Case number: 2600572/2018

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Ms H Seal		Grantham and District Mencap Limited

AT A FINAL HEARING

Held at:	Nottingham	On: 29, 30 April, 1 May 2019. And in Chambers on 25 July 2019.
Before:	Employment Judge R Clark Mrs F Newstead Mr J Hill	

REPRESENTATION
For the Claimant: In Person
For the Respondent: Mrs Peckham, Solicitor

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that: -

1. The Claim of suffering detriments for making a qualifying protected disclosure **fails and is dismissed**.

2. The Claim of unfair dismissal **fails and is dismissed**.

3. The Claim of breach of contract **fails and is dismissed**.

REASONS

1. Introduction

1.1 This is a claim arising from the claimant's resignation, effective on 30 November 2017, and the events leading up to it. She brings what are commonly termed "whistleblowing" claims of automatic unfair dismissal and detriments. She also brings a claim of wrongful dismissal relating to her contractual notice entitlement on termination.

1.2 The respondent denies it dismissed the claimant and that any alleged disclosures were material to any of the alleged detriments, or the principal reason for its actions which, the claimant says, were the reason for her resignation.

2. Issues

2.1 The issues were canvassed and recorded in the Preliminary Hearing before EJ Heap on 3 July 2018 (and can be found at page 38E-F of the agreed bundle). We adopt the issues as set out therein save for the following observations.

2.2 In respect of the breach of contract claim, there is no dispute that the termination took effect immediately on 30 November. If that was an acceptance of the employer's repudiatory breach of contract, the claimant was entitled losses limited to her period of contractual notice. The only issue then would be whether the claimant was herself guilty of conduct amounting to a repudiatory breach such that her employer was otherwise not contractually required to give notice.

2.3 In respect of the reason for dismissal, it is for the claimant to prove the reason, or principal reason, was that she had made the disclosure. The legal burden falls on the claimant simply as she has insufficient qualifying service for ordinary unfair dismissal (*Smith v Hale Town Council 1978 ICR 996 CA*)

2.4 We observe also that the letter submitted at the time of the claimant's verbal resignation relied on a range of reasons some of which might have formed the basis for other statutory reasons for dismissal. The claimant made clear she did not rely on those.

3. Evidence

3.1 We heard from the claimant in support of her case. For the respondent we heard from Mr Collings, the manager who undertook the claimant's disciplinary hearing; Karena Brookes, the home administrator who was present at the claimant's first investigatory meeting; Judith Bennett, the chair of the Respondent and Sue Crawford, the second investigation manager. All witnesses adopted written statements on oath and were questioned.

3.2 We were taken to a bundle running to a little over 500 pages and received a supplementary bundle of documents arising from photocopying errors which were received as

exhibits R1 to R11. We also received an original version of the staff handbook in respect of the internet use policy. We considered those documents we were taken to.

3.3 Both parties made closing submissions.

4. FACTS

4.1 It is not the role of the tribunal to determine each and every last dispute of fact between the parties. Our role is to make sufficient findings to resolve the issues before us and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2 The respondent is a charity local to the Grantham area and operating within the national MENCAP "franchise" which supports those with learning disabilities. It provides day and residential care services through a limited company. In the circumstances of this case, matters unfold in respect of its care home for vulnerable adults at "Fairview".

4.3 It is a relatively small concern employing around 60 people in total. Around 30 are employed in Fairview where the claimant mainly worked, the rest in the day care services. The respondent is governed by trustees. It obtains its HR advice from an external HR consultant. Its employment policy framework is basic. The respondent's management structure is limited. There has to be a registered home manager as part of its regulation. The chief officer was Judith Burnett who for the past two decades or so has provided her services as a volunteer. More recently, a new general manager role has been created. In the period that the claimant was employed, there was also some instability in the home management positions which seems to have contributed to some of the underlying issues in this case. To that extent, there may well have been some justification for some of the staff criticisms of management and management systems that we saw during the period relevant to this claim.

4.4 The respondent is subject to regulation by the Care Quality Commission ("CQC") and the local social services authority, in this case Lincolnshire County Council ("LCC"). LCC commissions some, if not all, of the services the respondent provides. Both LCC and CQC undertake periodic inspections and publish their reports. The relationship with LCC is closer and ongoing. Their oversight is performed through regular meetings in which issues and action points are identified and progress reviewed. The CQC inspections are less frequent but more formal and are publicly available. They give standard ratings of care over a range of criteria. One criterion relates to the risk of financial abuse of vulnerable people in the care of the organisation. One such report of 21 September 2016 found inaccuracies in the records the respondent kept when supporting service users with their money and concluded that the people being cared for by the respondent were: -

> ***"not consistently safeguarded from the risk of financial mistreatment"***

4.5 We should stress that nothing in the evidence before us showed any resident had been mistreated or that any member of staff had been dishonest in the handling of residents' money. The issue was the integrity of the systems in place to prevent it from happening.

4.6 We are satisfied that the trustees and Mrs Burnett took these reports seriously and accepted them. We did not find any sense of a conflict with LCC or CQC. Whilst we have no doubt that the managers of the respondent would prefer that deficiencies did not exist, the fact that they did and were identified were genuinely received as an opportunity to improve their service.

4.7 The claimant began her employment as a care assistant on 5 April 2016 until her resignation given on 30 November 2017 and having immediate effect. That is approximately 20 months. This is her first and only experience of working within the care sector. Her previous work experience was in finance and we have no doubt that entering the care sector exposed her to different ways of working and a very different culture. Her employment was unremarkable for the first year and she records having no issue with her employer. The claimant's supervision records with the then home manager, Bernice Griggs, show by the end of 2016 she was well regarded.

4.8 Bernice Griggs had replaced the previous home manager around the time of the claimant's appointment. We find the two got on well. The change of home manager also broadly coincided with a change of home administrator, Marla Patel. Bernice Griggs' management was subsequently attributed to a number of deficiencies in the running of the home, particularly in respect of the financial management of residents' money. Ms Patel was replaced by Karena Brooks. Ms Patel, as the outgoing administrator, was one of the two DWP appointees given the power to deal with the finances of those residents who lacked capacity. Two signatures were needed to handle their accounts. Ms Brooks would be the obvious person to take over that second signatory role as the new administrator. The process by which she became the new "appointee" was drawn out, had to be done resident-by-resident and took a great deal of time. We do not attribute the delay to the respondent or any of its staff. However, the fact of the delay meant the respondent was unable to deal with the finances of those residents who lacked capacity to deal with their own money. Benefits continued to be paid into their account but there simply wasn't the authority to deal with it. Those residents could not pay for their day to day expenditure and activities. In order to overcome this, the respondent set up a temporary system whereby it advanced them money from the respondent's funds with a view that this would be paid back at a later date. In the brief handover that took place between Ms Patel and Ms Brooks, Mr Brooks inadvertently misunderstood the issue and applied this "stop gap" solution to all residents, not just those who lacked capacity. This meant that those with capacity were then also being advanced money for activities and expenditure that they could have arranged payment for at the time. The mistake was identified sometime in early 2017, around the time that Ms Brooks was at last beginning to receive the individual authorisations to act as DWP appointee for each of the residents lacking capacity. When the error was discovered, those residents were required to repay the money that had been advanced.

4.9 The mechanism adopted for this repayment was primitive and relied on each resident making cash withdrawals rather than any payment by cheque or electronic money transfer. Even those who had capacity to deal with their own finance still required an escort to their bank or building society to withdraw the cash. Through the spring of 2017, a number of care

assistants were involved in such escorted trips to make withdrawals. The sums were various according to the money advanced. We heard of one in the sum of £450 and one in the sum of £400. We have no reason to doubt that this money was properly accounted for.

4.10 It seems that the home manager role was beyond the replacement manager. In May 2017, Bernice Griggs, was suspended due to her performance in the role. We understand the belief of some of the staff was this was down to the failure to use the correct process for the collection of fees from residents. That was not the case. She would in due course leave the home and be replaced but it left a period when the home was without a registered manager.

4.11 This all coincided with a growing view amongst some of the staff that the respondent was poorly managed generally. In particular, the view held of Mrs Bennet was far from complementary. We find, as is often the case, that such views are not universally held and differences of opinion are often reflected in different friendship groups amongst the staff. The relationships in, and between, those groups can often evolve to a state where they are described as "cliques". This case is no different. A culture of rumours and gossip evolved, partly due to the dynamics amongst the staff and partly due to communication vacuums in the management of the home.

4.12 On 9 May 2017, the claimant made one of the escort trips with a resident, "E". It was the only time she undertook such a role. The resident withdrew £450. At the same time, another colleague was escorting another resident who withdrew £400. That second resident was on their way to an activity and so the colleague asked the claimant to take her resident's money back to the home as well that of E. The claimant was therefore carrying £850 in cash. When she returned to the home she handed over the money and asked for a receipt from the then senior team leader, Liz Grimwood, who was acting as home manager. She refused. The reason given was partly due to a belief that such a document would contain confidential personal details of the resident and partly because she did not have access to headed paper.

4.13 The claimant was not happy that such a simple matter, with such an obvious justification, had caused such difficulties. The following day, 10 May 2017, she sent an email to Judith Burnett about the process and her concerns. It stated, as written: -

> ***I believe you are aware that today I asked for a receipt for cash I had collected no. Everyone has the right to receive a receipt if they hand over cash or values and should be made to feel embarrassed by having to argue and wait for it. This is not acceptable.***
>
> ***I was made even more annoyed because instead of saying she didn't realise I needed a receipt I was told some nonsense about how this is a residents private information. I'm not a fool and do not like to be spoken to like one. Could you please make sure I get my receipt as soon as possible.***

4.14 Before Mrs Burnett replied, the claimant made a request again and was directed to Ms Brooks. A receipt was provided.

4.15 Mrs Burnett replied to the email on Friday 12 May. Her reply stated that she was aware of the incident, she confirmed the claimant's entitlement to a receipt without question and explained it simply on the basis that no such receipt had been issued in the past. She

apologised for the claimant feeling embarrassed and explained that there was concern about resident confidentiality by LCC.

4.16 That email exchange discloses some more about the dynamic in this relationship. The first of which is that we find the Claimant was a confident individual prepared to state her case and to do so forcefully. The second is that the claimant is clearly an intelligent woman. She has broad experience in other sectors and she was in a position where she felt able to critically judge her managers in this setting. The third is that the tone of her email to Mrs Burnett was not consistent with a simple request for a senior manager to intervene. The tone appears consistent with a frame of mind anticipating the conflict she had experienced with Ms Greenwood would be continued by Mrs Burnett. We find the claimant had already formed a negative view of Mrs Burnett to the extent that she was not competent to occupy that general manager role.

4.17 On 10 May 2017 the claimant had also contacted the CQC. There is no dispute that this contact was made and that she made it anonymously. Her complaint was principally about the issue of cash withdrawals but, based on the rumours amongst staff, also the continued absence of a registered manager. We cannot be certain of the exact words spoken by the claimant in this phone call and there is no verbatim transcript. However, we do have the file note taken by the call handler at the CQC. It reads: -

> ***"ENQ1-28006742058***
>
> ***Care home – Staff member.***
>
> ***Concerns about accounts and how residents money is handled.***
>
> ***Caller is from a financial background and feels the process they have is open to abuse.***
>
> ***The service have been getting residents to draw large amounts of cash and then state it is for "pocket money"***
>
> ***Caller has had to take a SU out, learning disability, to draw £450 and was told was to cover money she has had in the past. There are a number of other large withdrawals and the caller advised this person wouldn't spend this amount.***
>
> ***Caller got the money, asked for a receipt and was refused by the manager. Manager refused initially however, caller pushed it and the manger was told by head office to supply the receipt. SU is called [gives name] – Female***
>
> ***Caller advised this is not isolated to only one SU***
>
> ***There is very little evidence to show that the SUs have spent the money, no receipts.***
>
> ***Caller advised she has no proof however, the service are very secretive about financial matters.***
>
> ***Callers sister used to be a manager of the building society the SU was using and her sister stated, not too much detail, that they also had concerns and found the mode this care home operate in terms of money, was very odd. They work with many services and this is the only service that work this way in terms of dealing in such large amount of cash.***
>
> ***Caller advised the service have had £1000s of pounds this week already, in cash.***
>
> ***Some of the SU's don't have people to act on their behalf like family etc.***

The manager has disappeared and staff have been told not to try to contact her. This was last week.

20170510 Safeguarding referral sent to LCC. MH"

4.18 We recognise there is a distinction to be made between how the events described look to someone seized of the full facts, as we are now, and how the very same would look far more sinister from the claimant's limited factual vantage point at the time, not to mention her negative view of the management. Knowing the facts, we see an honest and genuine desire to reconcile the residents' accounts, albeit done in a wholly insecure and potentially reckless way. We would expect that anyone would have recognised the obvious risks of this system. However, without knowing the full background, each piece of the picture that was known to the claimant seemed not only to show a system full of risks but to point to a more sinister explanation that the residents were at risk of, and could well actually be suffering, financial abuse. It was entirely reasonable for her to fear that was the case and particularly so in the wake of the sudden absence of the manager, large sums of cash being withdrawn and the initial reluctance to provide a receipt. With the claimant's financial background what would have been obvious to anyone would have stood out even more starkly to her.

4.19 We have considered why the claimant decided to contact the CQC instead of telling the home. We have concluded the answer to this lies in her view that the home's senior management was ineffective. We find she did not tell the home she had made this disclosure she did not give her name to the CQC. She was aware that the CQC did not give out the name of anonymous disclosures. We also find that the claimant was inclined to, and competent to, take on things that some of her colleagues were perhaps less able or inclined to. It was the claimant who undertook research of the CQC public reports on the home and so it was that she made this referral. That does not mean to say others did not have similar concerns or that the surrounding circumstances of these cash withdrawals was not a fertile topic of gossip amongst the staff. We find it was. We find that there were a wide range of suggestions and speculation being repeated relating to the previous home manager and the misappropriation of money and this did not take long to come to the ears of the home managers, not least because not all the staff shared the negative view of Mrs Burnett and some had negative views of some of their colleagues. Within that tangled network of loyalties, what was secret amongst some colleagues, others would pass on to managers with glee.

4.20 In response to the disclosure, the CQC referred it on to the responsible authority, LCC. In due course, LCC included this in their regular inspections and audits of the respondent's service provision. We have seen the periodic action points identifying the issue and the action taken to improve systems.

4.21 A staff meeting was held on 19 May. It was a routine meeting and dealt with a number of routine matters concerning the running of the services and updating staff on matters relevant to their function. Notes were taken in the usual manner. The claimant says during this meeting Ms Burnett expressed anger about rumours spreading about the residents' finances. We find what was said was fairly recorded and does not display anger or annoyance although we have no doubt that Ms Burnett's view was, correctly, that the rumours

were factually incorrect and she wanted to set the record straight. The relevant part states (in its original form): -

> ***"2. RUMOURS – FINANCIAL ISSUES***
>
> ***Rumours has been circulating about money being misappropriated from ladies and Gentleman's accounts. Judith assured everyone that his was absolutely not true and that the finances have been scrutinized by our own accounts and LCC accounts employees. They are satisfied that no money has been misappropriated, and at the work to repay money loaned to Ladies and Gentleman from the company funds to cover expenses whilst DWP money was not able to be transferred (Approximately 1 Year) was done in the correct way and that now all finances are in good order. Systems are to be overhauled and new recording system introduced to ensure complete transparency."***

4.22 The notes do not record that in the course of this part of the meeting, the claimant challenged Ms Burnett on the assertion that the accounts were in order and referred to the fact that CQC reports said residents were at risk of financial abuse. We do not accept that the claimant's recollection of the account is verbatim but do accept there was an exchange on the issue of cash handling and the CQC report's concern about financial abuse. We find Mrs Burnett did put the claimant right on her understanding and explained the problems with the previous signatories. Whilst the claimant, may not have understood, as she says in her evidence, why Ms Burnett was blaming Bernice we are satisfied that Mrs Burnett gave an account consistent with the previous state of affairs as we have found it on the issue of resident's money.

4.23 The claimant took annual leave in the summer of 2017 during which another employee made an anonymous report. There is no suggestion that this was the claimant. It appears it was made to environmental health, or similar body, and related to a hygiene deficiency. Waste bins had remained unemptied for too long and in one of the residents' room the waste had led to a fly blow hatching. Again, the report led to an inspection and the recommendations were adopted in the respondent's systems. When the claimant returned to work on 3 July 2017 she was informed of the new cleaning system. It seems to us that this is the sort of issue that clearly should not have arisen and was a failure not just of management but all staff who had it in their control to properly carry out their duties for it to have been prevented without the need for a very formalised system to be in place in response. It may well be a symptom of the staff approach to their work during the absence of a permanent manager. The fact is, however, there was a failure which was reported and the respondent accepted the recommendations that followed without hesitation.

4.24 We find that to be the case because this is not such an unusual state of affairs for the respondent as might first be thought. The relationship with LCC is one of an ongoing process of supervision of the delivery of services and at any one time the contract managers and the respondent are dealing with a number of action points. Those actions points could arise from any number of sources including first hand observation of the contract performance by the LCC managers, reports from residents or their family and staff reports. We have no basis to conclude this relationship is any different in nature to any other provider of LCC services although we would expect it to naturally follow that some providers have more issues than others to deal with although we cannot say where this respondent would fall in that range.

The significance of this process is that we find the fact that LCC receive a referral of a concern that needs dealing with is less likely to stand out from the existing process of identifying areas of service improvement and is unlikely to generate a negative response from those already dealing with the month to month action points.

4.25 At a further monthly staff meeting on 20 July 2017, we find there was reference to two people whistleblowing. This was expressed in positive terms as a reflection of the culture of the organisation and people feeling able to raise matters.

4.26 On 25 July 2017, LCC undertook one of its routine visits to the home to discuss its ongoing action points. Included in this was its concern about handling of resident's money amongst other issues. We find this arose as a result of the claimant's disclosure to the CQC and their subsequent referral to LCC although the claimant herself is not identified. We find Mrs Burnett was not aware of the identity of who it was who made this disclosure.

4.27 Around this time, the home advertised for a general manager. There was speculation and gossip amongst the staff as to whether this meant the suspended home manager had been dismissed. A small group of staff, including the claimant, were part of a private messaging group. Although provided through a social media platform, it was not something that could be viewed by the public or anyone outside the invited group. The advert prompted a conversation within the group. This conversation expressed frustration about not being told of the dismissal. There was a collective sense that the employer was not being forthcoming in telling them what was happening with Bernice when, at the recent staff meeting, they had been told she was still absent and the details of her position was confidential. The messages exchanged expressly refer to being kept in the dark and then asking rhetorically, why do they think people gossip and referring to the management as a "crock of shite" and that "we all know its constant lies from everyone in that office".

4.28 The claimant did not start this group discussion. Before she joined in, the exchanges had also been derogatory to a colleague, Holly. She was a carer studying a degree course in this industry and was working in the home at the same time. We find there was a view held by some in this group that she was above her station. There were also derogatory views expressed of the home management lying to the workers about what was happening to the suspended home manager, although we find their belief was mistaken. At one point there was an exchange about them all resigning together or going on strike. A colleague called Yazmin wrote: -

"time to write a snotty email watch me get a disciplinary"

4.29 A sharp email to Mrs Burnett was drafted by Yazmin, shared with the group and then sent.

4.30 The conversation had been taking place since about 10:30 that morning. The claimant did not join in until 16:59, after the email had been sent by Yazmin. We find the claimant's contribution to be an example of how she had more about her than some of her colleagues. She had clearly read the advert carefully and understood the role to the extent that she was able to explain to her colleagues her view that the role being advertised looked more like Mrs

Burnett's role than that of the home manager. However, her conclusion was still expressed in terms that could not be said to be complementary to Mrs Burnett. She said: -

> ***"I think Judith has been told she needs someone that's competent to run GDM instead of her. I doubt she decided to do this of her own accord."***

4.31 She then set out her view that this is a manager senior to the home manager and that they could see Bernice back in her role.

4.32 At 18:25 that day Mrs Burnett replied to Yazmin's message. She made clear that the vacancy was not the home manager role but a general manager over all services, not just Fairview. She concluded by expressing her disappointment in the tone of the email sent, that it is anything but respectful and that she was not a liar and Yazmin should be very careful about implying that she was. Yasmin posted the reply to the group. The claimant posted to the group afterwards. Her post was measured, although still critical of the management of the home, when she said:-

> ***"Judith knew most of us couldn't make the AGM which is why she should have told us at the staff meetings. This is just another example of poor man management. Maybe when we get a general manager this sort of thing will stop. Let's hope so."***

4.33 The private message comes into the respondent's possession. It seems likely that another colleague, whether Holly or another, obtained access to the phone of one of the invited members and was able to add herself to the group so that she then obtained access to the exchange between the claimant and her colleagues. That content was then passed on to the respondent's management.

4.34 On 15 August 2017 the claimant was sent a letter inviting her to a disciplinary investigation meeting for what was described as a breach of section 8 the company internet policy. All of those involved in the group chat were similarly investigated. A trustee, Mr Peter Flood, was appointed to investigate.

4.35 The claimant and most of the others involved had an investigatory meeting. Before her interview on 17 August 2017, the claimant attended a routine staff meeting. Mrs Burnett updated on the position with the current registered Manager who had been suspended since May. At the conclusion of the update Mrs Burnett thanked those members of staff who have stayed loyal. She ended with the comment: -

> ***"Sadly, not all staff have seen fit to show loyalty, in face some have been positively disruptive, I would have hoped that all would have been professional enough to concentrate on the care required by our ladies and gentlemen rather than denigrating colleagues for support the service."***

4.36 We find that comment was a reference to the critical comments found within the group chat exchange that was about to be investigated. It was not a reference to whistleblowing.

4.37 The claimant attended her investigatory meeting at 11:30am. We find she was confrontational with Mr Flood from the outset. We find Mr Flood had to repeatedly request that she calm down. We find she was argumentative throughout the meeting and displayed conduct which Ms Brooks, the notetaker present, was entitled to describe as aggressive. Her

position from the outset was that the respondent should not have access to her private messaging and that this was an offence and breach of her privacy. She maintained her stated view that Mrs Burnett was not a capable person to run the respondent.

4.38 In her evidence the claimant denied being discourteous and preferred to describe her conduct as that she was angry and raised her voice. She accepted it was entirely proper for her conduct to be investigated and that she did not suggest, then or thereafter, that this action was being taken because she had made the disclosure to the CQC.

4.39 During this same week, a number of other members of staff raised potentially serious allegations against the claimant. On Saturday 12 August, Holly Bowman witnessed what she believed was the claimant inappropriately responding to a service user. She recorded it in writing on headed memo stationary. Similarly, on Sunday 13 August, Jane Price recorded an exchange when the claimant was alleged to have referred to another service user in terms that suggested it would be easier not to get a resident out of bed, saying: -

"the longer he stays in bed the better."

4.40 It is clear to us that both of those complainants had a very low opinion of the claimant. There is a suggestion that there was some collusion for the two individuals to have made their complaints on internal memo paperwork. We do not find there was any collusion. The evidence simply does not support a finding that the only person who had access to this stationary was Mrs Burnett or other home managers and, in any event, it is entirely plausible that such concerns by colleagues would be shared verbally with a senior member of staff and such person would then request that they record their concerns in writing. We do accept, however, that the claimant's relationship with the two complainants was not particularly positive and they were within a group of other staff who regarded the claimant as difficult to work with. We suspect that these particular complainants may have been quite satisfied in observing conduct that enabled them to make their reports about the claimant. That body of opinion against the claimant is likely to be the reason why, when she attended work on 18 August 2017, some comments were made to her expressing surprise at her attendance in the belief she had been sacked.

4.41 The claimant was asked to attend a meeting with Ms Crawford soon after her arrival. She was told she was suspended and to go home. She was not told the details of the concerns at the time but was told she would receive a letter in the next 7 days. That letter was sent to the claimant by Mrs Burnett the following Monday. The letter confirmed her suspension and set out five specific allegations. They included the issue of the group chat messaging but not for what was said during that conversation, but instead that her response to the investigation meeting with Mr Flood was completely inappropriate and that she had shouted and screamed, became almost incoherent and aggressively challenged the comments and questions put. The other matters were the new allegations relating to her care of residents specifically on 12 and 13 August but also, more generally, in respect of her relations with other staff and recording residents' behaviour forms.

4.42 Whilst the relationship between the claimant and certain of her colleagues clearly had some part to play in some of these allegations, we are satisfied that there was a genuine

belief in the underlying issue and the respondent's response to it. The claimant herself accepted that if staff have such concerns about any other employee's conduct with a service user that it is perfectly reasonable that they bring it up with their employer.

4.43 On 25 August 2017 the claimant made a subject access request to obtain a copy of her personnel file. The respondent provided it without levying the applicable fee. The claimant regarded the subsequent disclosure as incomplete as it did not include the screen prints of her private messaging and nor had she had at this time copies of the disciplinary complaints against her. On 18 September she made a complaint to the information commissions Office about the respondent's handling of personal information. It is not suggested this was a qualifying protected disclosure or that any detriments or other consequences flowed from it.

4.44 What was now a second set of allegations involving the claimant was referred to Sue Crawford who was appointed as the investigating manager. She met with Sophie Philips and Jane Price separately on 20 September 2017 to explore the allegation concerning the resident remaining in bed. Her evidence suggested the comment made by the claimant reflected some sort of punishment for his behaviour and making things easier for the staff if he did not get up. The others present were said to be concerned about the comment and that it was not a good attitude to have with this resident. Jane Price also gave evidence of her view that the claimant was hostile and rude to other staff, ignored team leaders and did what she thought was best.

4.45 On 25 September 2017, Mrs Burnett sent an email to the claimant updating her on the progress of the investigation and confirming that she would be contacted by Sue Crawford shortly. She confirmed that Mr Flood was also continuing with his investigation into the groups chat messaging issue.

4.46 We find neither investigation was being progressed promptly and the evidence does not adequately explain the delay. An account was given to us relating to a period of holiday of Ms Crawford or her job share or other staff, the week's closure of the day centre, which seemed to us to be a reason to get on with the investigation a not a reason to delay it further, and the demands of the manager role generally.

4.47 So far as Mr Flood's investigation was concerned, it seems that nothing further of substance happened. A decision was reached that there was no disciplinary allegation arising. That must have been formed early on as not all the individuals involved in the group chat were interviewed. The decision that the matter was closed with no action being taken was communicated to the claimant in writing, albeit not until 1 November.

4.48 So far as the second investigation was concerned, Ms Crawford continued to obtain evidence about the allegations. She received a statement from Karena Brooks dated 5 October 2017 about her account of the claimant's conduct during the investigation meeting with Mr Flood. The next correspondence to the claimant was a letter around 3 weeks later, dated 26 October 2018, in which the claimant was invited to an investigatory meeting to take

place on 31 October 2017 in respect of the 5 allegations. That was subsequently postponed at the claimant's request to 3 November 2017.

4.49 During that investigation meeting, the claimant gave her response to the allegations. In respect of the inappropriate engagement with a service user on 12 August, the claimant denied she had acted outside her instructions, had not been trained and that staff behave differently, some harsher than others. In respect of the resident remaining in bed, she accepted saying what she had said and sought to explain it in context as a joke. In respect of her workload and demeanour towards other staff she denied being hostile, said she did not suffer fools gladly and has been assertive but that nothing had been brought to her attention. In respect of the meeting with Mr Flood she denied being out of control but was upset due to an intrusion into her privacy and got quite forceful when challenging him.

4.50 The claimant asked for copies of the written complaints and was told they would be sent to her as part of any disciplinary hearing. Being told this led her to conclude that the decision had already been taken to hold a disciplinary hearing. Whilst we accept that was her genuine view, we find it was clearly not the case as the original five matters would ultimately not be taken forward by the respondent.

4.51 On 7 November 2017, Sue Crawford spoke to the claimant by telephone. She informed her that the suspension was going to be lifted immediately and she was to return to work the next day. We find she was told in that phone call that another manager would write to her wrote shortly for disciplinary proceedings to commence. The call was confirmed in an email of the same date. It is clear to us from that that the claimant was still to face a disciplinary hearing.

4.52 The claimant did return to work the next day, 8 November and the previous day's exchange was clarified further in a letter which made clear that 3 of the original 5 allegations were not being taken further and that the two that remained (the comments about the service user staying in bed and her conduct during Mr Flood's investigation) were not regarded as being gross misconduct but were matters that still needed to be considered in a disciplinary hearing to be held on 30 November 2017.

4.53 That letter was written and sent by Mark Collings. He was the "other manager" referred to by Ms Crawford in the telephone call who had been appointed to the new general manager position only from 24 October 2017. We found him to be an experienced manager in this sector and unburdened with the recent history of the organisation and its culture. We found he approached his task of dealing with the claimant's disciplinary allegations in a detached and objective manner. We find the delay since the original suspension, which was now approaching 3 months, was both because of initial delays in evidence gathering and, more latterly, a deliberate decision to wait for Mr Collings to start in post to take on the disciplinary decision maker role.

4.54 On her return to work, the claimant's work location was changed to remove the need to work with the service user in respect of whom the claimant was still facing an unresolved allegation. The claimant remained at work and performed her duties normally for around a

week on that basis before going on pre-arranged annual leave for about a week. She returned to work for around another week before the disciplinary hearing held on 30 November 2017. Nothing of note happens during the three weeks that the claimant was back at work. She continued to harbour mistrust in the management, Judith Burnett in particular, and she said she wavered in her own mind about whether she wanted to continue working there. We accept her evidence that she had received advice from acquaintances after her suspension to the effect that she should complete the disciplinary process before resigning but we find that the to resign was reached early in the suspension and long before the disciplinary hearing. We find she had gone into that meeting intending to resign.

4.55 At the hearing, Mr Collings explored the two remaining allegations with the claimant. We found the notes of that hearing to be a fair representation of the discussions. After the two allegations had been explored, the claimant handed a letter of the same date. It is not explicitly in terms a resignation, but a statement of why she regarded her suspension and disciplinary to be unfair and an example of evidence that the management were actively seeking reasons to dismiss her. After Mr Collings had time to read it, the claimant verbally resigned with immediate effect.

4.56 The claimant says she resigned because she formed the view that all Mr Colling's decisions were pre-determined and he was not listening to anything she said. We reject that as a fact, the decision was reached early in the suspension. The letter refers to management seeking reasons to dismiss her yet dismissal had been removed as a sanction on 7 November when she returned to work. Secondly, her first explanation in evidence for the resignation being given at the hearing was nothing to do with the conduct of Mark Collings or the disciplinary hearing, it was simply a matter of fact that the hearing was just when it happened. There was then some further explanation given when it was suggested the resignation was prompted by Mr Collings behaviour during the hearing. The claimant was not able to identify the alleged conduct within the notes of the meeting. In fact, we were unable to identify any part which appeared to support the contention that Mr Collings was not listening to her or had already made his mind up. To the contrary, we found it clear that Mr Collings was exploring the two remaining allegations and was setting out the process for him to reach a conclusion at a later stage. Of course, the very fact the claimant had entered the meeting with the pre-drafted letter reinforces our conclusion that the decision was not influenced by Mr Collings' conduct in the meeting.

4.57 We accept the claimant's concession that Mr Collings would not have known about the claimant's disclosure to the CQC and we find as fact that to be the case. Similarly, we find he did not know about the background dynamics amongst the staff and the fact that some had a negative view of the claimant. The claimant did refer to her disclosure in her letter, albeit as the last of 6 reasons she believed she was being singled out for dismissal. She did not make any reference to it before Mr Collings. We reject her suggestion that this was her view at the time and we did not find convincing the suggestion that she remained silent about that matter expecting Mr Collings to ask her what it was about. Especially when, faced with him not doing anything of the sort, she did not advance the matter further.

4.58 Of the other 5 matters advanced in the letter, the claimant did not seek to maintain their relevance to the reason for her resignation. She stated how she was content that they had been put in her letter for completeness and were resolved.

4.59 On the same day, Mr Collings wrote to the claimant inviting a period of reflection or a "cooling off" period. The claimant responded on 3 December 2017 confirming her decision to resign. She rejected it because further time and reflection: -

> ***was not necessary as I had plenty off*** [sic] ***time to consider my options in the 3 months I was suspended.***

That again, further reinforces our conclusion that the decision was long standing and the only reason she did not resign months earlier was the advice from acquaintances that she needed to complete the disciplinary hearing.

4.60 On 6 December 2017, Mr Collings wrote to the claimant to confirm his decision on the outcome of the disciplinary hearing. Notwithstanding the fact that the employment relationship had by then ended, he decided that she was guilty of the alleged misconduct and imposed a written warning in respect of her conduct. She was given a right of appeal which she did not take up. The claimant agreed that if the respondent had wanted to dismiss her it could have done that much sooner and that this outcome, and the earlier offer of a cooling off period, was not consistent with such an aim.

4.61 The claimant was not the only other employee facing allegations of misconduct in relation to the care of residents. Around the time the claimant's employment ended, the respondent was also investigating allegations levelled at other staff in the context of the care of residents. These allegations were raised by a colleague in response to her own allegations of using threatening or offensive language. These were relied on by the claimant to show she was treated differently. We find she was not treated differently.

4.62 The first related to a colleague, Carly, who faced allegations of inappropriate behaviour with service users amounting to gross misconduct. The nature of the allegations included an allegation that she had dressed up a service user in inappropriate fancy dress and had taken photographs. The allegations were investigated and made out. Before the decision to dismiss her was reached, the individual resigned.

4.63 The second was a cross allegation raised by Carly in the course of responding to her own disciplinary allegations. Another colleague was alleged to have sworn at a male service user and that he would "kick him in the balls". The matter was investigated by Mr Collings. The allegation was denied. Mr Collings formed the view that there was one word against the other and preferred the account given by the accused and decided that there would be no further investigation. He documented his decision making in a file note.

5. DISCUSSION AND CONCLUSIONS

Protected Qualifying Disclosure

5.1 We approach the question of whether the content of the claimant's anonymous phone call to the CQC amounts to a protected qualifying disclosure by reference to each relevant aspect of the statutory regime. Section 43A of the Employment Rights Act 1996 defines a "protected disclosure" as:

> ***"[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."***

5.2 Section 43B provides, so far as is material:

> ***"(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—***
>
> ***[…]***
>
> ***(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;"***

5.3 The disclosure must be "of information". (Cavendish Munro Professional Risk Management Limited v Geduld [2010] ICR 325), that is conveying facts as opposed to allegations although a disclosure may also make an allegation and the distinction is not necessarily binary.

5.4 We have first considered the nature of what it was that was disclosed. We are satisfied that the claimant conveyed an allegation, arising from her "concern", that the service users were at risk of financial abuse. So much of that part of the disclosure may not, in itself have satisfied the statutory definition but her disclosure then goes on to set out the facts of what the claimant had herself been involved in when being asked to escort residents to withdraw large sums of case and the surrounding circumstances of the "pocket money" explanation, the absent manager, the secretive nature of the home and the refusal to provide a receipt all of which conveys her concern that the risk of financial abuse is, in fact, a risk that is already materialising. We are satisfied that in that part of the disclosure, the claimant does convey hard and fast information as opposed to mere allegations alone.

5.5 Information disclosed must "tend to show" one of the relevant failures set out in s.43B(1)(a)-(f) of the Act and the nature of the failure must sufficiently identify the relevant failure, albeit it need not be in strict legal language (Fincham v HM Prison Service UKEAT/0991/01) but in some disclosures the nature of the failure may be perfectly obvious from the context.

5.6 We are satisfied that the information conveyed in the facts of the disclosure tends to show the relevant failure that the respondent was failing or is likely to fail to comply with a legal obligation to which it is subject. There is no dispute that the respondent was subject to a legal duty under the service agreement with Lincolnshire County Council, if not otherwise, to comply with safeguarding standards in respect of the care of its residents. That is particularly so where those residents lack capacity and the decisions taken must be in the best interests of the resident. Those safeguarding standards include the risk of financial abuse. It is true that the claimant's disclosure does not identify such a legal obligation

explicitly. We are satisfied, however, that the nature of the disclosure itself makes the nature of the relevant failure obvious.

5.7 The degree of belief or the requirement that the worker has a 'reasonable belief' means that the belief need not be correct but only that the worker held the belief and it was reasonable for him to do so. Accordingly, it can be a qualifying disclosure if the worker reasonably but mistakenly believed that a specified malpractice was occurring: (Darnton v University of Surrey). The reasonableness of the belief is the worker's subjective belief, not an objective assessment but even on an objective assessment, we are satisfied the surrounding facts of the cash handling did render her belief a reasonable belief.

5.8 We are equally satisfied that the disclosure was made in the public interest. Whether a disclosure made after 25 June 2013 is made in the public interest (as opposed to in good faith) depends on whether a section of the public benefits or has an interest in the matter of the disclosure which can include private contractual matters. (Underwood v Wincanton PLC [2015] UKEAT 0163). It cannot be said that the claimant's disclosure was either for ulterior purposes, for personal gain or advantage or would only benefit a restricted pool of individuals too narrow to meaningfully engage a public benefit. Anyone being cared for by the respondent, any relative of such persons and anyone working in that environment (who could be wrongly accused of financial abuse) all forms a sufficiently identifiable section of the public with legitimate interests in avoiding financial abuse for the disclosure to be said to be properly in the public interest.

5.9 We then move on to determine whether that protected disclosure is a qualifying protected disclosure. Sections 43C – G provide the persons and circumstances to whom a disclosure may be made so as to render it a protected qualifying disclosure. Section 43F provides that:-

> ***(1) A qualifying disclosure is made in accordance with this section if the worker—***
>
> ***a. makes the disclosure ... to a person prescribed by an order made by the Secretary of State for the purposes of this section, and***
>
> ***b. reasonably believes—***
>
> ***i. that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and***
>
> ***ii. that the information disclosed, and any allegation contained in it, are substantially true.***

5.10 The order made under section 43F(2) is the Public Interest Disclosure (Prescribed Persons) Order 2014. The schedule to that order identifies the CQC as a person prescribed in respect of, amongst other matters, matters related to

> ***"any activities …. in relation to which the Care Quality Commission exercises its functions."***

5.11 We are satisfied that safeguarding vulnerable adult residents being cared for in a home such as that run by the respondent under a service contract from the local social services authority falls within the description of matters which renders the CQC a person to whom a disclosure can be made. If further justification for that conclusion is necessary, the CQC itself

accepted the disclosure and acted upon it within an existing system for dealing with such concerns. We are further satisfied that the claimant believed that to be the case and that what she was disclosing to them was substantially true.

5.12 If follows that the protected disclosure was a qualifying protected disclosure.

5.13 We then turn to whether the claimant suffered detriments and, if she did, whether the reason for those detriments was on the ground that she had made the protected disclosure. The meaning of "on the ground that" is that the disclosure materially influenced the treatment. She has the right to bring that claim as a worker under s.47B of the 1996 Act. We have considered the interaction between matters which are said to be both detriments whilst in employment and which then form the basis of a breach amounting to a constructive dismissal and how the statutory provisions deal with that, particularly by reference to s47B(2) of the 1996 Act. The case of Melia v Magna Kansei Ltd [2006] IRLR 117 confirms there is no conflict in suffering detriment whilst in employment and those same detriments forming the conduct on which a claimant relies asserting the acceptance of a repudiatory breach up to the point at which those matters form the dismissal in law under s.95(1)(c) of the 1996 Act.

5.14 Five detriments are pleaded at paragraph 29 of the claimant's ET1. The claimant abandoned the detriment at paragraph 29a, that is, that the respondent read the claimant's private messages (by which she means the group chat messages).

5.15 The alleged detriments at sub-paragraphs 29b-e are all elements of the same detriment, namely the second disciplinary process that the claimant underwent between August and November 2017. Whilst we consider them individually, as the claimant has advanced them, we considered the scope for different outcomes to be unlikely. In other words, if the first detriment of pursuing disciplinary allegations was materially influenced by her disclosure, then it would difficult to say the remaining 3 detriments would not also be materially influenced by the disclosure. Conversely, if pursuing the disciplinary allegations was not materially influenced by the disclosure, that would tend to show that there was some other legitimate reason for pursing disciplinary action and, if that was the case, it would be extremely unlikely that any of the remaining alleged detriments were influenced by it either.

5.16 The claimant did suffer the detriment alleged at paragraph 29b of her ET1 but only insofar as she was subject to two disciplinary investigations. We have concluded on our findings of fact that these were not based on unsubstantiated allegations as alleged. We are satisfied that the reason why the claimant was subjected to the initial disciplinary investigation was because of her participation in the group chat discussion in which critical views of Mrs Burnett were expressed. That group discussion did take place and came to the employer's attention and that is the only reason why she was subject to that investigation. The others involved, who had not made protected disclosures, were also investigated. We have concluded that the claimant's conduct during her interview became a significant issue in what would become the second disciplinary matter together with the other allegations which were accepted as being allegations an employer was entitled to investigate. It follows that we are satisfied there were reasons unrelated to any disclosure for both disciplinary matters to be

instigated and we are further satisfied that, in the absence of knowledge of the claimant being the discloser, it could logically have played a part. It follows that this claim of detriment fails.

5.17 The alleged detriment at paragraph 29c occurred both in terms of the fact of suspension and its extended duration. The absence of knowledge again creates a fundamental break in the chain of causation. Beyond that, however, we are satisfied that the reason for the delay was a combination of the lack of priority given to investigating the allegations in the early weeks of the suspension coupled with the desire to hold the issue in abeyance for when the new general manager, Mr Collings, took up his post. Those are not good reasons to justify the delay of 11 weeks and they reflect badly on the respondent as an employer but they are not reasons in any way related to the disclosure to the CQC. This claim of detriment fails.

5.18 It is difficult to discern the different point being made in the allegation at paragraph 29d. It is a fact that that the claimant was invited to attend, and did attend, a disciplinary hearing on 30 November 2017. It is not correct to say the reason for this was "because the respondent had not fully completed their investigation into the allegations" as the investigation had by then concluded and 3 of the 5 allegations had been dismissed. The very fact that the alleged detriment asserts within in it a reason which is not related to the making of a protected disclosure reveals the weakness in this allegation. The disciplinary hearing was a natural step in the disciplinary process, there being two allegations remaining to be determined. As the existence of the disciplinary process was not materially influenced by any disclosure, it follows that a step taken within that disciplinary process was equally unrelated to the disclosure. In this case, we have found there were legitimate grounds for the remaining two matters being concluded at a disciplinary hearing. Moreover, we found Mr Collings was not aware of the fact of the disclosure, still less the identity of the discloser. This claim of detriment fails.

5.19 The claimant was subject to the detriment alleged at paragraph 29e in that Mr Collings imposed, post termination, the sanction of a first written warning. We have already observed how Mr Collings was not aware of the disclosure or who made it, although during the hearing he was presented with the claimant's letter in which she did state she had made a qualifying protected disclosure to the CQC regarding Fairview. We found this was not explored further and, in any event, there is nothing to suggest this fact diverted Mr Collings from the course that would otherwise have been taken on the information before him unrelated to the fact of any disclosure. We found he had approached his task as disciplinary decision maker with a professional and objective attitude. It was his input that led to the 3 other allegations being dismissed and we find he formed a genuine view that the remaining two allegations were made out and that the appropriate sanction was a written warning. This claim of detriment also fails.

6. Whether there was a Dismissal or a Resignation

6.1 It is, perhaps obviously, an essential condition of both the claim of unfair and breach of contract that the claimant can establish her resignation *in fact* was given in circumstances that amount to a dismissal *in law*.

6.2 It is essentially the same legal test that applies to both claims. The statutory claim of unfair dismissal provides for this in s.95(1)(c) of the 1996 Act. That provision reflects the common law and confirms for statutory purposes that a "dismissal" occurs when:-

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

6.3 Whether an employee is "entitled to terminate it . . by reason of the employer's conduct" is to be answered by reference to principles of contract law. It is not enough for the employee to leave merely because the employer has acted unreasonably. (Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27). In order to make out a claim, four conditions must be satisfied: -

a) There must be a breach of contract by the employer.

b) That breach must be fundamental, in that it goes to the root of the contract showing the employer no longer intends to be bound by one or more essential terms of the contract.

c) The employee must leave in response to the breach and not for some other, unconnected reason, although it is sufficient if the breach is one of a number of reasons.

d) The employee must not delay too long in terminating the contract in response to the employer's breach or otherwise affirm the continuation of the contract.

6.4 The contractual term relied on in this case is the implied term of mutual trust and confidence. The elements of this term should not be paraphrased or reduced the shorthand. It was identified in (Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462) as:-

> ***'The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'***

6.5 There are therefore three elements to the term and unless all three elements are satisfied, the term has not been broken. They are :-

a) Conduct by, or properly attributed to, the employer.

b) Which is likely to seriously damage the relationship of confidence and trust

c) And which is without reasonable and proper cause.

6.6 We turn then to consider whether there has been a breach of the term as alleged by the allegations of conduct set out in paragraphs 29 b-e of the claimant's claim. The allegation at paragraph 29a was abandoned by the claimant at an earlier hearing.

6.7 The allegation at paragraph 29e that she was subject to written warning can be dealt with first and dealt with briefly. This allegation must be discounted as having any causative relevance to the resignation as the imposition of the written warning was not communicated to the claimant until after she had resigned and could not logically have influenced her decision to resign. If there is conduct breaching the implied term of trust and confidence, it must arise in respect of one of the earlier allegations.

6.8 The allegation at paragraph 29b, that the respondent pursued several disciplinary allegations, is conduct which we are satisfied is likely to seriously damage trust and confidence. Whenever such allegations are made by an employer to its employee, whether based on conduct or performance or otherwise, the relationship will be undermined in all but rare occasions. The key in such circumstances is whether there was reasonable and proper cause for the employer to act in that way. On our findings of fact, we are satisfied that there was. There was both the involvement in the initial derogatory chat room exchanges, the confrontational response to Mr Flood's investigation meeting and the circumstances of the allegations by two colleagues entitled the employer, reasonably and properly, to embark on the respective disciplinary processes. This allegation does not establish a breach of the implied term.

6.9 The allegation at paragraph 29c, relating to the claimant's suspension, has two elements. One is the fact of suspension, the other is the duration of that suspension. We are satisfied either is conduct likely to seriously damage trust and confidence and, again, the key is whether there was reasonable and proper cause for that conduct. In respect of the decision to suspend, we are satisfied that there was. Where an employee is employed to deliver care to vulnerable adults, sometimes on a one to one basis, the risk faced by the allegations, particularly those directly relating to the claimant's alleged attitude to one and interaction with another is sufficient justification for the suspension to be a reasonable and proper step to take.

6.10 In respect of the duration of the period of suspension we are less than satisfied this was reasonable and proper cause. We were not persuaded by the explanation for the initial delay. We accept that disciplinary investigations are not the day to day function of managers and that they continue with their other responsibilities but a suspension from work is a serious matter and a suspended employee is entitled to expect it will be given a degree of priority. We also accept however, that there will be some delay caused by key witnesses being on leave and, in smaller organisations such as this, the pressure is likely to be greater but we did not understand why the various episodes of annual leave and day care centre shut down explained the initial delay of a nearly a month. Even allowing for a small employer with limited resources, the number of investigative meetings undertaken and evidence eventually gathered and relied on ought not reasonably to have taken longer than a few weeks to collate, perhaps 4 to 6 weeks at most. There is then a second reason for the suspension being prolonged until 8 November which was because Ms Crawford was waiting for Mr Collings to take up his post as General Manager and to take over conduct of the disciplinary hearing. We accept Mr Collings set about that task promptly when he did arrive, but we are not satisfied that it was either reasonable or proper to maintain the suspension for that reason

either. The interim decision that was in fact taken on 7 November 2017 was whether the evidence supported a prima facie case of gross misconduct. The decision was taken that it did not and that 3 of the 5 allegations would be dropped. Had the investigation been concluded sooner, so too could the interim decision so far as it related to continued suspension. Nothing in such an interim decision prevented the ultimate disciplinary decision being delayed until Mr Collings was in post. The respondent has not persuaded us that this needed to continue as long as it did and we have reached a conclusion the reasons for the extended duration of suspension was neither reasonable or proper cause. We determine that the breach of the implied term that this represents occurs after no later than 6 weeks into suspension, that is around 29 September 2017.

6.11 The allegation at paragraph 29d is that the claimant was put through a further disciplinary meeting. That is the hearing on 30 November 2017. For the same reasons as already given, we are satisfied being required to attend a disciplinary hearing is conduct which was likely to serious damage trust and confidence although, as we have also already noted, there is an artificial separation between the conduct of alleging a disciplinary offence, and the conduct of arranging a hearing to decide it, as they are all parts of the same process. Similarly, the key is whether there was reasonable and proper cause for that conduct. We are satisfied that there was. The allegations that remained had an objective basis for the employer being sufficiently concerned to invoke its disciplinary process. The employer had already indicated that its concern had reduced and no longer represented a concern of gross misconduct likely to lead to dismissal. In those circumstances it was reasonable and proper to conclude the process on those remaining allegations according to its policy. There is no breach of the implied term in this respect.

6.12 We do not accept that the further aspect of this allegation, that the breach arises by inviting requiring the claimant to attend a hearing “despite being suspended for 11 weeks” adds to the allegations that we have already considered. The delay in suspension is a sperate matter. It does not alter the nature of quality of the decision to hold the disciplinary hearing.

6.13 It follows that we have rejected the claimant’s contentions that the implied term of trust and confidence was breached in the various stages of the disciplinary process as alleged accept in one respect, that is the excessive period of suspension. For that breach to form the basis of a dismissal in law, it is necessary that it was both the reason for the resignation, in other word’s she accepted that repudiatory conduct, and that she had not already affirmed the continuation of the contract of employment.

6.14 We are not satisfied those two remaining matters are made out. The point at which the period of suspension became unreasonable was, on our findings, around 6 weeks into the suspension. It could be said that the continuation of the relationship thereafter without prompt resignation was itself an affirmation of the contractual relationship but we take the view that it could not be said that the claimant was deprived of accepting the repudiation after 7, 8 or 11 weeks that occurred around 6 weeks as the nature of this particular breach is both continuing and increasing in magnitude. However, thereafter the claimant did return to work and worked under the full terms of her contract for a further 3 weeks unequivocally. We are satisfied that continuation of the employment contract had the effect of waiving any breach arising from the

duration of the suspension and the contract was thereby affirmed. Furthermore, we have not found that the reason for the resignation was the duration of suspension. The claimant's decision to resign was in response to the mere fact of being subject to the disciplinary allegations but she was advised by friends to see out the disciplinary hearing before resigning and before the period of suspension had become excessive. It follows that however long or short the period of time before the disciplinary hearing, the outcome would have been the same. We are not satisfied therefore that it can be said the only contractual breach we have identified was the reason, or even one of a number of reasons, for the decision to resign. In conclusion, the resignation was just that and does not amount to a dismissal in law.

7. Unfair Dismissal

7.1 If we are wrong on the question of dismissal and the claimant's resignation did amount to a dismissal in law, for the claim of unfair dismissal to succeed the claimant has to satisfy us that the reason or principal reason for it was the protected disclosure. In the context of a constructive dismissal, our focus is on the reason for the employer conducting itself in the manner that amounted to a breach, in other words, the disciplinary allegations and process as adopted. This question has been answered already to the extent that the allegations of conduct amounting to a breach of contract are also said to be the detriments short of dismissal. We have rejected the necessary causal link to the claimant's earlier disclosure, and that is on the lower standard of a "material influence". It follows that even if there was a dismissal in law, it was not an unfair dismissal.

8. Breach of Contract

8.1 Similarly, for completeness, if there was a dismissal in law arising from the claimant's acceptance of the employer's repudiatory conduct, the losses will be limited to the loss of wages the claimant could have received during the period following the acceptance of the breach, subject to the period that the contract could have been lawfully terminated contract. In the circumstances of this case, there is no conduct that the respondent could point to justify termination without notice. Had there been an acceptance of a repudiatory breach, the claimant would have been entitled to damages equivalent to her losses for the period of her notice.

EMPLOYMENT JUDGE R Clark

DATE 22 August 2019

JUDGMENT SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER
.
FOR SECRETARY OF THE TRIBUNALS