was further correspondence between solicitors about Mr Tarrant's attempts to call a Board meeting (pages 724-731).

Mr Tarrant's reply to allegations – 25 September 2017

260. HRC wrote to BC on behalf of both claimants on 25 September 2017 (pages 733-734).

261. In relation to Mrs Tarrant the letter said that she was unfit to work or to deal with the issues, and the continued correspondence from Rachel Collister was exacerbating the medical condition and amounted to harassment contrary to the Protection from Harassment Act 1997. The letter said:

> **"For the avoidance of doubt your client and/or Rachel Collister should not contact Juliette Tarrant in connection with issues relating to work as this would constitute unlawful harassment. All communication should be through us to avoid unnecessary stress and anxiety causing an exacerbation to our client's medical condition."**

262. In relation to Mr Tarrant the letter enclosed his response to the allegations against him. It made the point that it had been created from memory, and that he had not been provided with access to the company's records or files to help him rebut the allegations.

263. That response appeared at pages 735-757. Mr Tarrant reiterated his view that the investigation was a sham and predetermined. He did not accept that his grievance could be properly dealt with as part of the investigation, particularly because part of the grievance was that Mrs Collister was not independent. He

addressed a number of the specific allegations against him put in the letter of 4 September 2017. His letter said:

> **"Please go ahead and arrange for me to have full access to the computer systems without further delay so that I can establish that there is no merit to my suspension."**

264. The letter then addressed the issues about Atherton discussed at the investigation meeting, in broad terms asserting that everything had been handed over to Allison Murphy and that any shortcomings were her responsibility. There had been a fire plan and all required certificates were in the House Book.

265. Mr Tarrant then addressed the financial irregularity allegations. He made clear that his home had always been a place of storage for company property over the years. The same was true of other senior managers. The points he made included the following:

- The van hire was genuine and justified and did not conflict with mileage claims.
- No boiler had been purchased; it was a water tank which was in the cupboard at Atherton.
- The wall tiles were purchased for Crook Lane but were not used; they could be returned.
- The oak flooring had been for his home office.
- The Robin Hood pub meal had been for the contractor from Forces Regroup.
- The pine laminate was in the garage awaiting installation at Atherton.
- Some of the plumbing and bathroom items had been purchased for Atherton so there was a usable bathroom during the refurbishment project.
- The shelves should be at Atherton.
- He had started doing the invoices for Forces Regroup because of a complaint from Val Williams about the invoices provided by them directly; all invoices had been checked as accurate.
- Luke Pearson had been contracted to work for five days at Atherton when it opened but Allison Murphy had not allocated him work for the last part of the week.
- The arrears of council tax would not result in any extra liability for the company.
- The two mobile phone contracts had been for staff, one of whom was a new recruit who did not actually start the job, and both phones remained available for the business.

- The Samsung tablet was used by him at meetings for work purposes.

Collister Investigation Reports – 27 September 2017

266. On 27 September 2017 Mrs Collister finalised her investigation reports for Mr Tarrant (pages 764-769) and Mrs Tarrant (pages 770-772).

267. For Mr Tarrant she described most of what he had written as a

> **"complete fabrication as he is now aware that he has been caught misappropriating company funds".**

268. She said that it was untrue that her husband had been tasked with investigation work on site. She said he had only worked with the relevant contractors to ensure that work was done in a timely manner. This appeared to overlook the existence of Mr Collister's report at pages 282d-282o.

269. She said that Mr Tarrant had never requested access to the computer systems prior to 25 September. She was confident that he had received all the documents relating to the allegations against him.

270. The report then went through the various allegations. It suggested that there was no proper handover of Atherton to Allison Murphy. There were still issues with the fire plan, the soil pipe, the gas certificates and the electric certificates. She did not accept his explanation about a number of matters including whether a water tank or a boiler had been purchased, and the suggestion that the tiles and laminate were destined for Atherton. In general she found his answers to be either excuses or totally implausible. There were still concerns about the invoices from Force Regroup and Luke Pearson. The mobile phone contracts answer was a fabrication. She was waiting for confirmation that the two numbers were used by his children. She had never seen Mr Tarrant using a Samsung tablet. She concluded that there was evidence on the balance of probabilities that the claimant had been using company funds for his own personal gain and that of his family, and that he had failed to ensure the health and safety of staff and service users at Atherton. A disciplinary hearing was recommended.

271. The report for Mrs Tarrant concluded that the Shrigley Hall expense was not a genuine business expense, the throw from Dunelm had been purchased for personal use, that there were discrepancies about mileage claims, and that Mrs Tarrant had failed to provide a helpful response about the Samsung tablet. The mobile phones were used by her children and there were still concerns about the mileage claims. The recruitment of Abi Cooper had not been genuine. Her conclusion was that there was evidence that Mrs Tarrant had been using company funds for her own personal gain and for that of her family.

272. On 28 September Mrs Tarrant was certified unfit for work due to work related stress until 12 October 2017 (page 780).

273. On 29 September Mrs Collister wrote to Mr and Mrs Tarrant (pages 780a and 780b) to confirm that the investigation had concluded and the matter had been passed to Mr Higgins who would write regarding arrangements for a disciplinary hearing. The letter to Mrs Tarrant was sent via HRC.

Disciplinary Charges – 2 October 2017

274. Mr Higgins wrote to Mr Tarrant (pages 781-782) and to Mrs Tarrant via HRC (page 783) on 2 October 2017 inviting each of them to a disciplinary hearing on 5 October 2017. Mr Tarrant's hearing was at 10.00am and Mrs Tarrant's hearing at 12 noon.

275. In the letter to Mrs Tarrant he said that the grievance would be dealt with as part of the disciplinary process. It was open to her to put her response in writing because she remained off sick. The deadline for doing so was 4 October. The letter said:

> **"The purpose of this letter is to inform you that I am clear there is enough evidence against you to warrant inviting you to a disciplinary hearing. This will give you the opportunity to formally defend yourself against the allegations in respect of serious financial irregularities at the Atherton Care Home."**

276. The letter to Mr Tarrant was in the same terms save that it also referred to serious health and safety breaches at Atherton. It confirmed that the allegation about one Load and Go invoice was not pursued because it was a genuine business expense.

277. HRC asked if Mr Tarrant could be represented by a solicitor at the hearing (page 785a) but Mr Higgins refused this request (page 786). In response to a query about access to the computer system for Mr Tarrant, Mr Higgins said:

> **"As for access to the company's systems, I understand that both Marcus and Juliette have been able to request this from the start of the process and have consistently failed to do so, even when reminded. In any event, they both have all the evidence in their possession to answer the allegations against them. The company believes this continued argument to simply be a delaying tactic, and we will not hold up the process any further."**

278. In response HRC made the point (page 787) that it was not possible for Mr Tarrant to prepare properly to defend himself without access to the evidence to rebut the allegations. There had been no specific allegations raised in the invitation letter.

3 – 4 October 2017

279. Mr Higgins responded on 3 October (page 789). He said that as his wife also suffered from crippling anxiety and depression he had some understanding of the condition and how it might impact on Mrs Tarrant. He would take into account any written responses. In relation to IT access for Mr Tarrant he said:

> **"You have repeatedly made the point that in order for Marcus to be able to defend himself against the allegations, he needs access to the company's computer system. As has been confirmed to you previously, the company will not allow Marcus to simply trawl the company's system on a phishing [**sic**] expedition. To repeat the offer that has been made to Marcus and you on numerous occasions (and for the avoidance of doubt has been totally ignored throughout), if Marcus believes there is evidence he is not currently in possession of that would assist him to defend himself against the allegations, please provide me with a list no later than 12 noon tomorrow and I will send him any relevant information."**

280. Mr Higgins attached to the email the allegations against Mr Tarrant (pages 834-839). In a separate email the same day (page 790) he provided the allegations against Mrs Tarrant (pages 791-792).

281. HRC responded about IT access for Mr Tarrant on 4 October (page 794). They said that he had made numerous requests for access but none had been provided.

282. By an email the same day (pages 797-798) an adjournment was requested for Mrs Tarrant's hearing on the basis of her health. Concerns were raised about the lack of clarity in the allegations, the failure to provide an independent and proper investigation, the lack of independence of Mr Higgins, breaches of the ACAS Code of Practice, and the potential effects on Mrs Tarrant of a decision at a disciplinary hearing. This request was refused by email from BC at 8.30pm on 4 October (page 800). The email made the point that these were serious allegations, that the allegations and supporting evidence had been provided, and that there was no fit note saying Mrs Tarrant was not well enough to attend a disciplinary hearing as opposed to attending work.

283. At around the same time on 4 October Mrs Collister sent an email to Mr Higgins (page 799) in which she said that the suggestion that the Tarrants had found out about their suspension via Mr Kelly was a complete fabrication. She believed that Mrs Tarrant had read the email of suspension and had rung Ms Murphy to find out what was happening.

284. Mrs Collister told us that around this time Mr Higgins "had a wobble" about conducting the disciplinary hearings. Mr Higgins accepted that he was shaken by the prospect. It was the first disciplinary hearing he had done. He said that the circumstances gave him no pleasure, because he had worked closely with Mr and Mrs Tarrant, but he regarded it as his fiduciary duty to conduct the hearing.

<u>Mr Tarrant's Disciplinary Hearing – 5 October 2017</u>

285. At just after 10.00am HRC responded to BC about the refusal to postpone Mrs Tarrant's hearing. They provided comments on the email from the previous day with that decision. The comments appeared at pages 830-832. They related to the seriousness of the allegations, the lack of clarity in the allegations and the documentation, the fact the grievance should not be dealt with as part of the disciplinary hearing, and the fact that Ms Murphy had known that Mrs Tarrant had work related anxiety prior to the suspension because of their conversation by text on 20 July. Subsequently that disciplinary hearing was rearranged to 12 October.

286. Mr Tarrant's disciplinary hearing took place between 10.00am and 2.30pm. Mr Higgins was accompanied by a paralegal from BC, Mr Ko, who took notes which appeared at pages 840-861. During the meeting Mr Higgins made pencil notes on his copy of the list of allegations (pages 1279-1290), and he also had a draft script for the meeting which BC had prepared (pages 1276-1278).

287. Mr Tarrant had his own typed prepared script for the meeting (pages 808-828). He was accompanied by his father-in-law, Mr Kelly, who made some handwritten notes on this during the meeting. Mr Kelly also took some separate notes in a notepad. He used both sets of notes to prepare a single handwritten

record of the meeting later the same day. That handwritten record appeared at pages 894-905. Within a few days Mr Kelly had prepared a typed version of that handwritten note which appeared at pages 862-893. The typed version was more detailed than the handwritten composite note, and in cross examination Mr Kelly confirmed that it also contained some typed material which he had not typed himself. It appeared that either HRC or Mr Tarrant had amplified the draft note by reference to some of the documents provided by Mr Tarrant during the meeting.

288. Mr Tarrant brought with him a file of documents to the meeting. They were documents he had gathered from files and papers kept at home. They included copies of invoices and receipts relating to allegations against him. They also included some witness statements. A statement from Luke Pearson (pages 801-802) confirmed the work he had done in the first week in August, and that he had been told by a member of staff that the claimants had been suspended. A statement from Joe Dean (page 803) confirmed that a water tank had been purchased and installed at Atherton. A statement from Ian Brown of Forces Regroup (pages 804-805) confirmed the work done and the invoices that had been supplied, and the purchase of bathroom items for use by contractors whilst the refurbishment was going on. He also confirmed that some of the material from Meadowside had been moved to the Tarrants' home when Meadowside closed. He confirmed he had been provided with a spare company mobile phone whilst working at Atherton. A witness statement from David Taylor (an electrical contractor) appeared at page 807 and confirmed that all the necessary certification had been provided to Mr Tarrant, including that relating to a fully functional and tested shower.

289. At the meeting Mr Higgins took copies of the witness statements and possibly one other document, but he did not retain any copies of the majority of the documents produced by Mr Tarrant.

290. The notes taken by Mr Ko recorded that Mr Tarrant challenged whether Mr Higgins was the right person to be doing the hearing and asserted the whole thing was a sham. There was then a discussion of the allegations. The responses given by Mr Tarrant were summarised. His responses were broadly in line with the written response he had already prepared. The notes recorded him showing particular documents to Mr Higgins at particular stages of the discussion. He denied the allegations against him about the state of Atherton.

291. The discussion moved on to the financial irregularities. Again there was a response provided by Mr Tarrant to all the allegations and relevant documents were referenced. On page 849 Mr Ko's notes recorded Mr Tarrant providing a list to Mr Higgins detailing what all the purchases at Atherton had been for.

292. The discussion then moved to the contractor invoices. Mr Tarrant said he had a weekly meeting with Mr Brown to check what work was being done and that the invoices were accurate. The meeting went through them one by one. The position in relation to Luke Pearson was also discussed, then the council tax, the mobile phone contracts and the Samsung tablet. It was said to be a work tool with company software on it and photographs of it were provided. It had a full screen and keyboard.

293. After the lengthy discussion of the disciplinary allegations there was a brief discussion of the grievance (page 860). There was a disagreement about whether Mr Tarrant had requested access to the IT system or not. Mr Tarrant said he wanted

Mr Stock to be investigated as well for misuse of company resources, for being provided with cash in brown envelopes after Board meetings, and in respect of VAT on professional fees.

294. Mr Kelly gave evidence that during a break in the meeting Mr Tarrant asked Mr Higgins why he was doing it and that Mr Higgins said "I know what you are thinking, but this is not me you know". He said it was not in the notes he took because it was a comment made during the break. Mr Tarrant gave evidence to the same effect. Mr Higgins denied that any such comment was made. We will return to this point in our conclusions.

295. At the end of the meeting Mr Tarrant asked who decided on the suspension. Mr Ko's note recorded Mr Higgins saying that the decision was made by him, Peter Stock and Allison Murphy.

<u>After the Disciplinary Hearing – Higgins' Investigations</u>

296. No decision was made at the meeting. Mr Higgins undertook further investigations. He did this without the benefit of copies of the documents Mr Tarrant had brought to the hearing. He gathered a number of additional documents and witness statements. None of this material was shown to Mr Tarrant before he made his decision.

297. Some of it related to Mrs Tarrant. None of it was shown to her before he made his decision.

298. The new material included comments by Mrs Collister at pages 1315-1319. She disputed that the shower had been properly wired. That was the subject of a further inspection by Hayhurst Electrical on 10 October (page 1347). A live cable had not been terminated correctly, causing a switch to trip and the shower to cease working. Mr Hayhurst re-terminated the live cable and the shower worked correctly. The isolator had not been installed in an ideal position and he moved it.

299. In general terms Mrs Collister's comments to Mr Higgins were hostile to Mr Tarrant's explanations when she chose to comment. She accused him of telling "a complete lie" about the boiler. She challenged the explanation he gave in relation to a number of the financial irregularities. She described his answers as not plausible or convenient. She said that Allison Murphy could provide more information and that the answer about the mobile phones had already been proven to be lies.

300. Mr Higgins also had the note from Mrs Collister headed "Evidence of Fraud/Theft", copies of various invoices and notes on them, a number of photographs of various items, and the report from David Collister on the condition of Atherton between August and October 2017.

301. On Friday 6 October 2017 BC provided Mr Higgins with draft decision letters for Mr Tarrant (pages 1485-1496) and Mrs Tarrant (pages 1497-1501). The drafts both anticipated that the decision would be summary dismissal for gross misconduct.

302. Over the weekend of 7 and 8 October Mr Higgins spent most of Saturday and two hours on Sunday meeting with Mrs Murphy and going through matters in detail. No notes were kept of these discussions. He did, however, make some fountain pen

notes on a copy of the notes made by Mr Ko at the disciplinary hearing (page 1311-1314).

303. From 7 October onwards, Mrs Murphy forwarded a series of emails to Mr Higgins about various aspects of the investigation. Examples appeared at pages 1307-1310. Val Williams also provided Mrs Murphy with some information (page 1359).

304. On 9 October Ms Murphy provided some witness statements from members of staff at Atherton. They included statements from Gail Brunskill, the Home Manager, about a complaint from the resident's mother on 7 August (page 1353), from Kelly Bailey about waterproof Bluetooth speakers and other items (page 1367), from Sian Kirkpatrick about the shower and the coffee machine (page 1368), from Claire Jones about the coffee machine, waterproof speakers, a printer and other items (page 1366), and from Allison Murphy herself about the purchase of the Dunelm throw (page 1434).

305. That same day the father of the Atherton resident was asked by Ms Murphy to provide an email confirming that the shower had not worked when his son moved in (page 1352), even though this point had been recorded in the minutes of the meeting on 5 August 2017.

306. Draft letters inviting Mrs Tarrant to a rescheduled disciplinary hearing on 12 October were provided by BC to Mr Higgins on 9 October (pages 1502-1504).

307. Finally, on 9 October HRC provided BC and Mr Higgins with some further evidence. It included a copy of the worklists left with Allison Murphy for Atherton, evidence about the use of the Samsung tablet, evidence that the overnight stay at Shrigley Hall had been paid for by the Tarrants personally, and evidence that Mr Tarrant had paid personally for Forces Regroup work at his own house. The email appeared at page 914. Mr Higgins acknowledged it the following day (page 914) and said that although he had agreed with Mr Tarrant to consider dropping them, he would still want Mrs Tarrant to address the Shrigley Hall lunch and the Samsung Tablet allegations.

<u>12 October 2017</u>

308. The proposed disciplinary hearing for Mrs Tarrant on 12 October did not take place. At shortly before 7.00am HRC emailed Mr Higgins to say that she was too ill to attend. Further representations were made about the Samsung tablet, Shrigley Hall, mileage claims, the Dunelm throw and the employment of Abi Cooper. The email requested that it be taken into account if the disciplinary hearing proceeded in her absence.

309. At just before 12.30pm Rachel Collister forwarded to Mr Higgins some emails from early January 2017 recording that there had been work on the kitchen at the Tarrants' home. These appeared at pages 1379-1380.

310. Having received three further drafts of Mr Tarrant's dismissal letter, and one further draft of Mrs Tarrant's dismissal letter, Mr Higgins issued his dismissal letters by email late afternoon on 12 October 2017.

Mr Tarrant Dismissal Letter 12 October 2017

311. The email appeared at page 922 and the letter at pages 923-944. The letter was lengthy because Mr Higgins addressed each of the allegations.

312. In relation to the state of the premises at Atherton, he concluded that the shower could not have worked and relied on the electrician's report. He considered the witness statement from David Taylor to be discredited. The boiler had not been working properly when Mr Tarrant left on annual leave. The payment made for the boiler did not tally with that for the water tank which Mr Tarrant said he had purchased. He concluded that Mr Tarrant had failed to rebut the allegation to his satisfaction. A similar conclusion was reached in relation to the soil pipe causing a smell in the dining room, the absence of any gas certification certificate for the second boiler and the electrical certificate. He considered that Mr Tarrant had partially rebutted other allegations, including the state of the exterior of the building and loose cables, but there was still evidence of unsatisfactory workmanship. A couple of allegations were satisfactorily rebutted. The conclusion was that the building was not of the standard required to ensure resident safety.

313. In relation to the financial irregularities, the allegations were recorded under the preamble that they had arisen as a result of misappropriation of company funds. The allegations concerning wall tiles and bathroom/kitchen items were not rebutted by Mr Tarrant. No view was formed on the allegations about grey oak flooring and pine laminate, nor on the allegation about the pub meal at the Robin Hood public house. Mr Higgins concluded that there had been embellishment in relation to mileage claims.

314. As for the additional allegations, some were found to be rebutted, but many were not. The items where Mr Higgins found Mr Tarrant not to have rebutted the allegation included the following:

- The plumbing items purchased in November 2016;
- The premium photo paper and a polaroid printer for Chapel;
- The shelves purchased for Atherton;
- The waterproof Bluetooth speakers;
- A gas hose;
- The Tassimo coffee machine;
- The Load and Go invoice for 21 February 2017;
- The wi-fi enabled video doorbell;
- A number of the contractor invoices from Forces Regroup;
- The two allegations about Luke Pearson;
- The arrears on council tax for Chapel;

- The two mobile phone contracts;
- The Samsung tablet purchase.

315. The letter concluded as follows:

> **"Following the hearing, I considered your response to each and every allegation and I compared your responses to your previous responses during the investigation process.**
>
> **As a result of all the evidence available to me, together with the defence provided by you at the disciplinary hearing, I do not believe that you have provided an adequate rebuttal of the allegations made against you.**
>
> **As a result, you are summarily dismissed for gross misconduct. Your termination date will be recorded as Thursday 12 October 2017."**

Mrs Tarrant Dismissal Letter 12 October 2017

316. The dismissal letter for Juliette Tarrant was emailed to HRC (page 945). It followed a similar structure. Mr Higgins reached the following conclusions:

- The Shrigley Hall meeting on 23 December 2016 could not plausibly have been a work meeting in the absence of the rest of the Board and was not a genuine business expense;
- The throw had been purchased intended for personal use yet claimed on expenses;
- A mileage claim for travel to Atherton on 3 May 2017 was false because there was no company signing in book for Atherton before 19 July 2017 and a member of staff prepared a statement that Mrs Tarrant had not attended a meeting that date;
- Mrs Tarrant had deliberately misled the investigation about the Samsung tablet;
- Mrs Tarrant had deliberately misled the investigation about the mobile phone as at least one of the numbers had been used by her son since January;
- None of the additional mileage claim allegations were rebutted to his satisfaction;
- The allegation in relation to Abi Cooper was not upheld.

317. The letter to Mrs Tarrant ended as follows:

> **"Following the hearing, I considered your response to each and every allegation, I compared your responses to your previous responses during the investigation process. I also took into account the submissions your lawyer made in respect of your current ill health, but I felt that having this process hanging over you for an indeterminate time would not be likely to aid your recovery. Indeed, your lawyer confirmed that that your health had in fact deteriorated as a result of the original disciplinary hearing being postponed due to Marcus's disciplinary hearing**

> **overrunning. I therefore felt it was important to conclude this matter as quickly as possible. As stated above, your lawyer provided submissions on two separate occasions and I was confident that you were taking legal advice throughout the disciplinary process and that you had full legal representation throughout, despite not attending the hearing in person.**
>
> **As a result of all the evidence available to me, together with the defence provided by you at the disciplinary hearing, I do not believe that you have adequately rebutted the allegations against you. I believe that you have falsified expense claims and therefore misappropriated funds from the company. Your lawyer's submission on your behalf, suggesting that checking the signing in books would support your defence, actually supported the allegations against you. Further, despite your lawyer submitting on your behalf that the expense claims were submitted 'in good faith', my investigation has concluded that this was not the case.**
>
> **I also believe that you are in breach of clause 4.2.7(a) of your contract of employment which obliges you to ensure that the Board is aware as soon as practicable of your own misconduct or the misconduct of any agent, officer or worker of the company or any associate of which you are, or ought reasonably to be, aware.**
>
> **As a result, you are summarily dismissed for gross misconduct. Your termination date will be recorded as Thursday 12 October 2017."**

After Dismissal

318. On 13 October 2017 Mr and Mrs Tarrant were removed as directors. Mrs Collister became a director of 3L Care Limited.

319. HRC responded regarding Mr Tarrant by email of 13 October at page 951. They asked for details of how the appeal would be handled so that Mr Tarrant could decide whether to pursue it.

320. There was no acknowledgement of the termination letter for Mrs Tarrant. Mr Higgins asked HRC for an acknowledgement by email of 13 October (page 957).

321. On 14 October Mr Higgins confirmed that the appeal would be heard by a director, being Peter Stock.

322. That morning there was also correspondence from Mrs Collister to HRC about the return of company property, and that correspondence continued for some time.

323. HRC responded about Mrs Tarrant's outcome letter on 16 October (pages 963-964). The email said:

> **"I have never confirmed that you should communicate with Juliette solely through me. This appears to be an assumption or decision you have taken in isolation, in response to being made aware of the harm that your communication was having on Juliette's health. Instead I have repeatedly stated in correspondence that I had no intention of being the conduit by which you could cause further harm to Juliette and as such, on the basis of medical advice, I can confirm that I have not been sending your correspondence to Juliette."**

324. On 17 October Mr Higgins emailed Mr Tarrant (page 972a) attaching the outcome letter for Mrs Tarrant. His email said that he understood the solicitor had not been passing letters on. Mr Tarrant responded about an hour later (page 972a) to say that Juliette was not well enough to deal with any work related matters and he was not prepared to pass on the outcome letter to her.

Appeals

325. On 20 October 2017 HRC lodged an appeal by email on behalf of Mr Tarrant (pages 1000-1001). The email objected to Mr Stock as he was not independent. It was assumed that Mrs Tarrant would also wish to appeal should the decision to terminate be deemed to be effective. Mr Higgins responded (pages 1003-1004) saying that he deadline for submitting an appeal was that day, and that HRC could do so on Mrs Tarrant's behalf if she was unwell. In reply HRC said that for the avoidance of doubt both of them wished to appeal the termination decision subject to there having been an effective termination for Mrs Tarrant. A full re-hearing was required, and the right to submit further evidence was reserved.

326. On 26 October (page 1616) Mrs Tarrant emailed to Mr Higgins a fit note saying she was unfit for work until 23 November 2017 (page 1618) accompanied by a letter from her GP, Dr Faulkner (page 970a). The letter said that Mrs Tarrant first presented with symptoms on 1 August 2017 and was given propranolol. Her anxiety symptoms had worsened since then, and her work related anxiety would preclude her attendance at a disciplinary hearing.

327. Mr Stock wrote to Mr Tarrant inviting him to an appeal hearing on 10 November 2017 by a letter of 6 November 2017 (pages 1024-1025). A similar letter was sent to Mrs Tarrant on the same date (pages 1023-1023a). Her appeal was arranged to take place one hour after Mr Tarrant's appeal. Both appeals would be at the offices of BC.

328. Mr Tarrant responded by letter to Mr Stock of 9 November at pages 1026-1027. He said that the request for an independent third party had been ignored at the disciplinary stage and was being ignored again now. Mr Stock was a conflicted party and it was wholly inappropriate for him to deal with the appeal. The whole process had been a sham. The decision to remove Mr and Mrs Tarrant from the business had been initiated on 31 July 2017 before they even went on leave. There was no point attending the appeal as it would be a waste of time. All of the evidence already submitted should be considered. As for Mrs Tarrant, Mr Tarrant requested that the appeal be postponed until she was well enough to deal with the issues being raised.

329. Mr Stock set out his decision in appeal outcome letters of 17 November 2017 to Mr Tarrant (pages 1028-1029) and Mrs Tarrant (pages 1030-1031). The letters said he had considered the evidence and the grounds of appeal. He concluded that Mr Higgins had properly considered all the evidence. No new evidence had been provided. The decision to dismiss was not perverse and was within the band of reasonable responses. There had been a full and thorough disciplinary hearing. The appeal was rejected.

330. For Mrs Tarrant the appeal outcome letter said that no communication had been received, although a lengthy letter had been written to one of the company's employees. The same conclusions were reached: Mr Higgins had properly considered all the available evidence and his decision was within the band of reasonable responses. The appeal was rejected.

Submissions

331. Each advocate had helpfully prepared a detailed written submission which the Tribunal read prior to relatively brief oral submissions on 29 May 2019. What follows in this section is a brief overview of the position taken by the parties. Points of particular significance will be considered in more detail in the discussions and conclusions section.

Claimants' Submissions

332. Mr Northall's written submission ran to 334 paragraphs over 96 pages.

333. He argued that Mrs Tarrant's employment had never been validly terminated in accordance with clause 17.6 of her Service Agreement. The request by HRC for communication sent to them did not amount to a waiver of that contract, and the respondents' proposed reliance on estoppel (see below) was impermissible. It had not been pleaded and the claimants had been denied the opportunity of adducing any evidence on it. Further, the letter referring to "final pay" at page 1022 was not capable of being termination of employment, not least because no date was specified.

334. In relation to the unfair dismissal complaints, Mr Northall submitted that the principal reason for the dismissal of Mr Tarrant was the series of protected disclosures he had made in July 2017. In that series of disclosures, read together, he had disclosed information which tended to show that Mr Stock had interfered in the running of the company in breach of the investors' agreement, and that the impact on cashflow of paying down Bank debt would have a knock-on effect on the quality of service which the business offered, and therefore on the safety of patients. The terms of the investment agreement and the CQC regulatory framework were both legal obligations which Mr Tarrant reasonably believed the information tended to show were or would be likely to be breached. Disclosures about the regulatory framework and patient safety was plainly in the public interest. As for disclosures about the investment agreement, this was not purely a private matter. Applying the **Chesterton** guidelines, it was in the public interest to make disclosures about a breach of the investment agreement where the company in question operated in a regulated framework provided services to the public for which the NHS and other public bodies paid.

335. The true reason for dismissal was apparent, he submitted, from the circumstances of the disciplinary proceedings and dismissal. There was a lack of any cogent evidence of the origin of any disciplinary concerns. The respondents' witnesses had been unable to recall important matters, such as who made the decision to suspend the claimants. There was no evidence of internal deliberations and it was plain that Peter Stock had been the chief decision maker. The numerous flaws in the disciplinary investigation and procedures were also evidence of an ulterior motive, as was the decision to pursue Mrs Tarrant despite the lack of any substantial allegations against her. The fact the claimants were replaced as directors by Mr Stock as early as 10 August 2017 was one matter which showed that they were never coming back once suspended.

336. As to the investigation and procedure, Mr Northall submitted that Mrs Collister had not been an appropriate person to conduct the investigation and had displayed a

partisan approach, looking for evidence to find the claimants guilty rather than to identify whether they were guilty or not. The claimants had not been provided with proper information to enable them to respond fairly to the allegations. That included the denial of access to the IT system. Mr Higgins had not corrected the failure to provide information at his stage. He had conducted further investigations after the disciplinary hearing with Mr Tarrant, the results of which were never made apparent to the claimants until they received the letters of dismissal. The appeal process had been perfunctory and dismissive. Mr Higgins had required the claimants to rebut the allegations against them, thereby reversing the burden of proof. No action had been taken against Allison Murphy despite the concerns about the state of Atherton when it opened, which were within her responsibility.

337. Mr Northall then addressed in detail a number of the key allegations against Mr and Mrs Tarrant, suggesting in relation to each one that the matter had not been fairly investigated and that the conclusion that the claimants were culpable was outside the band of reasonable responses. He also suggested that the respondent had failed to take into account the numerous allegations where there was no wrongdoing established (in its view) as weighing in the balance when questions of credibility on the remaining allegations were considered. The allegations against Mrs Tarrant were particularly thin and it was clear that the Shrigley Hall and the Samsung tablet allegations had been retained even though they were matters for Mr Tarrant to answer. That also explained why there was a reliance on Mrs Tarrant's alleged failure to disclosure her own wrongdoing pursuant to the relevant clause of her service contract.

338. Mr Northall therefore submitted that both dismissals were fundamentally unfair and that there should be no finding in relation to contributory fault or any reduction pursuant to **Polkey**. To engage in a **Polkey** exercise would be to embark on a sea of speculation.

339. Mr Northall had not addressed the question of any ACAS Code uplift in his initial written submission and he was allowed to make a short further written submission in which he argued for an uplift of 25% in compensation and resisted any reduction due to failure to engage with the appeal process.

340. In relation to Mr Tarrant's whistleblowing detriment complaints, he submitted that the decision to suspend and the way in which the investigation was handled were part of a course of conduct designed to remove him from the business because of his protected disclosures in late July 2017. Both Mr Stock and Mr Higgins were involved in a way that made them personally liable.

341. As for Mrs Tarrant's marital status discrimination complaint, Mr Northall argued that even applying the test in **Hawkins**, Mrs Tarrant had been treated as an adjunct of Mr Tarrant rather than a senior employee in her own right, as a consequence of being married to Mr Tarrant. She was perceived as loyal to him because of marriage.

342. In relation to disability discrimination, Mr Northall submitted that but for the medication she had been taking long-term for anxiety there would have been a substantial adverse effect on Mrs Tarrant's day-to-day activities, relying on evidence she gave orally, but that in any even given her longstanding history of anxiety it was likely in August 2017 that the substantial adverse effect was going to last for 12

months or more. The respondent had constructive knowledge of this because had it made a proper enquiry into the medical position it would have been informed of that likelihood. It followed that there had been a failure to make a reasonable adjustment in relation to the disciplinary process. The respondent was unable to discharge the burden of proof once it shifted because it had not obtained medical evidence about Mrs Tarrant. Its approach was infected by the cynicism about whether her condition was genuine. The adjustments at paragraph 27 of the List of Issues were matters which would have cost nothing and there was no reason why the proceedings could not be delayed. As for harassment, the continued contact with Mrs Tarrant was unwanted conduct which had the proscribed effect, and it was related to disability because the approach was driven by an internal belief that Mrs Tarrant was not genuinely unwell. Further, the respondent seized upon her health related absence as an opportunity to move to dismissal swiftly and conveniently.

343. Finally, Mr Northall submitted that the disability and whistleblowing detriment complaints were within time, that there was no gross misconduct by either claimant and that notice pay was due, and that there had been an unlawful deduction from wages for Mr Tarrant in relation to the tax on his director's loan. Accepting the definition of wages in section 27 Employment Rights Act 1996 he did not pursue the allegation relating to expenses. As for Mrs Tarrant, the unlawful deduction occurred because her employment had never been validly terminated.

Respondents' Submissions

344. Mr Gardiner's written submission ran to 284 paragraphs (after a preamble about credibility) over 75 pages.

345. In relation to the termination of Mrs Tarrant's contract, he accepted that the original outcome letter had not been sent within the terms of clause 17.6, but argued that the claimant was estopped from relying on that because of the representation made by her solicitors on 25 September 2017 that all communication should be made through them. Failing that he argued that the letter of 31 October 2017 at page 1022 amounted to notice of dismissal.

346. As to the reason for dismissal, he submitted that he was a decision taken by Mr Higgins alone. The focus had to be on his mental processes. We were invited to accept his evidence that he genuinely believed there had been gross misconduct by both claimants. For reasons set out below, the alternative cases based on protected disclosures and marital status could not succeed.

347. As to the fairness of the dismissal, Mr Gardiner contended that Mr Higgins had a genuine belief which was based on reasonable grounds. Although there were some aspects of the investigation which with hindsight ought to have been done differently, it was for the Tribunal to determine whether that took matters outside the band of reasonable responses. The decision to dismiss was plainly within that band given the findings that the claimants were guilty of misappropriation of funds.

348. As to unfair dismissal remedy, Mr Gardiner submitted that there should be substantial reductions because of **Polkey** and because of contributory fault. He reviewed in detail a number of the allegations about health and safety issues and financial misconduct and invited the Tribunal to conclude that the claimants had been guilty of impropriety which would have led to a dismissal had there been a fair

investigation and procedure (which remained in dispute). That was the case not only for Mr Tarrant but also for Mrs Tarrant. He relied on what he suggested was a partial picture given by both claimants in their answers to the disciplinary hearing and in their evidence to our hearing. The prospects of Mr Tarrant being dismissed were at or close to 100%, while the prospects of Mrs Tarrant being dismissed were well above 50%. There should also be very high reductions for contributory fault.

349. Any failure by the respondents to comply with the ACAS Code of Practice was not unreasonable given the unusual circumstances, save for the failure to provide advance notice of evidence that would be relied upon in relation to disciplinary allegations. That should justify a reduction of no more than 10%. In contrast, both claimants had unreasonably failed to comply with the ACAS Code by not pursuing an appeal properly, warranting a reduction of 10% in each case. Mr Gardiner reiterated these points in a brief additional written submission on the ACAS Code in response to Mr Northall's additional submission.

350. As to Mr Tarrant's complaint of whistleblowing dismissal, Mr Gardiner drew attention to the fact that the claimants had not mentioned in their evidence the meeting on 19 July. This was a significant meeting. It was the occasion upon which Mr Stock became aware that there had been a failure to forecast cash requirements accurately, related to the wage increase that month, which created a situation where the company would not be able to meet its wage bill at the end of the month. He had to inject more money urgently. If anything that was the cause of any dissatisfaction rather than any of the subsequent communications, whether they were protected disclosures or not. In any event, Mr Gardiner submitted that there were no protected disclosures in the series of communications in late July 2017 by Mr Tarrant. A number of them contained no information. Where there was information it related to the issue about involvement in the business by Mr Stock, and the cashflow issues, which could not be matters in the public interest even if Mr Tarrant reasonably believed they tended to show a breach of the investment agreement, which was denied. No information capable of supporting a reasonable belief that patient safety would be endangered had been disclosed. There was a significant factual issue about whether any such matters had been discussed at the meeting on 24 July in any event.

351. As to the detriment complaints, Mr Stock and Mr Higgins could be liable in relation to the suspension decision but not for any flaws in the investigation undertaken by Mrs Collister. In any event these matters had no connection with the disclosures on which the claimants relied.

352. Turning to the disability complaint by Mrs Tarrant, Mr Gardiner argued that Mrs Tarrant had not shown that she met the definition of a disabled person at the material time. There was a distinct lack of medical evidence about the deduced effect without treatment and about whether the condition as "long-term". The suggestion Mrs Tarrant that she was taking fluoxetine for depression and anxiety on a long-term basis was not backed up by the medical notes. There was no basis for thinking that in August 2017 any substantial impairment was likely to last for 12 months or more. It was inherently short-term because it was related to an employment issue. In any event the respondent did not know and could not reasonably have known that the conditions of anxiety and hypertension amounted to a disability.

353. If Mrs Tarrant had been a disabled person, Mr Gardiner disputed that any of the PCPs relied on could be properly formulated as such given that they were too specific and only applied to her. There was no medical evidence of any substantial disadvantage and the adjustments suggested were pointless because Mrs Tarrant had been too ill to engage in the process in any way in any event. As for harassment, the correspondence about the disciplinary process was not unwanted conduct. It was part of the claimant's contract that she consented to the disciplinary processes being followed where appropriate. In none of her responses did she complain about the treatment until her solicitors' letter of 11 September 2017. In any event, that correspondence was not related to her disability. It was simply pursuit of a disciplinary investigation and proceedings. It could not have the proscribed effect in any event.

354. Mr Gardiner also suggested that the complaint of marital status discrimination was unfounded. The position would have been exactly the same had Mr and Mrs Tarrant not been married. At worst it was because of their relationship not the fact that they had the status of being married people.

355. It followed from his submissions on contributory fault that Mr Gardiner also submitted that neither claimant was entitled to succeed in the notice pay claims. As for unlawful deductions from pay, if Mrs Tarrant's contract had not been terminated the Tribunal would have to take account of the fact that she remained unfit for work during that period and her entitlement would be limited to her contractual entitlement to sick pay. For Mr Tarrant the alleged liability to refund tax on his director's loan was not a matter which arose under his employment contract. There was an "entire agreement" clause in the contract and a clause prohibiting any oral variation. The matter was not recoverable by means of an unlawful deductions complaint.

356. Finally, Mr Gardiner submitted that the whistleblowing detriment complaint about suspension was out of time for Mr Tarrant, and the complaints of disability discrimination about suspension on 16 August and the scheduled investigatory meeting on 18 August were out of time for Mrs Tarrant.

Discussion and Conclusions – Protected Disclosures by Mr Tarrant

357. The Tribunal addressed firstly the matter set out in issue 16, which was whether Mr Tarrant made one or more protected disclosures in July and August 2017.

358. We reminded ourselves of the legal framework summarised above. The disclosure had to be a disclosure of information, not simply a bare allegation. The claimant had to establish that when he made the disclosure he had a belief in two things. The first was that the information tended to show a breach of a legal obligation or that health and safety had been endangered, or that either of those matters was likely to happen. The second was that the disclosure was made in the public interest, applying the guidance given by the Court of Appeal in **Chesterton**. If those beliefs were subjectively held, they still had to be reasonable beliefs, even if ultimately incorrect or mistaken.

359. We considered each of the alleged protected disclosures individually before looking at them together.

360. **PD1** was the email of 20 July 2017 at page 455 where Mr Tarrant provided a comparison of gross salary figures and salary as a percentage of turnover between two different financial quarters. In cross examination he said that he did not believe that the information in that email tended to show any breach of a legal obligation or any risk to health and safety. There was no subjective belief and this could not be a protected disclosure.

361. **PD2** was the email from Mr Tarrant of 20 July 2017 at page 459. He was responding to Mr Stock's email at page 460 saying that if increases in care fees would not cover the increased cost of labour, savings would need to be found elsewhere. In cross examination Mr Tarrant accepted that his email did not contain any facts which he believed tended to show any breach of a legal obligation or any health and safety issue. It was a debate about the future approach to cutting cost. Mr Tarrant was putting forward his view that he did not want to make cost cuts which might have that effect. In the absence of any belief that any facts in the email tended to show one of the matters in section 43B(1), this could not be a protected disclosure.

362. **PD3** was an email a few minutes later forwarding that exchange to Mrs Tarrant and others as an example of differing priorities. Mr Tarrant accepted that there was no factual content in that email at page 458A beyond that contained in the email at page 459. For the same reason it could not in isolation amount to a protected disclosure.

363. **PD4** was the further email of 20 July at page 458. That email did contain some information. It said that savings had been made from budget reviews, and that the only input Mr Tarrant had had to the banking issue was being asked to sign documents in the previous week by Mr Higgins. He asserted that the new banking arrangement would put further cash pressure on the business. However, in cross examination Mr Tarrant accepted that none of the facts in that email tended to show a breach of a legal obligation had already happened. Nor, we concluded, could that information have given rise to a reasonable belief that a breach of CQC Regulations was likely. There were a number of possible solutions to cash pressure on the business, including the possibility of obtaining a further injection of funds from Mr Stock. We concluded that in isolation this email did not constitute a protected disclosure.

364. **PD5** was the email of 21 July at page 462. His email forwarded the email from Mr Stock of the previous evening which accused Mr Tarrant of having made an inflammatory statement, and gave an example of savings that should have been made, mentioning the delay in Mr Higgins and Mr Tarrant signing the new banking document. In forwarding the email Mr Tarrant said to Mr Higgins that he was being accused of making a decision on something he had not been involved in, and that Mr Stock had made wrong decisions without consulting the Executive Team and was now criticising them for it. In cross examination Mr Tarrant accepted that there were no facts in this email which gave rise to a belief that there was a breach of any legal obligation, or any health and safety issue. He did not have any such belief at the relevant time and therefore this was not a protected disclosure.

365. **PD6** was the email a few minutes later at page 463 in which Mr Tarrant emailed Allison Murphy and Mrs Tarrant to arrange the meeting with Mr Stock the

following Monday. That email did contain facts. It said that the claimant was "taking flack" over the payroll issue from Mr Stock, and that Mr Stock had made decisions on banking with no consultation and had accused Mr Tarrant of delaying when he had not been involved. However, in cross examination Mr Tarrant accepted that there were no facts in this email which he believed tended to show any of the matters in section 43B(1). In isolation, therefore, it was not a protected disclosure.

366. **PD7** was the email about two hours later at page 465. We concluded that this email did contain information. It asserted that Mr Stock made a decision to repay the Bank despite valid concerns on the part of the Executive Team, which left the business beholden to him now. It also said that Mr Stock had chosen not to involve or consult the Executive Team and had made a decision himself on committing the business to increased payments on Bank loans. It said that Mr Tarrant had expressed his concern over the decision and the effect on the business. In cross examination Mr Tarrant said that he believed that these facts tended to show that Mr Stock was in breach of the investors' agreement. We found as a fact that Mr Tarrant did have that belief when he sent the email. He was increasingly concerned at what he saw as interference by Mr Stock in the day-to-day operations of the business, including decisions about cost saving and cashflow, which were the remit of the Executive Team not of the principal investor under the investors' agreement from July 2016. Accordingly, two questions arose for the Tribunal. The first was whether that was a reasonable belief. The second was whether at the time the information was disclosed Mr Tarrant had a reasonable belief that the disclosure was made in the public interest.

367. On the question of the reasonableness of the belief, we considered the evidence Mr Tarrant gave in paragraph 30 of his witness statement about his understanding of the investment agreement. We concluded that he reasonably believed that Mr Stock had trespassed into matters which were the exclusive province of the managers (Mr and Mrs Tarrant and Ms Murphy). The role of the managers under clause 8.1 on page 105 was to ensure that the business was conducted in accordance with the business plan and good business practice. The matters on which the managers needed shareholder/investor consent were listed in clause 7. None of them related to questions of indebtedness, borrowings or cashflow unless beyond the parameters of the business plan. Mr Tarrant was not a lawyer. His belief that the actions of Mr Stock in controlling the overpayment of Bank debt and thereby the cashflow of the business were in breach of the investment agreement was reasonable.

368. That gave rise to the question whether he had a reasonable belief that his disclosure about these matters was in the public interest. We reminded ourselves of the guidance given by the Court of Appeal in **Chesterton**. The essential distinction is between disclosures serving only the private or personal interests of the worker and those that serve a wider interest. Even where the disclosure relates to a breach of a personal interest, there may be features of the case that make it reasonable to believe the disclosure is made in the public interest as well. The question must be answered on a consideration of all the circumstances of the particular case. We considered the factors which were mentioned in **Chesterton** as being normally relevant.

369. The numbers in the group whose interests the disclosure served was primarily restricted to the other parties to the investment agreement. The internal tensions between Mr Stock and the managers about how the business was being managed were of little or no concern to anyone else. It was possible, we acknowledged, to trace a line from that to a wider public interest, as Mr Northall argued. This was a business operating in a regulated environment paid out of public funds to undertake care contracts for vulnerable service users. The reference in the email to Mr Stock demanding further cost-cutting could give rise to a concern that the interests of service users might be adversely affected either by breach of the terms of care contracts or by giving rise to a risk to health and safety. However, that was at best a matter of inference from the terms of the email at page 465. The broad thrust of the email was about the internal tensions over the cashflow issue and how the business was being run. Looking at the second of the **Chesterton** factors, the direct wrongdoing raised by the email was the belief that Mr Stock was operating outside the investment agreement. The indirect potential impact on service users if costs were cut too far was not evident from the express words of the email. Further, the alleged wrongdoer was a private investor seeking to make a profit from his investment, a matter which suggested that there was no reasonable belief that the disclosure was in the public interest.

370. We also took account of the way in which this disclosure was made. It was not made in any way accessible to the public. It was an internal email to the other Board members copied to the Finance Manager. It was expressed in informal terms. Its focus was the internal issue about cashflow rather than making any mention of impact of such matters on people outside the business.

371. Putting those matters together we concluded that this email in isolation was not a disclosure which Mr Tarrant reasonably believed was in the public interest. He was essentially raising his private concerns about the cashflow issue within the small number of people concerned with the ownership and management of the business. In isolation, therefore, this was not a protected disclosure.

372. **PD8** concerned the management meeting on 24 July. The disclosures were said to have been made verbally during that meeting. There was no note of the meeting itself. The closest to a contemporaneous record was an email from Mr Tarrant after the meeting at page 474. In that email he summarised what needed to be done and gave a list of five action points. He ended by saying that it had been good “to go through everything today”. The factual dispute between the parties was whether at the meeting Mr Tarrant told Mr Stock that his and Mr Higgins’ actions were depriving 3L Care of the working capital necessary to provide for contingencies as prescribed by CQC regulations, and were thereby jeopardising patient safety and creating a regulatory breach, or whether it was simply a discussion of the payroll issue and the cash position overall without considering the regulatory situation.

373. Allison Murphy said in her witness statement that she did not recall such matters being raised but she accepted in cross examination that they might have been. Mr Stock said they were definitely not raised and maintained that position when cross examined. Both Mr and Mrs Tarrant remained firm in their evidence that matters were discussed. They were able to give some factual detail. Mr Tarrant said that Mr Stock told him not to worry. Mrs Tarrant gave an account of how in that part of the discussion Mr Stock said that his family had “poured enough money” into the

business. She said that he would not have needed to do that if he had not taken money out (through Bank repayments) and described how Mr Stock looked at her over his glasses and said, “it’s a mindset thing”. These accounts in cross examination had the ring of truth about them even though this detail did not appear in witness statements. Further, we did not consider that the absence of any mention of this part of the discussion in the email from Mr Tarrant at page 474 was significant. The email was a list of action points which was copied to Mr Stock as well as the other directors. It made no mention of another subject which everyone agreed had been mentioned, namely the possible removal of Mr Higgins.

374. We also thought it likely that Mr Tarrant would have raised these concerns. They were in his mind at the time. They were a natural consequence in his view of the pressure on cost cutting which Mr Stock had previously raised in the exchange of emails. Concerns about the regulatory impact of that approach were later raised on 15 August 2017 (page 527).

375. Putting these matters together we found as a fact that Mr Tarrant did inform Mr Stock at this meeting that his actions were depriving the company of the necessary working capital required to provide for contingencies as prescribed in the CQC regulations, and that they were likely to jeopardise patient safety and amount to a regulatory breach, and that Mr Higgins should be removed from his role due to his ongoing failures in financial reporting.

376. Having made that finding of fact we turned to consider whether this information met the test for being a protected disclosure. We considered it appropriate to take this discussion not in isolation but together with the emails between the meeting on 19 July and this meeting. Those emails were part of the background and context within which the discussion occurred.

377. The information disclosed which tended to show that Mr Higgins had failed in his obligations in relation to the financial reporting (a view with which Mr Higgins appeared to agree, given his “mea culpa” email), was not a matter which Mr Tarrant could reasonably believe was in the public interest. It affected the financial management of the company behind the scenes. That information did not give rise to a protected disclosure.

378. In contrast, the information disclosed about the breach of CQC regulations and the consequent impact on patient safety formed a disclosure which Mr Tarrant could reasonably believe was in the public interest. By its very nature it affected current and future service users in terms of the quality of care they could expect to receive. We were satisfied Mr Tarrant did reasonably believe his disclosure was made in the public interest.

379. The question for the Tribunal was whether Mr Tarrant had a reasonable belief that the information he disclosed in this meeting, when seen against the background of the emails leading up to the meeting, tended to show that a breach of a legal obligation had occurred or was likely to occur, or that the health and safety of any person had been endangered or was likely to be endangered.

380. The information disclosed by Mr Tarrant in that meeting was essentially that the practice of paying down Bank debt rather than retaining operating cash reserves had placed the business in a position where it was unable to meet the July payroll at

the end of the month and more money would be needed. We were satisfied that he was not saying that there was as at that date already a breach of CQC regulations or any impact upon patient safety. He was saying that these things would happen if the situation was not addressed.

381. We therefore had to consider whether Mr Tarrant had a reasonable belief that it was "likely" that this would happen. There was a dispute as to the meaning of "likely" in this context. In **Kraus v Penna PLC [2004] IRLR 260** the Employment Appeal Tribunal decided that the word in section 43B(1) requires more than a possibility or a risk that a person might fail to comply with a relevant legal obligation. The information had to tend to show that it was probable or more probable than not that there would be a breach (see paragraph 24). Mr Gardiner submitted that although **Kraus** was overturned on other grounds by the Court of Appeal in **Babula v Waltham Forest College [2007] ICR 1026**, on this point it remained binding on this Tribunal. In contrast Mr Northall argued that the decision could not survive the analysis of the Supreme Court in **SCA Packaging v Boyle** where the meaning of the word "likely" in the Equality Act 2010 was considered and found to mean simply "could well happen". We preferred Mr Gardiner's interpretation. The House of Lords in **SCA Packaging** did not consider the **Kraus** decision, and the judgments in that case were founded on the meaning of the word "likely" in a medical context and in disability discrimination law. We concluded that the appropriate approach remained that in **Kraus**: Mr Tarrant had to have a reasonable belief that a contravention of CQC regulations and/or that health and safety would be endangered was not simply a possibility or a risk, but was more probable than not.

382. We found that there were two possible breaches of CQC regulations which Mr Tarrant had in mind on 24 July. The first was an immediate breach at the end of that month if the company was not able to pay the payroll bill. We concluded that Mr Tarrant did not believe that this was more probable than not. It was evident from his email at page 466 sent on the eve of the meeting of 24 July that there were two ways in which that situation could be avoided. The first (and more likely) was that Mr Stock would put more money in. It was in Mr Stock's own interests to ensure that the company did not fail to pay payroll. If, however, Mr Stock declined to cover that cash deficit, Mr Tarrant's email said that he would talk to Yorkshire Bank to see if they would meet that temporary shortfall in cash. Given that the company's banking record had been recently renegotiated, and given that overpayments of Bank loans had been made, it was likely that the shortfall would not be met from one of those two sources. Accordingly, we concluded that Mr Tarrant had no reasonable belief that it was more probable than not that the July payroll would not be met.

383. The second CQC breach was more far reaching. It was a concern evident from the emails leading up to this meeting that the way in which Mr Stock wanted to run the company's finances created a risk that costs would be cut and that there would be a breach of the CQC fundamental principles with a consequent impact on patient safety. However, we concluded that there was no reasonable belief that this was more probable than not. The import of Mr Tarrant's emails over this period was that he would seek to avoid this situation occurring. For example, he suggested that there was a need to stop "pandering" to Mr Stock's demands and he was discussing with his executive team how Mr Stock's actions appeared to be a breach of the investment agreement. There was leverage available to prevent this course of action continuing, and thereby to forestall any possible breach of CQC regulations through

inappropriate cost cutting. We reached that conclusion even though we recognised that in his email of 15 August (page 527) Mr Tarrant referred to having considered whether the corporate and CQC responsibility carried was "too risky if we were to continue like this". Because he fully intended that the business would not continue in that way, it could not be said that a breach of CQC regulations was more probable than not.

384. Had we been able to apply the **SCA Packaging** test of whether a breach was something which "could well happen", we would have found that the information disclosed by Mr Tarrant on 24 July 2017, seen against the background of the emails leading up to that meeting, amounted to a protected disclosure.

385. That left protected disclosures **PD9** and **PD10**, being letters of 18 and 24 August 2017 respectively. Mr Tarrant confirmed in his evidence that he did not regard these as having had any impact on the decision to suspend him (which of course preceded these letters) or upon the events that ensued including the decision to dismiss. His case was that it was the exchanges leading up to and including the meeting of 24 July 2017 which were operative in the minds of the respondents in the period from August 2017 onwards. Mr Northall did not make any submissions about whether these matters were protected disclosures, and we concluded that this was academic because whether protected or not they had had no impact on anything that followed. Accordingly, we did not make any formal determination on whether these matters were protected disclosures.

386. It followed as a consequence that Mr Tarrant's complaints of automatic unfair dismissal and of detriment in employment because of a protected disclosure failed and were dismissed. Issues 19 – 21 fell away.

Discussion and Conclusions – Unlawful Deductions – Mr Tarrant

387. The next matter the Tribunal considered was the discrete question over whether there had been an unlawful deduction from pay for Mr Tarrant when employment terminated (issues 36 and 37). He alleged that the respondent had made an unlawful deduction from his pay by failing to reimburse him the tax which he had to pay as a consequence of receiving payments from the company treated as a loan to him as a director. There had also been claims pursued about expenses and in relation to property but they were abandoned during submissions having regard to the definition of "wages" in section 27 Employment Rights Act 1996.

388. The facts in relation to the director's loan were not in dispute. During 2014 and 2015 Mr Tarrant took income in the form of a director's loan totalling £60,000 in lieu of salary. That helped the company with a cashflow problem at the time. As a consequence of that outstanding director's loan he incurred a tax liability of approximately £2,400 per year which he paid personally.

389. Mr Tarrant also alleged that it had been agreed that the loan would be cleared by the company and that the tax he paid on it would also be reimbursed. We found as a fact that there had been such an agreement. The minutes of the Board meeting on 16 December 2016 (page 200) also recorded discussion of clearing the director's loan for Mr Tarrant by means of a notional bonus payment. Emails during 2017 reinforced that understanding. For example, on 23 June 2017 (page 437) Mr Higgins sent an email to the company's accountant saying that the company wanted to clear

out the director's loan account and any related tax. Similarly, at page 573b Mrs Collister emailed Mr Higgins on 26 August 2017 to say that she had been told by Val Williams that the tax on the loan was paid by the company. Mr Higgins confirmed that this was the case in his reply the same day.

390. Nevertheless, Mr Gardiner argued that this was not an amount payable to the claimant under his contract of employment. The Service Agreement was silent on it. The entire agreement clause and the clause prohibiting oral variations meant that there was no basis for finding that this entitlement arose under the contract of employment.

391. We rejected that contention. The definition of wages in section 27(1) includes any emolument referable to employment, whether payable under the contract or otherwise. Section 13(3) defines a deduction as being any occasion when the amount paid is less than the amount properly payable. Because Mr Tarrant took the director's loan in lieu of salary to assist the company, pursuant to an agreement that the loan would be cleared and he would be reimbursed any tax he paid on it in the meantime, that was an amount referable to his employment. If not paid during his employment it would be payable upon termination in the absence of any agreement to the contrary.

392. We therefore concluded that there had been an unlawful deduction from Mr Tarrant's final salary payment when the respondent failed to pay him an amount to reimburse him for the tax paid on the director's loan. This complaint succeeded.

Discussion and Conclusions – Mrs Tarrant's Disability

393. The next matter the Tribunal addressed was whether Mrs Tarrant met the definition of a disabled person between August and October 2017 (issue 22). The List of Issues made clear that the impairments on which the claimant relied were anxiety and hypertension.

394. We reminded ourselves of the legal framework summarised above. It was clear that she had a mental impairment in the form of anxiety and it was not disputed that she had a physical impairment in the form of hypertension. The question for the Tribunal was whether either or both of these conditions had a substantial adverse effect on day-to-day activities, and if so whether that effect was long-term. In particular:

(a) The effect on day-to-day activities had to be assessed ignoring the effects of any medical treatment, including medication – the "deduced effect";

(b) An effect would be long-term only if it had lasted for 12 months or more or was "likely" to last for at least 12 months;

(c) If a substantial adverse effect ceased but was "likely" to recur it should be treated as continuing, and

(d) "likely" in this context meant "could well happen".

395. We needed to make some findings of fact about the medical history prior to August 2017.

396. In relation to hypertension, we noted that there were no references to high blood pressure in the medical records between September 2012 (page 1183) and 17 August 2017 (page 1085). In cross examination Mrs Tarrant confirmed that she had not had any blood pressure issues until August 2017. She was not prescribed any medication for it on that occasion. It appeared to us that the hypertension was significant only in that it was linked to the anxiety. We found that by reason of hypertension alone the claimant was not a disabled person because it did not have any substantial adverse effect on her day-to-day activities. This was really a case about whether she was disabled by reason of anxiety and its consequences.

397. There was no record in Mrs Tarrant's GP notes of a complaint about anxiety prior to August 2017. In her oral evidence in response to questions from the Tribunal after cross examination, Mrs Tarrant told us that she had been taking fluoxetine since about 2004. She said that she had tried to come off it but the results were "not favourable" and she had found herself "unable to function". She said she had not been able to look after her children and "literally just sat and existed". Mr Gardiner submitted that this was not sufficient to enable the Tribunal to make a finding that by reason of anxiety she met the definition of a disabled person at any point prior to August 2017. He pointed out that the first mention of a prescription for fluoxetine was in September 2008 (page 1100) for a depressive disorder, not anxiety, and that there was no reference in the medical records to Mrs Tarrant continuing to take fluoxetine throughout that period. We noted, however, that the GP entry for 17 August 2017 (page 1085) recorded that Mrs Tarrant was already on fluoxetine at 40mg per day. We accepted her evidence that she had been taking it prior to August 2017 on an ongoing basis, with the dosage varying between 20mg (2008) to 40mg (2017).

398. However, we had no medical evidence about the purpose for which fluoxetine was prescribed or about how Mrs Tarrant would function if not taking that medication. From the limited medical information available it appeared to have been prescribed initially for depression rather than for anxiety. The position was also complicated by the fact of Mrs Tarrant's fibromyalgia and the range of symptoms resulting from it. Those symptoms included anxiety but also included other symptoms such as depression. It appeared to us overall that this was one of those cases envisaged by the Employment Appeal Tribunal in **Royal Bank of Scotland PLC v Morris UKEAT 0436/10** where the issues were "too subtle" to allow us to make proper findings without expert assistance. We rejected Mr Northall's contention that we should approach the matter in line with the **Pets at Home** case by taking a common sense view that there must be a substantial adverse effect if long-term medication is no longer taken. In our judgment that view was not appropriate in this case because of uncertainty as to whether the fluoxetine was prescribed for anxiety as distinct from depression, and because of the lack of any medical evidence about the effect of other symptoms upon Mrs Tarrant's functioning if fluoxetine were no longer to be taken. We therefore concluded that we could not apply paragraph 5 of Schedule 1 to the Equality Act 2010 and proceed by reference to the deduced effect of anxiety in the period before August 2017. Mrs Tarrant failed to prove her case on that point.

399. The alternative argument was that in August 2017 and for the weeks that followed the substantial adverse effect was likely to last for at least 12 months. This was the focus of the disability witness statement of Mrs Tarrant which appeared at pages 1068-1072. It was a matter to be addressed without the benefit of hindsight, considering only the information available at the time. That medical information was relatively limited. The GP notes at page 1085 showed that there was a mention of anxiety having increased in a consultation on 1 August 2017, but no prescription at that stage. On 17 August, however, there was a description of extensive symptoms which recorded that Mrs Tarrant "can't function…[is] not eating properly, not sleeping". The diagnosis of the problem was "anxiety state" and the history recorded that she was already on 40mg of fluoxetine. The fit note issued was only for two weeks, and indicated that she did not need to be seen again at the end of it, but we declined to attach any significant weight to that. On 31 August she was seen again and the dosage of fluoxetine was increased by 50% from 40mg to 60mg per day. She was described as being "still bad with anxiety".

400. We concluded that the claimant should be assessed as if there had been no increase in her fluoxetine following the consultation on 31 August 2017 as this was medication to treat her impairment of anxiety. We also took account of the fact that the claimant was a person with a history of taking fluoxetine on an ongoing basis and with entries in her medical records of depression as well as the numerous other symptoms resulting from fibromyalgia. Even though there was no specific medical evidence from the time expressing a view about whether the substantial adverse effect was likely to last for 12 months or more in the absence of that increase in medication, we were satisfied on the evidence we heard that this was something which could well happen. The blow to Mrs Tarrant of hearing that she and her husband had been suspended from the business which they had built up and on which they depended for their livelihood was extremely significant, particularly because the prospect of dismissal was readily apparent to her, and given her medical history it could well happen that the substantial adverse effects, without measures such as increased medication, would last for at least 12 months. We therefore concluded unanimously that Mrs Tarrant had shown that she satisfied the definition of being a disabled person in the period from 17 August 2017 onwards.

Discussion and Conclusions – Mrs Tarrant's Termination Letter

401. Issues 1-3 concerned Mrs Tarrant's termination date.

402. It was accepted on behalf of the respondents that the sending of the dismissal letter to HRC alone, not to Mrs Tarrant at her home address, was not in compliance with clause 17.4 of her Service Agreement. In submissions Mr Gardiner sought to argue that Mrs Tarrant was estopped from raising that point because of the email from her solicitors of 25 September 2017 (page 733) which said that all communication should be through them to avoid unnecessary stress and anxiety causing an exacerbation of her medical condition. The use of the word "through" implied that any communication would eventually reach Mrs Tarrant.

403. Mr Northall objected to the reliance on the estoppel argument on the basis that it had not been pleaded. Mr Gardiner said that if permission to amend were required, he sought it on behalf of the company. Mr Northall objected to that application on the basis that the claimant had been denied the opportunity of calling

further evidence on this point. He said that the claimant might have sought to waive privilege in part and call evidence from her solicitor, Mr Whitehead, as to what was intended by the communication of 25 September. The difficulty with that argument, we concluded, was that evidence of the subjective intention behind that email was not relevant. The test is an objective one of what a reasonable recipient would understand by the communication in question. Applying the overriding objective in Rule 2 and the test of the balance of prejudice in **Selkent Bus Co Ltd v Moore [1996] ICR 836,** we decided that the company should be granted permission to amend paragraph 39 of its response form so as to raise the argument that the claimant was estopped from denying that the communication of her dismissal was effective because of the representation made by her solicitors. It was a pure point of law not requiring any additional evidence.

404. We also concluded that the estoppel argument was well-founded. The communication gave a good reason why the respondents should not contact Mrs Tarrant directly. It was sent at a time when Mrs Tarrant and her solicitors were aware of the disciplinary proceedings and the possibility that the outcome could be notice of termination. It did not suggest that there was any exception to the request for contact to be through them. Mrs Tarrant intended the respondent to stop writing to her direct. The letter said that to do otherwise would be unlawful. The respondents reasonably relied upon that representation by not sending the dismissal letter to Mrs Tarrant herself. Of course, it would have been open to them to have taken that step in the days that followed when this point was raised by the solicitor for Mrs Tarrant, but, as Mr Gardiner pointed out, the effect of the estoppel is such that the effective termination had already taken place when it was communicated to Mrs Tarrant's solicitor.

405. For those reasons we concluded unanimously that the respondents had effectively terminated Mrs Tarrant's employment with effect from the date upon which the dismissal letter was received by HRC, Mrs Tarrant being estopped from relying on clause 17.4 of her Service Agreement.

406. As a consequence the complaint of unlawful deductions from wages in the period from 12 October 2017 for Mrs Tarrant (issues 38 and 39) also failed and was dismissed.

Discussion and Conclusions – Unfair Dismissal – Both Claimants

Whose Decision?

407. The first matter the Tribunal considered was who decided that Mr and Mrs Tarrant should be dismissed. That was a necessary precursor to identifying the reason (issue 4).

408. There were nine unusual features of the investigation and disciplinary proceedings which together suggested they were not being pursued transparently and in good faith.

409. Firstly, following the discussion with Ms Murphy on 26 July 2017 the origin of the decision to investigate matters was concealed from the claimants. They were told that it began with an investigation of the state of Atherton which then uncovered financial concerns. In reality it was the other way around.

410. Secondly, the claimants were not informed that there were any concerns or an investigation under way until they were suspended whilst still on annual leave on 16 August 2017. That had the effect of removing their access to the company's computer systems and their ability to contact other members of staff. The opportunity to have an initial discussion prior to making a decision on suspension was not taken. Mr and Mrs Tarrant were invited to attend an investigation meeting on 18 August even though they were still on annual leave at that date. That was consistent with the desire to get on with the process as quickly as possible.

411. Thirdly, although Mrs Collister immediately started to make contact with individuals as part of her investigation (by speaking to Val Williams on 26 July and emailing Allison Murphy on 31 July), any contact which could have been visible to Mr and Mrs Tarrant was delayed until they went on annual leave on 1 August. That was the same day that Mrs Collister met Allison Murphy at Atherton, and it was the following day that her husband began his investigation into the state of the works at Atherton.

412. Fourthly, Mr Stock made sure that he had a meeting with Mr Higgins to brief him at the very start of Mr Higgins' first day back at work, Monday 7 August. That was a meeting to get him on board. It was agreed in the few days that followed that Mrs Collister would be doing the investigation, Mr Higgins would deal with the dismissal, and Mr Stock would hear any appeal. In that way Mr Stock retained control of the entire process.

413. Fifthly, no records were kept of these initial stages. For example, there were no records of what Mr Stock and Mr Higgins discussed with Allison Murphy when they saw her together on Monday 7 August.

414. Sixthly, Mr Stock took steps to appoint himself a director of the holding company on 8 August. This was not communicated to the other directors until 15 August, a day before Mr and Mrs Tarrant were to be suspended. When Mr Tarrant responded to this email on 15 August his response was forwarded immediately by Mr Higgins to Mr Stock. There was also plainly a sensitivity on the part of Mrs Collister and the others to any response by Mr and Mrs Tarrant to this step. It was consistent with knowledge that two directors would be leaving shortly.

415. Seventhly, the day after being appointed as a director Mr Stock instructed his own lawyers BC to provide advice on this matter, rather than the company's usual lawyers or the HR Consultancy, Spectra. That was another means by which he was able to maintain control of what ensued.

416. Eighthly, Mr Stock took steps to be appointed as a director of the trading company with effect from 31 August 2017.

417. Finally, the investigation conducted by his daughter Rachel Collister was deeply flawed. We will consider those shortcomings in more detail below, but essentially we found that it was not an impartial investigation but rather a search for evidence which could be used against Mr and Mrs Tarrant. Importantly, the completion of her investigation reports was not the end of Mrs Collister's involvement, as one would ordinarily expect of an employer acting reasonably. She provided further input to Mr Higgins by preparing a document on 7 or 8 August headed "Evidence of Fraud/Theft" (page 1291). That was an entirely partial

document seeking to argue the case as to why Mr Higgins should reach that conclusion in the disciplinary proceedings. On the eve of the disciplinary hearing she emailed Mr Higgins to say that the suggestion by Mr and Mrs Tarrant that they learnt of their suspension from a third party was "a complete fabrication" (page 799). Even after the disciplinary hearing she still had some input to Mr Higgins. She prepared some comments on the notes of the hearing (pages 530R-530V/1315-1319) which were critical of the answers Mr Tarrant had given and which were before Mr Higgins when he made his decision. These were all means by which Mrs Collister sought to influence Mr Higgins to make sure that Mr and Mrs Tarrant were dismissed for gross misconduct.

418. These anomalies were explained by the fact that Mr Stock had made the decision and others were simply putting it into effect. We found that Mr Stock had decided by the end of July 2017 that Mr Tarrant had to go. A combination of factors caused him to take that view, including the delay in getting Atherton open and the overspend on the refurbishment, the absence of control and visibility over finances (for which Mr Higgins was also responsible) and the delay in signing the banking documentation between April and July 2017. The main factor, however, was the dispute between Mr Stock and Mr Tarrant about how the business should be run.

419. That dispute came to a head in the email exchanges in July leading up to the meeting on 24 July 2017. Put broadly, Mr Stock did not like being challenged by Mr Tarrant over his decision to repay bank debt rather than retain operating cash reserves, and he saw Mr Tarrant as resistant to cost cutting measures. That was evident from their email exchanges about cost cutting in which Mr Stock reiterated his view that he had never seen a business where costs could not be cut. He also regarded as inflammatory Mr Tarrant's suggestion that Mr Stock was prepared to cut costs at the expense of patient care.

420. That was why, we concluded, Mr Stock took Ms Murphy for a coffee on 26 July after their meeting with the Bank at Atherton and asked her whether she trusted Mr Tarrant. We accepted her oral account of the conversation and how it occurred. Her witness statement said that she instigated it but in cross examination she confirmed that Mr Stock had suggested the discussion and that he had asked her first whether she trusted Mr Tarrant. Mr Stock agreed that he had asked that question although he thought that it was because of something that Ms Murphy had said. We found as a fact that Ms Murphy had said that Mr Stock should look at the accounts but the only specific item which she appears to have mentioned (which neither of them could recall but Mrs Collister recalled having been told about) was the Dunelm throw. It was odd that Mr Stock had not asked for more details of the concerns that Ms Murphy said she had. We concluded that this meeting showed that he was looking for some way to rid the business of Mr Tarrant and that he found what he was hoping to get in that discussion with Ms Murphy. He decided then that Mr Tarrant would be leaving the business and for that reason he instructed his daughter to carry out the investigation and it was arranged that Mr Higgins would deal with any disciplinary hearing and Mr Stock himself with any appeal.

421. The decision that Mr and Mrs Tarrant would be dismissed was a decision made by Mr Stock.

Role of Mr Higgins

422. As for Mr Higgins, the role he played in matters was guided entirely by Mr Stock's lawyers. As an example, the day after his disciplinary hearing with Mr Tarrant, when he still had much investigation to do, he received draft decision letters for both Mr and Mrs Tarrant which envisaged them being dismissed for gross misconduct. The drafts did not envisage any other outcome to the disciplinary proceedings. That was because the decision was a foregone conclusion. That approach also explained why the decision letters required the claimants to rebut the allegations against them rather than considering whether the allegations had been proven.

423. We also found as a fact that Mr Higgins had made a comment that "it's not me" during a break in the disciplinary hearing with Mr Tarrant and Mr Kelly. We accepted the evidence of Mr Tarrant and Mr Kelly that this was said even though Mr Kelly had not recorded it in his notes because it was a casual conversation during the break. In cross examination Mr Higgins accepted that it would have been reasonable for Mr Tarrant to have asked him why he was doing this, and although he denied having used those words, or that the inference that someone else had made the decision was appropriate, we rejected that. We were satisfied that the comment was made and that it represented an insight into what was really happening in this disciplinary procedure.

424. The Tribunal concluded that Mr Higgins had been told by Mr Stock on his return from annual leave on 7 August 2017 that there had been dishonesty by Mr and Mrs Tarrant. Mr Stock did not tell Mr Higgins the real reason he wanted Mr and Mrs Tarrant to leave the business. That was why Mr Stock immediately took Mr Higgins to speak to Allison Murphy himself so that she could discuss her concerns about what had been happening at Atherton. Mr Higgins was aware from 7 August that Mr Stock wanted Mr and Mrs Tarrant out of the business, and although he was not party to the real reason in Mr Stock's mind, he went along with it to the extent of participating in a deeply flawed disciplinary process. It explained the reference by Mr Higgins to "if Peter agrees" in his communication with BC of 25 August 2017 (page 537c). He was manipulated by means of Mrs Collister's investigation reports and her subsequent input, and he was guided into following a fundamentally unfair disciplinary procedure.

425. That explained why he was able to say to Mr Tarrant and Mr Kelly on 5 October that "it's not me", showing that any reservations he might have had about whether Marcus and Juliette Tarrant had in truth acted dishonestly had been put to one side, and that he was going along with what he believed to be a settled decision that they would be dismissed for gross misconduct.

Reason for Dismissal – Mr Tarrant

426. As a consequence the Tribunal unanimously concluded that:

(a) The decision to dismiss Mr Tarrant was taken by Mr Stock.

(b) The principal reason was the conflict between Mr Stock and Mr Tarrant over how the business should be run in terms of cashflow and cost savings.

427. This was not a potentially fair reason for dismissal. The company failed to show a potentially fair reason for dismissal. The dismissal of Mr Tarrant was unfair.

Reason for Dismissal – Mrs Tarrant

428. We found that Mrs Tarrant was dismissed partly because she had been involved in the conflict with Mr Stock over how the business had been run, but predominantly because Mr Stock could not allow her to stay in the business after Marcus Tarrant had left. That was because they came as a pair. They had set up the business together. It reflected their relationship.

429. This was not a potentially fair reason for dismissal. The company failed to show a potentially fair reason for dismissal. The dismissal of Mrs Tarrant was unfair.

Fairness if Misconduct Dismissals

430. It is worth summarising what the Tribunal's conclusion would have been on issue 5 had we concluded that these had been dismissals by reason of gross misconduct. Even had that been our finding we would have found both dismissals unfair.

431. The investigation undertaken by Rachel Collister was outside the band of reasonable responses. It was not the impartial investigation that should have been carried out given the seriousness of the allegations against the claimants. The claimants were not provided with details of the allegations against them or any documentation to enable them to respond before the proposed investigation meetings on 18 August. Marcus Tarrant was misled by the suggestion that Mr Collister was only there to take notes when in fact he had carried out part of the investigation that related to the state of Atherton. The investigation reports which Mrs Collister compiled were not the product of an objective and independent look at the evidence but rather an attempt to press the case for gross misconduct. Important witness evidence was gathered only verbally, and not recorded in writing until long after dismissal. The evidence she gathered in the investigation was not shared with the claimants. The lack of access to the IT system prevented Mr and Mrs Tarrant from having a fair opportunity to respond to the allegations against them, a point particularly important where ultimately it was for them to rebut the allegations. We will deal separately below with the treatment of Mrs Tarrant's ill health during this period.

432. Once a significant number of additional financial allegations were raised against Mr Tarrant there was no attempt to convene a further investigation meeting to go through the new matters. The first time that Mr Tarrant could provide his response to these matters was at the disciplinary hearing when he still had not had a reasonable opportunity to access the information to enable him to defend himself fairly.

433. As for the disciplinary proceedings themselves, they were also conducted in a fundamentally unfair manner. The full evidence on which the case against Mr and Mrs Tarrant was based was not provided to them. It was given piecemeal and in some cases not provided at all. That led to the ridiculous situation in the disciplinary hearing where neither Mr Higgins nor Mr Tarrant knew what items had been purchased on the invoices relied upon, and it led to a situation where information

was provided to Mr Tarrant for the first time in the letter dismissing him. In addition, we noted that only two hours had been scheduled for the disciplinary hearing with Mr Tarrant despite the significant number of allegations to be considered. That was plainly never going to be sufficient for a properly detailed consideration of the case for and against him.

434. Although Mr Higgins looked at the documents Mr Tarrant provided on 5 October he did not take any copies. At best he only had copies of the witness statements from Mr Tarrant. He then engaged in some further investigations without making the claimants aware of what he was doing. No notes were kept of the investigations conducted by Mr Higgins with Ms Murphy over the weekend of 7 and 8 October 2017, and nor had there been any reference to that in the dismissal letter.

435. The family of the resident at Atherton was asked to provide an email about the shower on 9 October even though the point was recorded in the minutes from the meeting on 5 August, enabling the company to evidence the shower problem without disclosing the more serious concerns about care which were nothing to do with Mr Tarrant.

436. The unfairness at the disciplinary stage was not cured on appeal by Mr Stock. He was simply rubber-stamping the decision below.

437. Accordingly, even had the principal reason for these dismissals been a belief that the claimants had committed misconduct, we would have found the dismissals unfair.

Discussion and Conclusions – Marital Status Discrimination Complaint by Mrs Tarrant

438. This complaint gave rise to issues 32 and 33.

439. Although we were satisfied that the principal reason for the suspension and dismissal of Juliette Tarrant was that she could not be allowed to stay once Mr Tarrant had gone, applying the decision in **Hawkins** we concluded that this was not influenced to any extent by the fact that she was married to Mr Tarrant as opposed to the fact of their relationship itself. It would have been exactly the same had they been an unmarried couple who jointly founded the business and who had run it together prior to Mr Stock's investment.

440. The complaint of marital status discrimination failed and was dismissed.

Discussion and Conclusions – Disability Discrimination Complaints by Mrs Tarrant

<u>Harassment</u>

441. The first matter we considered was the complaint of harassment related to disability (issues 29-31). We were satisfied that the course of correspondence, once the respondent was informed of Mrs Tarrant's anxiety, was unwanted conduct. Mrs Tarrant did not want to receive these letters and they had a significant impact on her because of her anxiety state.

442. However, we concluded that the unwanted conduct was not related to disability. We rejected the arguments raised by Mr Northall in paragraph 312 of his written submission. Although the test of "related to" is broader than the test of causation in a direct discrimination complaint, it still fell short on the facts of this case. The content of the letters was exactly as it would have been had there been no health issue. The course that the correspondence took, and the timescale and the date of the dismissal decision, was exactly as it was for Mr Tarrant, for whom there was no disability issue. The reality was that the real complaint brought by Mrs Tarrant was that the respondents failed to take any account of her disability, a matter we consider in relation to reasonable adjustments below. The fact that the correspondence had a greater negative impact on her because of her disability is not sufficient to mean that it is related to disability. Accordingly the complaint of harassment failed and was dismissed.

Reasonable Adjustments

443. We then turned to the complaint of a breach of the duty to make reasonable adjustments. The first matter to be determined (issue 23) was whether the respondents knew or ought reasonably to have known that Mrs Tarrant was a disabled person between August and November 2017. As explained above, we concluded that she was disabled by reason of anxiety in this period because the mental impairment had a substantial adverse effect on her day-to-day activities from August 2017 onwards, and it was likely to last for 12 months or more since that could well happen.

444. We reminded ourselves that in order for a respondent to have knowledge (actual or constructive) of disability it must have knowledge of all the elements: the impairment, the substantial adverse effect on day-to-day activities, and the likelihood that it would last for 12 months or more.

445. Mr Higgins was aware already that Mrs Tarrant suffered from the mental impairment of anxiety. There was some consideration of whether the company should obtain specialist advice on her condition. That was evident from the email sent by Mr Higgins to the lawyers on 6 September 2017 (page 688a) and copied to Mr Stock which said that he saw her revised sick note saying her anxiety was work related as a direct and tactical response to suspension, but still said that if the Tarrants did not come to a settlement they should consider a specialist to review her condition. That possibility was never pursued.

446. The position was made clear, however, by HRC five days later in their letter of 11 September 2017 where (page 708) they said that Mrs Tarrant was disabled under the Equality Act 2010 by reason of anxiety (and high blood pressure). Upon receipt of such a letter the company could reasonably have obtained some medical advice about her condition with a view to seeing whether she met the definition of a disabled person. We concluded that properly informed medical advice would have confirmed that without medication the substantial adverse effect could well last for 12 months or more. Accordingly, the respondents had failed to prove that they could not reasonably have known of Mrs Tarrant's disability.

447. We then considered issue 24, which is whether PCPs were applied to Mrs Tarrant. They were formulated as a requirement to attend an investigation meeting on 18 August 2017, and a requirement to attend a disciplinary hearing in person at

the offices of the lawyers on 5 October 2017. The invitation to the investigatory meeting for Mrs Tarrant was on 16 August at pages 534a and 534b, and the invitation to the disciplinary hearing on 2 October 2017 for Mrs Tarrant was at pages 783-785.

448. The dispute about this issue arose because Mr Gardiner submitted that neither of these matters could amount to a PCP because they were only matters applied to the claimant in her very specific circumstances. We rejected that argument. The same requirements were applied to Mr Tarrant who was not a disabled person. The comments made in **Nottingham City Transport v Harvey** were about the phrase "practice". The purpose of a PCP is to enable a comparison to be made to see whether the duty to make adjustments might arise. We were satisfied that this represented a provision or criterion which was applied to Mrs Tarrant and which was also applied to a non-disabled employee, Mr Tarrant.

449. The next question was whether this PCP placed Mrs Tarrant at a substantial disadvantage compared to Mr Tarrant because of additional mental distress due to her existing anxiety state (issue 25). We were satisfied that this was the case. Not only would it be in line with common sense, but it was also supported by an entry in the GP records for 17 August 2017 at page 1085 where the following was recorded:

> **"Supposed to have a meeting next week but doesn't think can cope with confrontation as already feeling anxious."**

450. That additional disadvantage was not minor or trivial.

451. The next issue (issue 26) was whether the respondents knew or ought reasonably to have known that she was likely to be placed at that substantial disadvantage. We found as a fact that there was some knowledge in the business of Mrs Tarrant's history of anxiety. That included the knowledge of Mr Higgins, and also the text message exchange between Mrs Tarrant and Ms Murphy on the morning of 20 July about how anxious she was feeling that morning. However, Mrs Tarrant had not had any time off work at this stage and nor were the respondents aware that she had seen her GP on 1 August complaining of a number of problems including increased anxiety. Accordingly we were satisfied that when the suspension email of 16 August was sent inviting her to an investigation meeting on 18 August, the respondents did not know and could not reasonably have known that she was likely to be at that substantial disadvantage.

452. However, within a day the respondents had received the fit note certifying her unfit for work due to anxiety until 31 August (page 538) and Mrs Tarrant's text message saying she would not be attending (page 536). That illness was not acknowledged in the letter of 18 August confirming suspension (pages 547-548) but Mrs Tarrant spelled out the position in her grievance letter of 24 August at page 568. She said that her current ill health was work related and had been severely exacerbated by recent actions with regard to her suspension. At the end of the letter she referred to wanting to provide more information when fit enough to deal with the matter properly. We concluded that by the time this letter was received the respondents either knew or ought reasonably to have known that Mrs Tarrant would be at a substantial disadvantage because of anxiety (whatever its cause) in dealing with meetings about the disciplinary allegations against her. In principle, therefore,

the duty to make reasonable adjustments had arisen either on 17 August 2017, or at the latest upon receipt of the grievance letter of 24 August 2017.

453. Issue 27 concerned the reasonableness of the adjustments sought. It was apparent from the evidence we heard that none of the adjustments which the claimant sought were considered because the respondents did not regard her assertion of work related anxiety as genuine. That was evident from the email sent by Mr Higgins on 6 September 2017 at page 688a, and from the fact that no efforts were made to obtain medical advice. However, in a reasonable adjustments complaint the Tribunal is not evaluating the employer's reason for not making the adjustments, but rather assessing for itself whether they were steps which should reasonably have been taken on the information available at the time. Further, we noted that there is no requirement for the proposed adjustment to be one which will completely remove the disadvantage. It can still be reasonable to make an adjustment which has only a prospect of reducing or removing the disadvantage. That is simply a factor to be weighed in the balance of assessing what is reasonable.

454. We considered the adjustments in turn. The first was providing Mrs Tarrant with advance notification of the matters to be discussed at the investigation meeting. We considered that it would have been reasonable for both claimants to have been informed in advance of the details of the allegations in order to render the investigation meeting more fruitful and less stressful for them both, and we were satisfied that the failure to do this had a greater adverse impact on Mrs Tarrant because of her anxiety than it did on Mr Tarrant. However, the PCP on which Mrs Tarrant relied was simply the requirement to attend the meeting itself. The PCP contained no reference to the provision of information in advance. Accordingly this proposed adjustment was not an adjustment to the PCP as pleaded. It therefore failed.

455. The second PCP was postponing the investigation or disciplinary meeting. We were satisfied that this would have been a reasonable adjustment. Mr Gardiner suggested that it would not be reasonable to postpone on an open-ended basis, but of course that would not have been necessary. An employer acting reasonably would have sought some medical advice about when Mrs Tarrant was likely to be fit to attend such a meeting, and would have been informed by that advice in deciding when the meeting should have been rescheduled. It may be that with hindsight one can say that the postponement would have been a lengthy one, and possibly the point would have come where the company would have been justified in pressing forward even without Mrs Tarrant being well enough to attend, but that was a matter to be ascertained through medical advice. The complaint of a breach of the duty to make reasonable adjustments therefore succeeded (subject to time limits) in relation to this matter.

456. The third proposed adjustment was to amend the format of the meetings to enable Mrs Tarrant to participate. The suggestion was made that they should be conducted by telephone. There was an adjustment in the sense that the investigation was conducted by asking for written responses to written questions. However, we accepted Mr Gardiner's argument that this was not an adjustment which would have had any prospect of removing the disadvantage because Mrs Tarrant accepted that she was simply too ill to engage in any form of meeting at the time. That was also the tenor of her correspondence of 24 August and 4 September. For that reason this

was not an adjustment which should reasonably have been made. The same was true, we concluded, of the proposed adjustment in relation to the venue of the meeting. Mrs Tarrant would not have been able to attend the meeting no matter where it was held.

Liability of Mr Stock and Mr Higgins

457. The next issue was whether the second or third respondents could be personally liable for a failure to make reasonable adjustments by not postponing the meetings (issue 28). Mr Gardiner conceded that even where the contravention of the Equality Act amounted to an omission rather than a positive act, personal liability could still attach.

458. We concluded that whilst the company remains liable (subject to time limits) for the breach of the duty in relation both to the investigation and the disciplinary hearing, Mr Stock was not personally liable for either of those failures. There was no evidence that he was personally involved in the detail of decisions of this kind, despite what we found to be his orchestration of the overall process. It was essentially a matter for Mrs Collister. She was not a respondent.

459. However, the decision to press ahead and bring the disciplinary proceedings against Mrs Tarrant to a conclusion without delaying so that there could be a disciplinary hearing is a decision for which Mr Higgins is personally responsible, even though we accepted he may have acted on legal advice. Accordingly, the complaint of a breach of the duty to make reasonable adjustments succeeded against Mr Higgins.

Time Limits

460. We then addressed the time limit point for Mrs Tarrant. Mr Northall abandoned his contention that the Tribunal could not address this and issue 40 fell away. Issue 41 also fell away because the whistleblowing detriment complaints had failed. That left issue 42. It concerned the investigatory meeting scheduled for August, not the disciplinary hearing in October 2017.

461. We were satisfied that the failure to delay the investigatory meeting and the failure to delay a disciplinary hearing and to proceed without such meetings amounted to conduct over a period within the guidance given by the Court of Appeal in **Hendricks**. It was all part of a process designed to get Mrs Tarrant out of the company at the same time as her husband, ignoring the effect of her illness on her ability to participate in the investigatory and disciplinary process. Time therefore started to run at the date that Mr Higgins brought the procedure to an end by dismissing her, 12 October 2017. Even ignoring the effect of early conciliation her claim form was lodged within three months of that date, on 11 January 2018.

462. The complaint of a breach of the duty to make reasonable adjustments by not delaying meetings was therefore in time and succeeded against the first respondent on both the investigation and the disciplinary hearing, and against the third respondent, Mr Higgins, only on the latter.

Discussion and Conclusions – Notice Pay

463. The issue for the Tribunal to determine (issue 34) was whether either of the claimants had committed gross misconduct which gave the respondents grounds for terminating their contract without notice. This remained a live issue even though the Tribunal concluded that none of these matters were the reason for dismissal.

464. We reminded ourselves that this was a matter to be determined by the Tribunal for itself on the basis of the evidence we had before us. We were not limited to assessing the reasonableness of the views expressed in the dismissal letters.

465. Further, we bore in mind that in order for there to be gross misconduct there must be conduct on the part of the employee which amounts to a repudiation of the contract. In broad terms that will require either deliberate misconduct in the form of dishonesty, or gross negligence.

466. The burden of proving gross misconduct lay on the respondent. The matters on which the respondents were most confident of establishing gross misconduct were those addressed by Mr Gardiner in paragraphs 51-115 of his written submission. It would be otiose to consider each and every matter canvassed in our hearing. We considered each of those highlighted by Mr Gardiner.

Boiler Gas Certificate

467. The Collister investigation concluded that there was no gas certificate for the Glow Worm boiler at Atherton, and therefore that Mr Tarrant had failed to ensure that the premises were safe. Mr Tarrant had said at the disciplinary hearing that the Atherton House Book contained all certificates but there was only one gas certificate in there for a different boiler. Mr Gardiner argued that the claimant's assertion that the certificate was somewhere at Atherton was not credible. He relied on the fact that David Collister had not been able to find it during his investigation. Mrs Collister said in her investigatory report that two gas engineers had been contacted but there was no evidence of who that was.

468. However, we had grave misgivings about the extent to which the respondent could rely on the investigation as proving the absence of the certificate. As explained above, the investigation had not been carried out thoroughly and impartially. A gas certificate for the other boiler issued by Philip Heaton appeared in the Atherton house pack (page 510), but Mr Tarrant did not have the opportunity to show Mrs Collister in the investigation where the other certificate was. He maintained that it was somewhere else at Atherton. Mr Tarrant explained that he had asked Ian Brown to sort this out and that the second certificate had been done by Phil Heaton, and he pointed out that the CQC inspection would have required sight of certificates for each boiler before the Home could be certified ready to open.

469. On the balance of probabilities, we concluded that the respondent had not proven that Mr Tarrant was guilty of gross misconduct in relation to this issue, or indeed any failure save for the failure to include the second certificate in the house pack. Because of the fundamental flaws in the Collister investigation we could not attach significant weight to its conclusion that there was no second certificate. The fact that the CQC certified Atherton as fit to open also undermined Mrs Collister's conclusion.

Atherton Shower/Status Electrical/Soil Pipe

470. In relation to the shower which failed to work when the service user first moved into Atherton, the subsequent investigation by the electrical contractor (page 1347) showed that the problem was due to a live cable not terminating correctly at the fuse. Once it was re-terminated a satisfactory test result was achieved. There was no way Mr Tarrant could have known this before he went on leave. There is no evidence that the shower had failed to work properly at any time before the resident moved in. It was not a failing on his part to have omitted to check that the wiring had been done properly when he had engaged an external electrical contractor to carry out that work.

471. Mr Gardiner submitted in paragraph 53 of his written submission that the evidence showed that the certification of Status Electrical from the certification body Stroma had lapsed on 9 May 2017 before they certified the Atherton electrics in July 2017. That was mentioned in the report of David Collister at page 282k, but that report did not itself provide the primary evidence. In any event, Mr Tarrant was entitled to rely on the fact that a Stroma certificate had been issued by Status Electrical (pages 452b-g) and it could not be characterised as gross negligence on his part to fail to check that the electrical contractor was actually still authorised by Stroma to issue such certificates.

472. Finally, in relation to the uncapped soil pipe the evidence before us showed that the problem of smell resulting from this was only apparent after Mr Tarrant had already gone on holiday, and the only criticism that could be made of him was that he should have checked whether the soil pipe had been properly capped. Even if that criticism is well-founded it falls well short of amounting to gross negligence.

473. We concluded overall that the respondents had failed to show that the shortcomings in the state of readiness at Atherton when it opened in early August 2017 were attributable to failings on the part of Mr Tarrant which amounted to gross negligence, even when they were taken cumulatively rather than individually. Indeed, at the Board meeting on 18 August 2017 the Board was informed that any problems at Atherton when it opened had been rectified within 24 hours. The CQC had inspected the house and certified it fit to open, having checked all required certification, as confirmed by Mr Tarrant in his email of 27 July at page 1314. The CQC approval itself appeared at pages 484-485. Gross misconduct had not been proven.

Misappropriation Allegations - General

474. The allegations of misappropriation had to be seen in their proper context. This was a business which Mr and Mrs Tarrant had founded and run for some years prior to the involvement of Mr Stock as a new investor. They both spent long hours working on the business and at times there had been a blurring of the lines between business expenditure and personal expenditure. For example, Mr Tarrant regularly made business and personal purchases at the same time without ensuring that those matters appeared as separate transactions on a separate invoice. The safeguard was that any expenditure on the company credit card, or any claims for reimbursement of expenses backed by an invoice or a receipt, would be scrutinised by the Financial Manager, Val Williams, and if there were doubts about whether it was genuinely a business expense they would be raised and discussed with Mr and

Mrs Tarrant. If necessary matters which were not satisfactorily accounted for could be credited to Mr Tarrant's loan account as a holding measure before being reconciled. Although the Service Agreements signed in July 2016 reinforced the fiduciary duty of Mr and Mrs Tarrant as directors, they remained the two most senior executives in the company and on the face of the investors' agreement operational matters such as business expenses were a matter for the executives to determine, not for Mr Stock as principal investor.

Shrigley Hall

475. Having heard all the evidence about the Shrigley Hall event the Tribunal concluded that it had genuinely been an opportunity taken by Mr and Mrs Tarrant to discuss the business away from the immediate pressures of work and family life. We found as a fact that they did have a working lunch at Shrigley Hall which they were entitled in principle to reclaim from the company. The discrepancies over the handwritten endorsement of "managers Xmas dinner" on the invoice, even though no-one else attended, and what Mrs Tarrant told Val Williams the day before about stopping work, did not undermine that conclusion; nor did the oddity of the way in which items were allocated on the hotel invoice. We accepted that the lunch had taken place in the restaurant not in the courtyard.

476. Further, although the vouchers used for the overnight stay of their children and their son's girlfriend had apparently only covered four people, we accepted Mrs Tarrant's explanation that their daughter occupied a third bed in their room and was therefore covered by the scope of the vouchers.

477. Putting all these matters together we concluded that the respondents had failed to show that there was any gross misconduct in relation to the expenditure at Shrigley Hall.

Expenditure on Domestic items

478. In paragraphs 58-63 of his written submission Mr Gardiner submitted that there had been gross misconduct in relation to expenditure on a number of items over Christmas 2016. At that time the kitchen at the home of Mr and Mrs Tarrant was being refurbished following a flood. They had received an insurance payout. Atherton was still in the relatively early stages of refurbishment. No-one was resident there. Mr Gardiner relied on the purchase of a cutlery tray, a hole saw set, the purchase of items at Screwfix in Macclesfield on 27 and 28 December, and the purchase of a cooker hose. He relied on evidence that Ian Brown was doing work on the kitchen of Mr and Mrs Tarrant shortly before Christmas.

479. In relation to this matter and the other items which the first respondent maintained had never appeared at any of its Homes, we concluded that the first respondent had failed to show that there was dishonesty on the part of Mr or Mrs Tarrant. It was clear that because of his involvement in managing the Atherton refurbishment Mr Tarrant had become responsible for purchasing the items needed for refurbishment of a care home at the same time as some work was being done in his own bathroom and then his kitchen. Further, because of the closure of the Head Office at Meadowside, and in line with previous practice, the situation had arisen where items which were company property were stored on a temporary basis at the home of Mr and Mrs Tarrant. The process by which items were procured for Atherton

was not ordered and rigorous. Items were purchased on an ad hoc basis by Mr Tarrant, sometimes before they would be needed if he saw a suitable item at an attractive price. In those circumstances he would keep the item at home for some time before taking it to Atherton.

480. In addition, we accepted Mr Tarrant's evidence about the need for some kitchen and bathroom facilities at Atherton even before the Home opened because there was a room available for him and others to stay over from time to time whilst the work was being carried out. Despite the discrepancies which Mr Gardiner properly emphasised in his submission, which followed a forensic scrutiny in our hearing of the receipts, invoices and expenses claims, we concluded that this was at worst a situation of inadvertent error from time to time by Mr Tarrant (e.g. the purchase of the gas hob restrictor on 28 December 2016) rather than any deliberate dishonesty or gross negligence on his part which could amount to gross misconduct.

481. We therefore rejected the first respondent's case that there had been gross misconduct in the purchase of domestic items which had not found their way to Atherton or another one of the company's Homes by the time that the Tarrants were suspended.

482. We reached the same conclusion in relation to the Sabatier knife block, the shelving and the Dunelm throw. The knives were used in the temporary overnight accommodation during the Atherton refurbishment, where basic meals were sometimes prepared; the shelving was in a storeroom at Atherton different from that photographed during the disciplinary investigation (as Mr Tarrant could have demonstrated had he been allowed), and the Dunelm throw was genuinely a purchase by Mrs Tarrant for Atherton even though it was still at her home when she was suspended two months later.

Polaroid Camera/Printer

483. The Amazon receipt for this item at pages 654-655 had been forwarded by Mr Tarrant to Mrs Tarrant saying it had been ordered for their daughter (page 309b). The witnesses from whom statements were taken during the internal investigation said they had not seen such a camera in use.

484. However, we considered that Mr Tarrant had adequately explained both matters. He had used his work account with Amazon to order both sets of the Polaroid camera, one for Chapel and one for his daughter, using the company payment card details for the former and his personal payment card details for the latter. That explained why the two transactions were the subject of separate emails. He had been unable to access his company emails after suspension and had not been able to retrieve the acknowledgement of the order placed for their daughter. He had forwarded the first order to his wife to tell her of the second order.

485. As for the physical location of the polaroid printer/camera, we accepted his evidence that he had last seen it when handing it over to Allison Murphy with a box of items at some point in December 2016. We did not find that there was any dishonesty or gross misconduct on this allegation.

Mobile Phone Contract

486. We heard a great deal of evidence about this and it was addressed in some detail in the written submissions. Ultimately the Tribunal concluded that Mr Tarrant had arranged for two mobile phone contracts not currently in use by the respondent to be used by their children whilst they were on holiday in Spain. The £2 or so of additional charges would have been reimbursed on their return had they not been suspended. There was no loss to the company from this.

487. Mr Gardiner invited us to conclude that it was still disciplinary misconduct because the Tarrants' children were benefitting from a payment which the company was making, but we declined to reach that conclusion in the context of this case. Given the way in which the business had operated for some time and the lack of rigorous separation between business and work expenditure, we declined to conclude that this amounted to dishonest intent which amounted to a repudiatory breach of contract. Gross misconduct was not proven.

Samsung Tablet

488. Despite the evidence that witnesses did not recall having seen Mr Tarrant use the Samsung tablet during work meetings, and despite the fact that emails sent from it did not contain a Samsung electronic signature, we concluded that the respondents had failed to show that there was gross misconduct by Mr Tarrant on this point. When set up with its keyboard in place the tablet looked very similar to a small laptop, and there had not been the inspection of the item that one would expect in order for a case that it had not been used for work to be proven. Whether a Samsung signature appeared on emails was configurable, and would not necessarily be the default position for a web-based email account.

489. We concluded that there was no gross misconduct in the purchase and use of the Samsung tablet.

Contractor Invoices: Luke Pearson and Ian Brown

490. The gist of this allegation of gross misconduct was that Mr Tarrant had arranged for Luke Pearson to carry out work at the house of Mrs Tarrant's parents on two days in the week commencing 7 August, as recorded by the calendar provided by Mr Tarrant to Ms Murphy when he went on leave (page 577), but that he had arranged for Mr Pearson to invoice the respondent for the full week of work.

491. We rejected that allegation and found that there was no gross misconduct. The position as explained by Mr Tarrant in his oral evidence to our hearing was consistent with the statement from Luke Pearson at pages 801-802. He was available for work at Atherton if required by Ms Murphy, but it had also been arranged that he would work for Mr Kelly if not required at Atherton.

492. As for the suspicion about the way that invoices were prepared, we noted that the position for Ian Brown was explained by Mr Tarrant in an email of 16 November 2016 at page 298. Although in general terms the way in which contractors were commissioned and invoices raised was somewhat informal, with those same contractors doing work for the Tarrant family as well as for the respondents, that was in our judgment simply a further instance of the blurring of the lines between work

and home which was part of the culture within the respondent. Indeed, we noted from the statement of Ian Brown at page 805 that he had also done work at Mr Stock's mother-in-law's house, for which the company was invoiced, and that he did work at Val Williams' house for which he made no charge.

493. The email of 16 November 2016 represented a transparent move to a new arrangement which was inconsistent with any dishonest intention on the part of Mr Tarrant.

Allegations against Juliette Tarrant

494. We dealt above with the position in relation to Shrigley Hall and mobile phone bills. Given Mrs Tarrant's anxiety state we did not draw any adverse inference from the limited responses she gave to the disciplinary enquiry. We did not consider that the respondents had established any gross misconduct on her part either. The respondents failed to show that she was in breach of the clause in her Service Agreement which required her to report her own misconduct or misconduct of another employee to the company. There was no misconduct to report.

495. For those reasons the Tribunal unanimously concluded that both claimants succeeded in their claims that they should have been paid notice upon termination of employment because the respondents had failed to prove on the balance of probabilities that either of them was guilty of gross misconduct.

496. Issue 35 concerned the value of the claims and will be addressed at the remedy stage.

Discussion and Conclusions – Unfair Dismissal Remedy Issues

497. There were three issues affecting remedy for unfair dismissal which we addressed in turn.

Polkey Reduction

498. Given the Tribunal's conclusion that the reason for dismissal was not misconduct but reasons relating to disputes about how the business should be run, and given our conclusions that there had been no gross misconduct by either claimant, we were satisfied that a fair and impartial investigation, had one been warranted, would have come to the same conclusion. We therefore declined to place any limit on the compensatory award on the basis that a fair investigation and disciplinary process would have resulted in dismissal in any event.

499. Nor could we conclude that Mr and Mrs Tarrant would have been fairly dismissed because of the disputes about cashflow, cost cutting and the like. They were disputes about how the business should be run which were to be resolved through discussions between the Board and the investors. On the information before us they could not fairly have led to dismissals of Mr and Mrs Tarrant from their executive positions.

500. We therefore declined to reduce or limit the compensatory award for unfair dismissal in either case.

Contributory Fault

501. We concluded that no reduction for contributory fault was appropriate. Although there had been accounting errors made by Mr and Mrs Tarrant in certain respects, none of this approached the level at which it could be regarded as culpable, blameworthy or unreasonable in a way that should result in any reduction in compensation. That was in part due to our conclusion that there had been no gross misconduct (set out in the notice pay section above) but also because the true reason for dismissal was not any of the disciplinary matters but rather the internal wrangling over how the business should be run. Although the perceived misconduct provided the excuse for the dismissal it was not the real cause of it. No reductions for contributory fault are appropriate to either the basic or compensatory awards.

ACAS Code

502. The Tribunal found that the principal reason for dismissal was not misconduct but rather the dispute about how the business should be run. In one sense that might render the way in which the disciplinary proceedings were conducted as irrelevant and mean that an uplift for an unreasonable failure to follow the ACAS Code of Practice would be inappropriate. However, we decided that was not the case here. The first respondent chose to pursue its goal of getting rid of the claimants through the mechanism of disciplinary proceedings, and the procedural requirements of the ACAS Code should still have been met even though ultimately the proceedings were only going to end with dismissal.

503. We accepted the points made by Mr Northall in his supplementary written submission that there had been an unreasonable failure to follow a number of aspects of the ACAS Code, including the failure to ensure that there was independence of the investigatory, disciplinary and appeal officers, a failure to provide information prior to the investigatory meeting, and a failure to postpone the disciplinary hearing to enable Mrs Tarrant to attend. Further, there was also an unreasonable failure to deal with the grievances lodged by the claimants in accordance with that part of the Code. There was no formal meeting to discuss either grievance. The decision to deal with the grievance as part of the disciplinary process meant that the grievance was not given proper consideration. Neither claimant received any grievance outcome letter.

504. Overall the Tribunal was satisfied that it would be appropriate to impose the maximum uplift of 25% because of these unreasonable failures by the company to comply with the Code of Practice. This will apply to the compensatory awards for unfair dismissal only. None of the other matters for which we will be awarding compensation featured in the grievances.

505. Mr Gardiner also sought a reduction on the basis that the claimants had unreasonably breached the disciplinary aspects of the ACAS Code by failing to engage with the appeal process. Given our finding that the disciplinary process was a mechanism designed to conceal the real reason for dismissal, we considered that the claimants dealt with the appeal process entirely reasonably. We declined to order any decrease in compensation.

Remedy

506. Within 21 days of the date this Judgment is sent to the parties, both sides must indicate to the Tribunal their time estimate for a remedy hearing and provide dates of availability in the period between 1 August and 31 December 2019, whereupon the matter will be listed for remedy.

507. It may be, of course, that as a consequence of the findings the parties are able to agree the appropriate remedy for some or all of the claims which succeeded, in which case the Tribunal should be notified as soon as practicable.

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Employment Judge Franey

28 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 July 2019

FOR THE TRIBUNAL OFFICE

Appendix
Protected Disclosures –
Information Mr Tarrant claims was disclosed

16.1	Information demonstrating: - an increase in staffing costs in Q1 2017; - an increase in staff costs as a proportion of revenue for the same period; - salary increase would outstrip revenue increase for the same period.
16.2	Information demonstrating: - In relation to business costs, the business is "*running as close to bone";* - Introducing further cuts would "*seriously jeopardise the quality of the business, staff and … patients*"; - The First Claimant: "*wouldn't be comfortable putting profit before people's welfare".*
16.3	Information demonstrating: - Peter Stock had different priorities to the First and Second Claimant, and Allison Murphy as regards the running of the business; - [By implication]: Peter Stock's priorities were inconsistent with the good and effective running of the business.
16.4	Information demonstrating: - Banking arrangements made by Peter Stock and Brian Higgins were not approved by the executive directors of the business, namely the First and Second Claimant and Allison Murphy; - These banking arrangements would put further cash pressure on the business.
16.5	Information demonstrating that: - Peter Stock had made wrong decisions in relation to the management and financial affairs of the business; - Peter Stock was now seeking to blame the First and Second Claimants for the effect of those decisions.
16.6	Information demonstrating that: - Peter Stock had taken banking decisions without consultation with

	the executive directors; - Those decisions were putting additional pressure on the business's cashflow; - Peter Stock had falsely accused the First Claimant of losing money; - The executive directors were being told to make additional cost savings, with which the First Claimant disagreed; - Peter Stock was driving down quality and care for the sake of making more money for himself.
16.7	Information demonstrating that: - Peter Stock made a decision to repay debt to the bank despite the valid concerns of the executive directors; - Peter Stock committed the business to increased payments on loans without involving or consulting the executive directors; - Peter Stock had created his "own version" (i.e. one that was false and misleading) regarding the reasons for pay rises; - Peter Stock had falsely accused the First Claimant of withholding loan documentation - Peter Stock had made business decisions to "line his own pocket"
16.8	[Information already given at §16.8 of the draft list of issues]
16.9	Information demonstrating that: - Allison Murphy's management of the outstanding works at the Atherton care home, in her capacity as the responsible person in the First Claimant's absence, were in breach of her regulatory obligations towards the Care Quality Commission; - Allison Murphy delayed in notifying the CQC of her own failures and only after being prompted by the First Claimant; - There had been a breach of confidentiality towards the First Claimant through disclosure of his suspension to third parties; - During the course of the First Claimant's suspension, decisions had been taken in relation to the running of the business that were detrimental to the wellbeing of staff and service users, inconsistent with regulatory obligations and inconsistent with health and safety requirements; - The conduct of the Board was a threat to the service levels and future sustainability of the business.
16.10	The First Claimant relies upon the totality of the information contained in the grievance and its duplication here would serve no further purpose