EMPLOYMENT TRIBUNALS

Claimant: Mrs. L. Gaidam

Respondent: Voyage 1 Limited

Heard at: London South, Croydon
On: 4-6 March 2019 and the 25-26 June 2019, the 14 October 2019 to consider the Claimant's application to amend and 4-5 November 2019 and the 6-7 November 2019 in chambers

Before: Employment Judge Sage
Members: Ms. Blake
Mr. B. Dixon
Representation

Claimant: Mr Gaidam the Claimant's husband

Respondent: Mr. Brockley of Counsel

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is well founded
2. The Claimant's claim of race discrimination is not well founded and is dismissed.
3. The Claimant's claim for whistleblowing (detriment) is not well founded and is dismissed.
4. The Claimant's claim for whistle blowing (dismissal) is not well founded and is dismissed.
5. The Claimant's application to amend is refused.
6. The Claimant's claim for breach of contract is not well founded and is dismissed.

REASONS

1. By a claim form presented on the 24 November 2017 the Claimant claimed unfair dismissal, race discrimination and breach of contract. The

Claimant was employed from the 8 April 2013 to the 13 July 2017 as a Senior Support Worker. The Claimant added a claim for whistleblowing on the 4 March 2019 and clarified that she was pursuing a claim that the referral to the DBS was a detriment because of race and whistleblowing.

2. The Respondent submitted that the dismissal was fair and for gross misconduct and denied that there was any evidence of race discrimination and stated that the Claimant did not raise a complaint of discrimination during the disciplinary process or at any time prior to the disciplinary process. The Respondent amended their ET3 at on the 5 March 2019 with the permission of the Tribunal to respond to the new complaint of referring the Claimant to the DBS (clarified on the first day of the hearing), they denied that the decision to refer the Claimant to the DBS was an act of direct race discrimination or a detriment because she had done a protected disclosure. They also denied that the Claimant raised a qualifying and protected disclosure or that her dismissal was unfair under Section 103A.

Witnesses

The Claimant and Ms. Trumble gave evidence
For the Respondent we heard from:
Ms. Capon-Hyland Service Manager
Ms. Walters of HR
Ms. Mayes Support Worker
Ms. Mathers Appeals Manager
Ms. Welsh-Clark under a witness order (see below at paragraph 7).

Preliminary Issues on the 4 March 2019

3. There was a discussion at the start of the hearing as to whether the Tribunal was to deal with liability only or remedy, this was initiated by the Respondent who was concerned that if the Tribunal found discrimination proven, there were no documents in the bundle that went to the issue of personal injury. This was discussed with the Claimant's representative who was not legally qualified, and it was his intention to give evidence to the Tribunal because he said that "I saw what she was going through". The Tribunal discussed with the Claimant's representative what type of evidence was required to support a claim for personal injury which would include medical evidence, psychiatric reports, GP records, evidence of the Claimant being signed off sick. The Claimant's representative was informed that his anecdotal evidence would not be enough. The Tribunal decided that it would be best to deal with liability only as if the claim for discrimination was successful, the Tribunal may need to discuss with the parties at the appropriate time, whether a joint medical report would be of assistance. The Respondent indicated that as the Claimant's representative was intending to give evidence, there should be a statement. [The Tribunal were provided with a statement from the representative to this effect on the 25 June 2019].

4. The Claimant was asked how the claim for race discrimination was put, and he referred to the findings and outcome of the grievance report dated the 16 June 2017 (pages 83-5), he confirmed that Ms Mayes and Ms Trumble were treated more favourably than the Claimant, who was

dismissed. The Respondent referred to the Claimant's statement at paragraphs 66-7 and questioned whether these were also acts of race discrimination.

Witness Orders issued.

5. Witness orders were issued on behalf of the Claimant to compel the attendance of Ms. Welsh-Clark (who carried out the investigation into the disciplinary matter), this witness was not called by the Respondent. Ms. Welsh-Clark attended on the 6 March 2019. The Claimant on being informed of the procedure adopted in Tribunal (that he was unable to cross examine or ask leading questions of his witness), decided not to call her. The Respondent was given the option of calling this witness, they decided they wished to call her so orders were made for a witness statement to be served in the usual way. The Claimant would have time to prepare his cross examination before the reconvened hearing in June.

6. A second witness order was issued at the request of the Claimant for the dismissal manager Ms. Barrow to be compelled to attend; this witness was also not being called by the Respondent and the reason given was that this person no longer worked for them. Ms Barrow did not attend the hearing but sent a notification that she only received the order on the 6 March 2019 and was unable to attend. She was asked to put this in writing and the status of the witness order would be reviewed once the Claimant had considered the position. The Claimant decided not to renew the application for the witness order for Ms. Barrow.

The Claimant's application to add a claim for whistleblowing.

7. The Tribunal then discussed the issue of whistle blowing, this was not a claim that had been discussed at the preliminary hearing before Employment Judge Freer on the 26 February 2018, the only issues identified in that hearing were the claims of race discrimination, unfair dismissal and breach of contract (see the case management order at pages 37-8 of the bundle). The Claimant's representative referred to his email of the 4 April 2018 where he pursued an application to amend to add a claim for whistle blowing and at the same time attaching the schedule of loss, which was sent to the Respondent's legal representative. The Respondent did not have a copy of this document, so the Claimant provided them with a copy. The Claimant confirmed a claim under section 103A was being pursued.

8. The Tribunal then asked the Claimant's representative whether there were any further acts of detriment relied upon in respect of the whistle blowing claim. The Claimant's representative was told that he could not simply add claims they had to be referred to in the claim form. It was confirmed that the Claimant was claiming that the dismissal was automatically unfair. He further added that Ms Barrow had misrepresented statements and that the dismissal was because of the two ABC reports. The Claimant's representative was asked how he identified the protected act and he confirmed that he relied upon Section 43B(b) failing to comply with a legal obligation and Section 43B(d) that the health and safety of a

service user was likely to be endangered. He also suggested that Section 43B(f) applied however this did not appear to be on the face of the documents or in the pleadings so questions should be put clearly to the witnesses if there is a suggestion that information tending to show a matter that falls within one of the preceding paragraphs in Section 43B is likely to be deliberately concealed.

9. The Tribunal then asked if the Claimant was pursuing any other claims and her representative referred to the DBS reference saying it was an act of victimization. The Respondent objected to this head of claim being added as it did not appear on the face of the ET1.

10. The Claimant's representative also referred to a potential claim for harassment and indirect discrimination. The Respondent objected to this. The Tribunal then advised the Claimant's representative that he had to set out exactly what was being claimed as the hearing could not proceed by hearing the evidence and 'seeing what comes out'. The Tribunal had taken from the case management order that the claims were only of direct race discrimination and unfair dismissal. Although the Claimant referred to a document dated November 2017, which was not before the Tribunal, we only had access to a document sent to the Tribunal and to the Respondent dated the 25 February 2019, which outlined what he described as the main issues in the case. (which referred to the DBS reference made in September 2017). The Tribunal discussed the DBS reference and he confirmed that this was to be added to his claims and this was granted. The Claimant confirmed that the only claim he was adding was the whistle blowing.

11. The Respondent objected to the Claimant's application to amend and reminded the Tribunal of the balance of prejudice and asked that they be given an opportunity to see the amendment and to amend their defence. They submitted it would be unfair to proceed with the evidence until this was done.

12. The Tribunal having considered the application and the fact that the amendment was sent to the Tribunal and the Respondent shortly after the case management hearing and there was reference to whistle blowing on the ET1, the Tribunal allowed the amendment. The Respondent was ordered to present an amended ET3 which was provided the following day (5 March 2019). The Respondent was also granted leave to make handwritten amendments to the statements as appropriate.

Application to amend made on the 25 June 2019

13. At the start of the hearing on the 25 June 2019 the Respondent raised a concern that there had been uncertainty about the claims being pursued. The Claimant served a document headed 'Whistle Blowing Claim' and in that document was a reference to discrimination. He then referred to an email dated the 11 June 2019 from Mr Brady of the Respondent referring to the Claimant's claims before the Tribunal commenting that the issue in relation to a pay increase being the claim for breach of contract. The Claimant then wrote to the Tribunal on the 17 June 2019 where it was

alleged that the failure to award the Claimant a pay increase was an act of discrimination. The Respondent stated that this had not been discussed at the case management hearing and was a repeat of what Employment Judge Freer described as "financial abuse" which was not a claim before the Tribunal. The Respondent wanted it confirmed in writing that the Claimant was not pursuing this claim. The Respondent referred to a letter of the 24 June from Mr Brady which was not before the Tribunal.

14. The Tribunal asked the Claimant about the reference to a claim for discrimination in respect of a pay increase given to others in 2016. The Tribunal noted that the issues had been agreed in the previous preliminary hearing and the pay increase had not been identified as a race discrimination claim. The Claimant said that if it appeared that there was discrimination because of pay should the Tribunal close our eyes to it? The Tribunal stated that the issue of pay was discussed with Employment Judge Freer and the issues had been agreed and these had been discussed at the start of this hearing in March 2019, there was no mention of this being an act of discrimination. There had been no cross examination of the witnesses on this point and no evidence produced to support this claim. It was pointed out that the Tribunal would not be dealing with this issue, which was not part of the Claimant's case.

15. The Claimant's representative confirmed that he would pursue the matter as a claim for breach of contract only as had been identified by Employment Judge Freer. There followed a lengthy discussion about this matter. It was confirmed by the Claimant's representative that the claim in respect of disparity in pay or the failure to award a pay increase was to be pursued as a claim for breach of contract only.

16. The Respondent raised a concern that the Claimant's representative had accused one of the Respondent's witnesses of producing a false evidence. It was alleged that the person who took statements over the telephone did not have a lisp (it was described as a BBC voice by the Claimant) however it was alleged that the person giving evidence had a lisp, it was suggested therefore that the witness before us was not the same person. This was denied by the Respondent and by Ms Welsh-Clark.

Issues raised on the morning of the 26 June 2019

17. On the morning of the 26 June 2019 the Respondent raised a concern about several documents sent to his solicitors overnight (and to the Tribunal which had not reached the file). One was a claim being pursued by the Claimant's representative for an interim payment of £120,000 in respect of what was described as the costs incurred in representing his wife. This was discussed with the Claimant's representative and it was explained that costs were only awarded in limited circumstances in the ET. There was no evidence that costs were appropriate in this case and it was not appropriate to consider it at this stage of the hearing (before the close of evidence).

18. The next issue raised on the 26 June 2019 by the Claimant, was an application to pursue the claim for non-payment of a pay increase as a claim for race discrimination. The Claimant's representative stated that the

key word in the ET1 was discrimination. The Tribunal took into account the totality of the ET1 together with the Case Management Orders of Employment Judge Freer and it was entirely consistent for Employment Judge Freer to conclude that this was a claim for breach of contract only (page 38) and not a claim for discrimination. It was also considered by the Tribunal that there had been no reference to this head of claim in the schedule of loss (pages 32-3) and no mention of a discriminatory reason behind the decision made by the Respondent. The Tribunal noted that the race detriments were identified by Employment Judge Freer and they did not include reference to the pay increase as being a discriminatory act.

19. The Respondent referred to the case of Durrani v London Borough of Ealing [2013] UKEAT/ 0454/2012 which was a case that was critical of a Tribunal who failed to take a broad view of the use of the word discrimination. The Respondent stated that it was not necessary to identify the exact nature of the discrimination in order for it to be before the Tribunal.

20. The Tribunal therefore decided that to be fair to both parties, this must be dealt with as an application to amend. It was taken into account by the Tribunal that the Claimant's representative was not legally qualified. The Tribunal therefore took time to explain the different legal principles that applied to a claim for breach of contract and to a claim for direct discrimination. The Tribunal was concerned not to stick too slavishly to the list of issues and to ensure that a fair hearing takes place from the perception of both parties. The Claimant's representative was given leave to draft an application to amend to add a claim that the failure to award a pay increase was discriminatory.

21. The Tribunal therefore made an order that the Claimant was given until the **10 July 2019** to present the amendment to the ET1 identifying exactly how the claim is put. The Claimant's representative was asked to explain in his application why the amendment is being pursued now and why it was not made before. The Claimant was referred to the case of Selkent Bus Company by the Respondent to assist with his application.

22. The Respondent was given leave to amend their ET3 by the **7 August 2019.**

23. If the parties wished for this application to be dealt with at a preliminary hearing for three hours, they were invited to write in making a joint application. The case could not proceed to complete the Claimant's evidence until this matter had been dealt with, therefore the case was adjourned to the **4-5 November 2019 and the 6-7 November in chambers.**

The preliminary hearing on the 14 October 2019

24. The Claimant's application to amend to argue in the alternative that the failure to award a pay increase was an act of race discrimination was listed, with the agreement of the parties, for a preliminary hearing on the 14 October 2019 before the full Tribunal.

25. The Claimant's application was dated the 25 June 2019 and it was stated that there was a continuing act of discrimination which was a 'practice or principles applied to the Claimant who was treated differently to those who were British". It was submitted that this was not a separate claim he described it as being "everywhere and formed part of the claim for breach of contract".

26. The Claimant's representative clarified in his oral submissions that it was not a policy but a practice or an understanding and the burden of proof should be on the Respondent as to how and why this discrimination was conducted. It was stated that the Claimant thought that she had been racially discriminated, the perception was usually about people with skins of colour. He stated that the Claimant became aware of her claim for discrimination in relation to the pay increase 'after the ACAS letter' which was in November 2017 and stated that this was referred to as financial abuse/ discrimination. The Claimant's representative said that if time limits were such "a big thing" the Respondent should be questioned as to why they did not reply in time.

27. The Respondent complained that they had not seen an amendment to the ET1 (as the Claimant was ordered to provide) but accepted that he could perhaps infer from the submission documents what the amendment would be. He presumed it was argued as a direct discrimination (failing to give a pay increase) but it also could be indirect. The obvious question that flowed from this was that we have a list of detriments identified by Employment Judge Freer, what would the result be if the amendment was allowed? Proving the additional detriment would be difficult and we would be looking at an award with the Vento band.

28. In terms of the authorities the Respondent referred to Selkent Bus Co v Moore [1996] ICR 836 and stated that the Tribunal may need to consider if this was a relabelling (the Respondent disputed that this was a relabelling matter) as the matter was previously discussed in the PH before Employment Judge Freer. This was not a relabelling issue.

29. If this is not a relabelling issue there is an issue of time limits. There is not enough to fudge it. The Claimant's case is on the basis that he states that all you need to do is to note that similar things have happened, but that is irrelevant. What we have here is a single decision, which determines the date on which time begins to run.

30. On the timing and the manner of the application, the Claimant was seized of the discrimination claim in November 2017, that is a significant point. It was a nonsense to say it was only identified on the 24 June 2019. The application of the time limits should result in the application not being allowed.

31. The Respondent referred to the case of *Mist v Derby Community Health Services NHS Trust [2016] WL 212876* (paragraphs 74-5 and 77) and *Chandhok v Tirkey [2014] WL 7254319* at paragraphs 16-18 which stated that there must be parameters; the Tribunal must apply Selkent giving prominence to time limits. The time limits do not outweigh all other factors, but the Tribunal needs to consider all other factors. In Chandhok it stated that although the Tribunal must avoid undue formalism; the starting

point is that the parties must set out their case on the ET1, which has an important function to ensure the claim is presented (and responded to) within stringent time limits. The ET1 is more than just a starting point. It was said in the case of *Saha v Capita plc* however that applying a dogmatic approach is not helpful (paragraph 30-37). The Respondent referred to the case of *Owusu v London Fire and Civil Defence Authority [1995] IRLR 574*. The Respondent also referred to the case of *Virdi v Commissioner of the Police of the Metropolis [2007] IRLR 24* which concluded that an act is done when it is completed and the act is completed when the decision is taken. The Respondent also referred to the case of *Robertson v Bexley Community Centre [2003] IRLR 434* which states that the onus is on the Claimant to convince the Tribunal to extend time.

32. The Respondent went through the Claimant's chronology paragraph by paragraph. The Respondent noted that the Claimant did not appeal the outcome of Employment Judge Freer's case management order that identified the money claim as a breach of contract only (and not as a claim for discrimination). The Respondent also noted that the Claimant has failed to show that there was a continuing act. The Respondent referred to the order made by Employment Judge Freer noting that reference to what was described as financial abuse could not be incorporated into unfair dismissal or race discrimination and described the Claimant as adopting an "optimistic interpretation" of the order.

33. The Respondent reminded the Tribunal that the Respondent's conduct in the case was not relevant to an application of an amendment and as our legal system is adversarial, the Tribunal hearing should not become an open-ended enquiry to consider claims that were not before you. The Respondent referred the Tribunal to the Claimant's representatives oral submission that he was aware of the claim in November 2017 however in the written chronology it was stated that failure to pay a wage increase became apparent after what was described as coming to light on 'the 11 June 2019 due to the un-cooperative response from the Respondent on the 24 June 2019'.

34. In responding generally to the Claimant's application, the Respondent stated it was difficult to respond to. The Claimant asserted that the claim for breach of contract may also be an act of race discrimination but there is also a reference to defamation; however the Tribunal had set out with clarity on the first day of the hearing that they have no jurisdiction to consider this as a head of claim. It must also be considered what the Tribunal did at the start of this hearing to clarify the claims (in respect of whistleblowing). What the Claimant has done is to wrongly describe the circumstances. The Tribunal has not had to do anything other than to refer to Employment Judge Freer's list of issues in the case management order and to confirm what can be dealt with. This is a point that is being repeated.

35. The Respondent invited the Tribunal to re-read the submissions and it was said that it was tolerably clear that the Tribunal has been incredibly tolerant of the Claimant and hugely concessionary. The Tribunal were live to the fact that the Claimant is self-represented and that the issues are in

relation to the Representative's wife. If the breach of contract claim was a discrete act of discrimination, this should have been said on behalf of the Claimant. The Respondent stated that the amendment should not be allowed.

Decision of the Tribunal.

36. Although the Tribunal did not have the precise wording of the amendment, we were able to deduce from his written application dated 4 July 2019 that it was being claimed that the Respondent failed to pay to the Claimant a pay rise in 2016. The Claimant claimed that others who were British received a pay rise, but the Claimant who is Moldovan did not receive a pay rise. It is put to us that this was an act of race discrimination and we can infer that this is a reference to direct or indirect discrimination.

37. Nowhere in the claim form was a reference to the failure to award a pay increase as being an act of discrimination. The only reference to this matter was in respect of a claim for what was described as long term constructive dismissal. The matter was considered by Employment Judge Freer in a telephone preliminary hearing on 26 February 2018 (see pages 34-38 of the bundle) and the order reflected that all claims were discussed with the Claimant's representative, including how she put her claim for what was identified as financial abuse in the case management order. It was noted that the issue in relation to a pay increase was identified as a claim for breach of contract with the caveat that time limitations may arise in respect of this claim. The Claimant's representative did not apply for a reconsideration of this order nor was the case management order appealed.

38. The Tribunal on commencement of this hearing on 4 March 2019, took over half a day going through the issues in the case. The Tribunal allowed an amendment in relation to whistleblowing and made orders as required to ensure fairness, requesting the Claimant to set out precisely how the claim was put and to allow the Respondent to serve an amended response. The Tribunal also discussed with the Claimant how the claim for breach of contract was being pursued. The Claimant's representative raised issues of harassment and direct and indirect discrimination at the time, the Claimant's representative was reminded that the issues were those identified in Employment Judge Freer's order. After discussing the claims at the start of the hearing with the parties, the Claimant's representative confirmed that he was not adding any additional claims to the list of issues (apart from a claim under section 103A). The Tribunal called a number of adjournments on the first day of the hearing to ensure that we understood the claim and that the Respondent was aware of all the claims they had to respond to and the case they had to meet. The Tribunal proceeded with the evidence on that basis after all issues had been discussed and agreed.

39. The Claimant now seeks to add a further new claim that failure to award a pay increase was an act of race discrimination. This application was followed up by a letter dated 25 June 2019. The Claimant also provided what was described as a chronology, which has been referred to by the Respondent above.

40. We firstly considered the test in Selkent Bus Company, which has been referred to by the Respondent in their submissions above. We are satisfied that this is a new claim and not a relabelling of an existing claim. Even though the claim form made reference to race discrimination, it has not been pleaded that the failure to award a pay increase was an act of race discrimination and it is only referred to as part of the claim for unfair dismissal. As we have concluded that the claim form did not include a claim for discrimination in relation to awarding a pay increase, this is a new head of claim and we must therefore consider the applicability of time limits.

41. Although the Claimant states that they should not be limited to the number of offences they can rely on, that is not the case. The claim should be identified with certainty in the ET1 and both parties should know the case before them. The ET1 is not a pleading that can be amended and added to as the case proceeds and as evidence unfolds. The Tribunal was referred to the case of Chandhok where it was stated in robust terms that the claim form is the starting point of the case and the parties should not be allowed to deviate or add to that, as to do so would undermine the principle that the Respondent was entitled to know the case they have to meet. We conclude that that is an important principle and one which should not be undermined lightly.

42. The Claimant's representative confirmed to the Tribunal that he was aware of the claim for race discrimination in November 2017, when the claim was presented. There appeared to be no good reason why this claim was not included on the claim form and we have heard no evidence to suggest that there was some impediment to pursuing the claim within the statutory time limit.

43. The Respondent has presented a number of cases to the Tribunal which are referred to above on the issue of time limits. The amendment application is as far as the Tribunal can understand it, is to add a claim for direct or indirect discrimination in respect of the decision made in April 2016. We considered the case of Owusu which stated if there was an underlying policy that underpinned the decision not to award an increase, this could be a continuing act. However, the manner in which the Claimant's representative described the amendment reflected that it was being pursued as an act of direct discrimination (as no underlying policy or practice has been identified). Time would therefore start to run when the decision was made in April 2016.

44. We conclude from the Claimant's submissions that this was a one off act and not a continuing act; and there was no evidence to suggest that this was as a result of an application of an underlying policy and none had been referred to us. That being the case, time started to run from the date of the decision and the Claimant had three months to put in a claim. The statutory time limitation period would have expired in July 2016. The application is therefore out of time by over three years.

45. There has been no explanation as to why the claim was not pursued within the statutory time period. There was no evidence from the Claimant

and no reference in the submissions as to why it would be just and equitable to extend time in this case.

46. We considered the timing and the manner of the application to amend the claim form. We have noted already that the issues were discussed in Tribunal at the start of the hearing on 4 March 2019 and in June 2019 and great care was taken by the Tribunal to understand and identify all the issues that the Claimant wished to pursue. The Tribunal took into consideration the fact that the Claimant's representative has no legal training and that we as a Tribunal must not stick slavishly to a list of issues as identified in the case of Saha v Capita PLC. That is why we have taken a more hands-on approach to assist the Claimant and her representative as far as possible to achieve a fair hearing on all the issues.

47. However, the Tribunal are mindful that a fair hearing must be viewed from the perception of both parties to a case and not just that of the Claimant. We have already recorded above that the Claimant was aware of the claim for discrimination in November 2017, but despite having detailed discussions with the Claimant's representative at the start of this hearing in March 2019, failed to raise this matter until the 4 July 2019. This is nearly 2 years after the claim was originally presented and over 3 years after the date of the act complained of.

48. We are now nearly to the end of the evidence in this case and the Claimant is on the witness stand and is the final witness. The evidence suggests that the Claimant failed to pursue this application expeditiously and the Tribunal is now coming to the end of a lengthy hearing.

49. The Tribunal must consider where the balance of prejudice lies, and we conclude that it falls adversely on the Respondent. We considered that if the amendment were allowed out of time, the Respondent would have to present an amended defence to respond to the new head of claim. New witnesses would need to be called and it is highly likely that as three years have since passed since the alleged act, will be difficult to defend. It is highly likely that the Respondent's witnesses' memories will have faded and many of the Respondent's employees involved in this case have since left the company. An amendment would further extend the length of the hearing which has already been extended after the previous applications to amend. This will adversely impact on the cost to both parties in this case. The Respondent is entitled to expect finality to these proceedings and to allow an amendment at this late stage will result in further delay in the resolution of this matter.

50. The Claimant's representative was unable to help the Tribunal on the issue of prejudice that may be caused should the amendment not be allowed. The value of this application is likely to add minimally to the value of the case, should this head of claim be accepted and subsequently be successful. It was only likely to add minimally to any award for injury to feelings and the financial value of the breach of contract claim is before this Tribunal (subject of course to the Tribunal, concluding that this head of claim is in time). The Tribunal conclude overall therefore that the balance of prejudice falls more heavily on the Respondent.

51. The Tribunal's unanimous decision is that for all of the above reasons, this amendment should not be allowed

The Issues

The issues were discussed at the start of the hearing (as referred to above at paragraph 6-8) and were agreed to be as follows:

52. Unfair Dismissal.

a. Was the Claimant dismissed for misconduct?
b. Did the Respondent believe in the misconduct?
c. Whether the Respondent held the belief in the misconduct on reasonable grounds after having carried out a reasonable investigation?
d. Was dismissal a fair sanction (one that was within the bands of reasonable responses) taking into account equity and the substantial merits of the case?
e. The Claimant clarified at the start of the hearing on the 4 March 2019, that the dismissal was unfair because of the following:
    i. The Claimant was framed;
    ii. It was done on purpose;
    iii. False statements were produced;
    iv. There was a sinister investigation in that it was not investigated properly;
    v. Words were added in the Claimant's and other statements (for example in the statement of Mr Temple);
    vi. They ignored one of the witnesses (Ms Webster) and no statement was taken from her;
    vii. They based their decision on the balance of probabilities, they did not use simple common sense logic for what they have done;
    viii. The letter of the 24 May was sent without reference to the allegations, they failed to say who the investigator was;
    ix. The same person with an interest was doing the investigation on the Claimant's complaint and then she passed it on to someone else (HR).

53. Automatic Unfair Dismissal

The Claimant also complains that the dismissal was automatically unfair because of whistleblowing (Section 103A).

54. Whistle blowing

a. Did the Claimant raise a qualifying and protected disclosure? The Claimant claims that this was her ABC report presented on the 9 May 2017 which was seen in the bundle at page 119.
b. The Claimant claims that this fell within Section 43B Employment Rights Act 1996 as it suggested that the "person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" (b); it is also stated that this disclosure falls within section (d) that the "health and safety of any individual has been is being or is likely to be endangered" and (f) that "information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed".

c. The Respondent denies that the Claimant raised a qualifying or protected disclosure.
d. Was the Claimant subjected to a detriment because she raised a qualifying disclosure – it was confirmed by the Claimant that the same detriments were relied upon as those relied on for the claim for race discrimination (see below).

55. Race discrimination

a. The Claimant is white and Moldavian. She states that she was treated less favourably than her British colleagues.
b. The Claimant relies on the following detriments (which are also relied on for her whistleblowing complaints):
   1. Did Ms. Mayers make false statements of facts;
   2. Ms. Capon-Hyland findings on her investigation of the conduct issue;
   3. Ms. Capon-Hyland's encouragement of Ms Mayers to falsely report the incident;
   4. Ms. Mathers upholding the dismissal and being inconsistent in her findings;
   5. Ms. Welsh-Clark falsified statements relating to the incident;
   6. Ms. Welsh-Clark removing the last three paragraphs of the Claimant's statement;
   7. Ms. Barrow dismissing the Claimant;
   8. Ms Trumble being treated differently.

c. The Claimant will rely on hypothetical comparators but it was confirmed on the first day of the hearing that it was alleged that the Claimant was treated less favourably than Ms. Mayes and Ms. Trumble.

d. Was the Claimant treated less favourably because she was non-British?

e. The Claimant also added a final detriment on the 4 March 2019, which was whether the decision to refer her to the DBS was a detriment because of her race and/or because of her whistleblowing.

Breach of Contract

a. The Claimant alleges that she was not given a pay rise in 2016 where other employees were. The issue for the Tribunal was whether the Claimant was paid the sums properly due to her under the contract and if not, to calculate the sums due to her.

b. Although the hearing was listed to consider liability and remedy, it was agreed that the Tribunal did not have sufficient evidence in the statements or in the bundle deal with remedy. The case was limited to hear liability only.

Findings of Fact

56. The Claimant was employed as a Senior Support Worker at the Respondent Company. The Claimant worked at a residential unit called 'The Acorns' in Crawley, which provided support to four residents with learning disabilities, moderate physical disabilities, cerebral palsy, visual

or hearing impairments, epilepsy, acquired brain injuries and associated mental health needs. She was employed from the 8 April 2013 until her dismissal in July 2017. The Claimant's work was largely administrative and included staff supervisions and appraisals. She was interviewed and recruited by Ms Capon-Hyland who told the Tribunal that she knew she came from Moldovia and this had no impact on her decision to recruit her and no impact on her treatment of her.

57. The Claimant's line manager was also Ms Capon-Hyland, who told the Tribunal that the Claimant was hard working and very organized but when she started a University degree and an additional job, she became more stressed. It was for this reason that Ms Capon-Hyland offered to take over the role of conducting supervision meetings from the Claimant. She felt that this was a supportive move to assist the Claimant and she denied that this was done to undermine her. The Claimant accepted in cross examination that this was of assistance to her.

58. Ms Trumble, a support worker and witness for the Claimant, confirmed to the Tribunal that she was aware of the Respondent's whistleblowing policy and was aware that a report should be made if "you see something that you do not think is right and telling someone to get it sorted out". She confirmed that there was a telephone number in the house to call should the staff wish to escalate a concern. There were also cards available and the staff had access to an email address to escalate concerns. Ms Trumble could not recall receiving whistleblowing training in 2017. The Claimant accepted in cross examination that she was aware of the Respondent's whistleblowing policy that was in the bundle at pages 180-1 of the bundle and was aware that a whistleblow could be raised orally or in writing. The Claimant was taken to paragraph 3.2 on page 181 and she accepted that the policy stated that if a concern was raised it will be forwarded to the whistleblowing team and would be responded to within 5 days.

59. The Tribunal were taken to the support guidelines of a service user who will be referred to as "CS" on pages 121-4, this was compiled by Ms Capon-Hyland and Ms Trumble, who was confirmed to be one of CS's key workers. The support guidelines dealt with emotional and behavioural support and how to deal with what was described as verbal threats and intimidation. The guidance emphasized that those working with CS should not raise their voices and should not argue with her as this only made her worse. The report at page 121 confirmed that CS did not like being told 'No' and staff were advised to remain calm and 'keep your voice low. Do not raise your voice'. Both guidelines confirmed that staff were always to report matters on an incident report form and to tell a manager. The second support guideline dealing with 'verbal threats and intimidation' suggested that if a staff member were having difficulty with CS, the staff should ask a colleague to take over. It was Ms Trumble's evidence to the Tribunal given in cross examination that she wrote the guidelines and denied ever raising her voice to CS and said that she engaged a number of tactics to bring CS round, including humour.

60. Ms Capon-Hyland told the Tribunal that the ABC document that was in the bundle at page 119 was an 'internal monitoring tool' kept in the client files; they were not a reporting tool. She confirmed to the Tribunal that the

service user CS often accused staff of wrongdoing and every time that this happened, they had to go through the process. These comments would be recorded on the ABC sheets and the comments would later be discussed with CS. Ms Capon-Hyland stated that if CS had accused staff of forcing her to do something, she would expect to see this recorded on an incident form. The difference between an Incident form and an ABC form was that if you wanted some action to be taken, an Incident form was completed. Ms Capon-Hyland confirmed that she viewed shouting as a form of abuse.

The incidents that led to dismissal.

61. There were two incidents, one on the 5 May and one on the 9 May 2017 both involving CS, the incident on the 5 May did not lead to dismissal therefore the Tribunal will not make findings of fact about this. The report of the incident on the 9 May was made by the Claimant were seen on pages 119 on an ABC form. She described CS as "*shouting, screaming being rude towards staff and PWS. Screaming JM forces her to go out every day like Monday, again Tuesday etc. staff not having time for her*". The Claimant described the action she took in the incident as "*talk to CS explained neighbour can call police for shouting and distress others*". The report ended in the "consequences" column to reflect that the agreement reached with CS that she had the right not to go shopping, resulted in her being "very happy" with the outcome. The Claimant relied upon this document as her protected disclosure to the Respondent in her amendment to her ET1. The Claimant was asked in cross examination to clarify what information related to the whistleblowing allegation and she confirmed that it was Ms Mayes "forced her to go out every day". The Claimant told the Tribunal that she whistleblew when she told Ms Capon-Hyland of the incident on the 15 May at 7.30am (which she then followed up with an email complaint to Ms Trott).

62. The person described in the Claimant's ABC form as 'JM' was Ms Mayes, a support worker, she was subordinate to the Claimant. It was the Claimant's evidence (in her statement at paragraphs 5 and 9) that Ms Mayes had a bad attitude towards her, and this started after the Brexit Vote in March 2016. In cross examination the Claimant stated that after the Brexit vote they started to be rude to her and they told all foreigners to go home. Ms Capon-Hyland confirmed that there were issues between the Claimant and Ms Mayes but felt that they were not serious and could have been sorted out. She described them as being personal issues and she stated that the Claimant had told her that she felt that Ms Mayes did not like her and she was talking about her behind her back. Ms Capon-Hyland confirmed that this was discussed in a one to one with the Claimant, but she told the Tribunal that as the Claimant was Ms Mayes senior, she should be able to deal with it.

63. Ms Capon-Hyland confirmed in cross examination that the Claimant had complained to her that Ms Mayes was not carrying out her instructions and felt she was being rude to her. Ms Capon-Hyland told the Tribunal that the Claimant had left messages for Ms Mayes in the day book, which all could see. She did not feel that this was appropriate as the Claimant should have dealt with these issues in a one to one meeting.

64. Ms Trumble in evidence confirmed that Ms Mayes was rude to the Claimant and there was ill feeling between the two of them. She confirmed in cross examination that she had witnessed Ms Mayes talking differently to those who were non British and she referred to an employee called Bhata where she spoke to her in a loud and slow manner "like a stereotypical skit of an English person abroad". Ms Trumble did not notice a change in Ms Mayes treatment of the Claimant after the Brexit referendum outcome. Ms Trumble was unable to comment as to whether Ms Mayes was a racist and could not comment as to whether this was her intention.

65. Ms Mayes denied that she had any problems with the Claimant and felt that she got on well with her. This appeared to be inconsistent with the evidence of the Claimant, Ms Trumble and Ms Capon-Hyland who all acknowledged that there were problems with their working relationship, on balance the Tribunal prefer the evidence of the Claimant, Ms Capon-Hyland and Ms Trumble to that of Ms Mayes on this point. The Tribunal find as a fact that there was ill feeling between the Claimant and Ms Mayes however Ms Trumble, who the Tribunal found to be an open and honest witness, did not corroborate the Claimant's evidence that Ms Mayes' attitude changed after the Brexit vote.

66. On the day of the incident (the 9 May 2017) Ms. Capon-Hyland was on annual leave. On her return from leave on the 15 May, she became aware of the Claimant's ABC report. Ms Mayes reported the incident to Ms Capon-Hyland and she was asked to complete an accident/incident report. Ms Capon-Hyland scanned the form and sent it to Head Office at 9.34 addressed to Ms Mathers and Ms Welsh-Clark (see page 116-8). In this report Ms Mayes gave her recollection of the incident which was that on that morning, she heard CS say that she was forced to go out to a club that she did not want to go to. She reported that Ms Trumble "raised her voice in order to be heard and went on to argue with CS about other things but during this time Jade (support worker) came from another room to see what the shouting was about". The report went on to state that the Claimant "then came to CS shouting very loud saying we don't force you" and the Claimant was reported to have shouted back to CS "you force me to come to work" over and over again in a very loud and intimidating way. The Claimant was then alleged to have "approached CS on the stairs and said this is how you force someone. I didn't see what [the Claimant] did but she made contact with CS's coat (I think she may have pulled her coat)". She reported that the Claimant said to CS to stop shouting or "the neighbours will call the police then opened the front door and shouted call the police, call the police". Ms Mayes then said she shouted, "this has to stop, this is wrong" and Ms Trumble returned from a service users bedroom and told the Claimant to come away. The Tribunal noted that the allegation in respect of the Claimant pulling CS's coat did not appear to be corroborated by any of the other witnesses. It was also noted that Ms Mayes accused both the Claimant and Ms Trumble of raising their voices and of arguing (or disagreeing) with CS. There appeared to be no evidence to support the Claimant's claim that Ms Mayes made false statements in the incident report form because of the Claimant's race. There was also no evidence that Ms Trumble was treated more favourably

by Ms Mayes in this report as similar allegations were made against them both.

67. The Claimant's recollection of the incident on the 9 May was in her statement at paragraph 13-14. It was her recollection that CS said to her that she was being forced to do things she did not want to and began shouting, the Claimant said to her "I am here for you to help but calm down if you continue shouting the neighbours will call the police". It was the Claimant's contention that Ms Mayes had triggered CS's anxiety. The Claimant told the Tribunal at paragraph 14 of her statement that CS got up and attempted to hit Ms Mayes but she stood in front of CS and said something like "this is not nice you can't behave like this". After that she said that Ms Mayes left the building. The Claimant told the Tribunal that she did not report this incident at the time because CS has schizophrenia and often accused the staff of wrong doing (paragraph 18 of her statement). From this evidence the Tribunal find as a fact that this was not a disclosure of information to the Respondent about a breach of a legal obligation or of a health and safety breach. It was confirmed by the Claimant that this was normal behaviour by CS and only required close monitoring and was not reported to the Respondent at the time.

68. The Tribunal noted that the support guidelines stated that matters such as this should be reported on an incident form, which was corroborated by Ms Capon-Hyland. The Claimant did not do this and neither did Ms Trumble.

69. After the completed accident/incident report form had been sent to head office on the 15 May 2017, the Claimant and Ms Trumble were suspended by telephone pending investigation. The Claimant dealt with this call in her statement at paragraph 21, she confirmed that she was suspended by Ms Capon-Hyland between 9 and 10 am. Ms Trumble was suspended for about 3 weeks. Ms Trumble received a final written warning for failing to file an incident form, not for shouting or for arguing with CS, both of which were forbidden under CS's care plan.

70. The letter of suspension was sent to the Claimant on the 24 May 2017 and was in the bundle at pages 80-1. It was recorded that suspension had taken place on the 16 May (however it was not disputed that suspension took place the previous day). It did not provide details of the charges and simply recorded that there had been serious concerns about the Claimant's working practices. Her point of contact was Ms Welsh-Clark in HR. Ms Capon-Hyland told the Tribunal that she did not write the suspension letter despite her being named as the sender, she stated that the letter was 'nothing to do with me'.

The Claimant's grievance.

71. On the 15 May 2017 at 12.44 the Claimant sent in a grievance to Ms Trott the Managing Director (pages 75-6). The Claimant made reference to a previous complaint where she claimed that the right procedures were not followed. The Claimant referred to what she described as a complaint by CS that Ms Mayes "forces her to go out every time she goes out" (which

was similar to the wording used in the ABC report). The Claimant said that she had to be "firm with CS" to inform her of the consequences of shouting, which was again consistent with the ABC report. The Claimant then stated that as Ms Capon-Hyland was on holiday, she "couldn't go ahead with this complaint". The Tribunal felt that this statement appeared to be contradicted by the ABC report as there was nothing to suggest that the Claimant felt that any action was required or that an incident report was necessary after the ABC form had been filed. The Claimant was asked in cross examination where the whistleblowing was in this email and she replied that it was about racism and "the negligence that occurred in January 2017". The Claimant made no mention of the ABC report or the incident of the 9 May.

72. In the grievance the Claimant made a number of complaints against Ms Mayes personally, saying that she spoke to her in an intimidating manner, she failed to follow instructions given to her and that Ms Mayes had said on "many occasions to the staff team she will make me go as I am a foreigner and vegetarian". The Claimant also made an accusation against Ms Mayes in respect of her treatment of a service user back in January 2017. The Claimant further complained that Ms Mayes was buying service users presents which made other staff feel undermined. At the end of the email she stated "..everyone is afraid and personally I feel bullied. To right (sic), this complaint took even me a lot of courage as for the last year I felt bullied, unsupported, removed from senior jobs and treated worthless despite I help other homes in past".

73. The grievance was acknowledged the same day by Ms Welsh-Clark. The Claimant was not aware that the meeting called by Ms Capon-Hyland (referred to below) was convened in part to discuss her grievance.

The grievance investigation

74. The Tribunal have noted above that there was no specific invitation to attend a grievance meeting and no reference in Ms Capon-Hyland's statement to an investigation being conducted into the grievance. There were no minutes in the bundle of any investigations carried out into this matter. The Claimant's evidence on the conduct of her grievance was that she was invited to a meeting on the 31 May 2017 by telephone (on the 30 May), she was told it was an informal meeting and she did not need to have a union representative to be present.

75. When the Claimant arrived at the meeting on the 31 May, it transpired that this was an investigation into the disciplinary charges against her in respect of the incidents on the 5 and 9 May 2017. The Claimant accepted that the second half of the meeting was devoted to discussing her grievance (see the Claimant's evidence at paragraph 26 of her statement). Ms Capon-Hyland made no reference to the investigation of the Claimant's grievance in her statement. Ms Capon-Hyland accepted in cross examination that by the time this interview took place she had seen the incident report and the ABC report but accepted that she failed to follow up all lines of enquiry in investigating the grievance.

The grievance outcome.

76. The outcome of the grievance was dated the 16 June 2017 at pages 83-5 of the bundle. The outcome letter stated that the purpose of the meeting on the 31 May 2017 was to address the Claimant's concerns in her complaint letter, however this was inaccurate as the Claimant had been called to the meeting at short notice (by telephone) to discuss the incidents of the 5 and 9 of May (page 90) in addition to her grievance. Although the grievance outcome letter referred to interviews with all the current working staff, the Tribunal did not see the interview notes nor was there any evidence that each point in the Claimant's grievance was investigated.

77. It was conclude in the outcome letter at paragraph 4 (page 84) that "*none have heard Julie say she will make you leave because you are a foreigner and a vegetarian*", she also concluded that she had not been made aware that Ms Mayes "*shouts at you and tells you to tell staff to do thing in a rude manner*". Ms Capon-Hyland also concluded that there was no evidence that Ms Mayes had intimidated staff. The grievance outcome acknowledged that she had previously discussed the Claimant's difficulties in her relationship with Ms Mayes at paragraph 3. The grievance was not upheld. The Claimant did not appeal the outcome and gave a number of reasons in cross examination for failing to do so; the first being that she did not have enough time and was suffering from stress. These were not the reasons the Claimant gave in the dismissal appeal hearing. The Claimant confirmed in cross examination that she was not pursuing any issues in relation to the conduct of the grievance or the outcome.

Disciplinary Investigations.

78. Ms Capon-Hyland carried out the initial investigations into the disciplinary charges on the 31 May 2017, and the Tribunal saw the questions asked of the Claimant and Ms. Trumble (pages 90-95). She told the Tribunal first that she was not carrying out the investigation, she was carrying out the instructions of her managers. She accepted that she did not inform the Claimant that it was a formal part of the disciplinary process because she did not feel that was her role. She confirmed that the questions were formulated by HR not by her. She did not continue with the investigation after she conducted the first few interviews because, in her words, it did not feel right. She accepted that she called the Claimant to what she described as an 'informal chat' when it turned out to be the formal investigation meeting and this was something that she regretted. Ms. Capon-Hyland confirmed that the disciplinary meeting was based on the allegations raised by Ms. Mayes in the accident/incident report form.

79. In the minutes of the interview on the 31 May with the Claimant, she was recorded to have said "I was calm and did not shout, not at all, I was firm but not shouting" (page 91). She also confirmed that during the incident CS was screaming and she looked like she was going to hit Ms Mayes. The Claimant was asked in the interview if there was anything she wished to add and she replied "No I think it's a staff issue against me and I think CS was supporting me. I think my colleague was protecting herself". The Claimant confirmed when asked who she was referring to, confirmed that this was a reference to Ms Mayes. The Claimant added that "[Ms Mayes] has said that I am not coming back, Pat won't have me back and apparently Pat is going to deal with me". The Claimant confirmed that

everyone had told her this save for one member of staff. The Tribunal note from this comment (which was not followed up by the Respondent at the time) that the Claimant had been talking to her colleagues after suspension. This appeared to be a breach of the terms of her suspension, which forbade her from speaking to her colleagues and specifically forbade her from discussing the allegations.

80. The Claimant accepted in cross examination that she made no reference to whistleblowing in this interview and the reason she gave was that the interview "was about CS" however the Tribunal noted that the reference to the above allegation against Ms Mayes showed that the Claimant was able to refer to any matters that she felt to be relevant. The Claimant was asked in cross examination why she did not refer to her concern about race discrimination in this interview and why she did not do everything to protect her job and she replied "*I was convinced I would be put back on the job, I did nothing*". This reply did not appear to corroborate what she said in this interview that she had been told that she would be dismissed. On this point the Claimant's evidence did not appear to be consistent. The Claimant then gave a number of alternative explanations for the failure to raise her race discrimination complaint in this interview, the first was that she did not trust the Respondent and then she said it was raised but was not written down. If the second explanation was the genuine reason why nothing appeared in the minutes, the Tribunal noted that the Claimant made no complaint about the accuracy of the minutes at the time (as she had done in relation to the minutes of the 20 June). The Tribunal find as a fact and on the balance of probabilities that the Claimant made no mention of a race complaint in this interview.

81. The Tribunal saw the notes taken during the interview with Ms Trumble at pages 93-5 of the bundle. In the notes Ms Trumble was recorded to have said that "CS on stairs shouting at [Ms Mayes], [the Claimant] raised her voice above CS and said that the neighbours would phone the police if she didn't stop shouting as the front door was open…". The minutes went on to record that Ms Trumble walked away from the situation believing it to be resolved.

82. Ms Mayes was interviewed on the 2 June 2017 (page 96) and in cross examination she confirmed that this statement was possibly taken in the workplace by Ms Capon-Hyland. Five questions were asked, and Ms Mayes signed and dated the statement, this interview was typed (the only one produced in this manner). She confirmed that after the incident she went outside with Ms Trumble for a cigarette. The notes reflected that Ms Mayes denied CS shouted at her and also denied that CS raised her voice at her.

83. Mr Temple was interviewed on the 7 June 2017 (page 97), this statement was taken by Ms Welsh-Clark and was handwritten, he confirmed by email that the contents of the statement were accurate. He confirmed that he heard the Claimant raise her voice, he then went on to state that he heard raised 'voices'. The Tribunal felt there was some ambiguity in what was recorded when he said that he did not hear the service user raise her voice, as he had referred to raised voices. It was clear reading the statement as a whole that Mr Temple had heard the service user raise her voice during this incident. It was noted that at the

end of the statement he stated that “no one spoke to me about (sic) until [Ms Mathers] phoned the other week”. In cross examination Ms Mathers was asked when she contacted Mr Temple and she said it was initially on the 15 May 2017 then when she was taken to page 97 of the bundle which suggested that she did not contact him until much later she stated that she could not remember. Unfortunately, Ms Mathers did not make a handwritten note of her initial discussion with Mr Temple.

84. Ms Trumble was interviewed for a second time but this time by Ms Welsh-Clark on the 7 June 2017 (pages 106-8), this was again handwritten and not signed. It was sent to her for approval on the 8 June but she did not reply and she said in cross examination that this was because it was not accurate. She explained this by saying that the words used in the statement were not hers, for example she would not have said ‘used’ when referring to the Claimant’s voice and she did not make any comment about the ensuite bathroom. Ms Trumble confirmed in cross examination that her statement regarding the comment was accurate at page 108 which stated “that if you keep screaming the neighbours will call the police. [The Claimant] did not touch [CS] whilst I was there”. Ms Trumble stated, “I went out for a cigarette with Julie Mayes and whatever I did not witness, she didn’t either”. The Tribunal noted that this comment corroborated what Ms Mayes had told the investigation about going outside for a cigarette.

85. The Claimant gave a statement over the telephone on the 16 June 2017 (pages 110-1) to Ms Welsh-Clark. This was again handwritten but was agreed to be accurate. In this statement the Claimant stated that she said to CS “if scream and shout neighbours will call police”. The notes went on to state “Julie, me were present when talking to CS. I used a firm voice, I didn’t shout over her, no way I was shouting but she was able to hear me. I don’t know if anyone else heard. I don’t remember but [Ms Trumble] was in the building. I spoke to her after Julie left. I made [CS] a coffee. [CS] attempted to hit Julie”. There was an issue in Tribunal over whether there was a full stop after the word ‘way’, which would have changed the meaning of the sentence to suggest that the Claimant admitted shouting at CS, the Claimant denied that she admitted this in this interview. The Tribunal find as a fact and on the balance of probabilities that the Claimant did not admit to shouting in this interview as her evidence had been consistent with the evidence she gave in the previous interview that this allegation was denied.

86. The final sentence of the statement taken on the 16 June was that she “did an ABC chart, nothing different in her behaviour that day”. If that was the case it was difficult for the Tribunal to understand how the ABC chart could have amounted to a protected disclosure and it corroborated the evidence of Ms Capon-Hyland that this document was an internal record kept on the service users file only. It was also consistent with the Claimant’s statement at paragraph 18 (and also referred to above in paragraph 67) that she did not feel that this should be reported as CS was schizophrenic and felt that the matter required monitoring only. There was no evidence that the Claimant intended the ABC document to be a disclosure of information to the Respondent and there was no evidence that there was a breach of a legal obligation or a health and safety breach.

There was no evidence before the Tribunal to suggest that the Claimant was concerned that any information would be destroyed or deliberately concealed as the ABC report was completed as normal and put in the file and she did not raise a concern of this nature at the time or in her statement.

87. After the ABC document was filed, the Claimant did not escalate her concern about this incident with anyone and did not indicate at any stage of the disciplinary process that she was relying on the ABC form as a protected disclosure. The Claimant could not explain why she made no mention in this interview about her whistleblowing complaint and she accepted that at the time she completed the ABC document, she did not have enough evidence to suggest that there was service user abuse and she had to do more investigation and "sit down with my manager" to discuss it. There was no evidence to suggest that the ABC document and the subsequent email was a protected disclosure. The Claimant did not disclose the ABC report to the Respondent and there was no evidence to suggest that she had a reasonable belief that this tended to show that the Respondent was failing to comply with a legal obligation or that the health and safety of CS was being endangered. In fact it was quite the opposite, the Claimant decided not to escalate this matter concluding that there was not enough evidence to raise a concern.

88. Ms Mayes was interviewed on the 20 June 2017 again by telephone. The statement was in the bundle at pages 100-4 and was handwritten, there was no indication what questions were asked. The evidence given by Ms Mayes in this statement was largely consistent with her Incident/accident report form provided on the 15 May 2017. In the minutes Ms Mayes stated that at the time CS was calm and it was the Claimant who was "starting shouting" at CS (page 102). It was noted that in relation to the allegation made that the Claimant touched CS, Ms Mayes did not appear to have witnessed this as she stated that "she imagined" it was some action taken by the Claimant. The Tribunal asked Ms Mayes about her evidence regarding this point and she accepted that she did not see the Claimant touch CS and she did not know why she included this in her statement. She accepted she did not see any evidence of the Claimant touching CS. The Tribunal find as a fact that no physical touching occurred in this incident and Ms Mayes' evidence was also unreliable on this point.

89. The Claimant was interviewed on the 20 June 2017 again by Ms Welsh-Clark over the telephone, the notes were on page 115. This was again a handwritten note and there was no indication of the questions asked. However, the Tribunal noted from the answers given that it was highly likely that the contents of the interview with Ms Mayes on the 20 June were put to her. In the notes the Claimant was seen to deny being loud and aggressive, she denied CS was shouting at her (she said it was 'about everyone else'), she denied walking in and starting the shouting. The Claimant confirmed she opened the front door. The Claimant denied she shouted out of the door for the neighbours to call the police and she also denied saying "this is how you force someone to do something". The notes also reflected that the Claimant accepted that Ms Trumble said to her "come away now" and she went to another service users' room, however this was something the Claimant denied she said in this interview. This was something that appeared in the Incident/Accident

report form, but this allegation was not put to Ms Trumble for her to comment on. The Claimant did not approve these minutes.

90. Ms Welsh-Clark told the Tribunal that at the time, the Respondent was experiencing IT difficulties and asked the Claimant to call her to approve the minutes. The only email in the bundle was prior to the statement being taken but there was no record of any telephone call or email sent to the Claimant after the statement was taken (page 132). It was noted that Ms Mayes was able to approve her statement taken that day but the Claimant was not. The Claimant in cross examination said she believed the statement was falsified. It was put to Ms. Welsh-Clark in cross examination that she had added the last three sentences to improve their case against her, which she denied. Ms Welsh-Clark concluded from her investigations that two employees in this incident shouted and she confirmed that the words written were those said in the interviews.

91. The Claimant was invited to a disciplinary hearing by letter dated the 21 June 2017 (pages 134-6). The charges were as follows: *"1. [the Claimant] took away CS's choice of not attending a club in Gossops Green on 5/5/2017 by preventing her from getting back in the car as she had changed her mind about attending the club. 2. [the Claimant] shouted at CS (a) in an aggressive manner; (b) stating that she has come to work because of CS; (c) stating that this is how you force some from doing something. 3. Behaved in an unprofessional manner by opening the front door of the service and shouting that the neighbours should ring the police and 4. You acted in a manner that is wholly inappropriate for an employee of the company and as such the company has lost trust and confidence in you as an employee*".

The investigation report.

92. The Claimant was sent the investigation report together with all appendices and a copy of the disciplinary procedure. The investigation report was dated the 16 June 2017 and was signed by both Ms Capon-Hyland and Ms Welsh-Clark. It was noted that the report appeared to have been finalised and signed off before the last two statements were taken on the 20 June. The conclusions of the report were on pages 88-9 and in relation to allegation 2 it stated "*The maintenance operative had confirmed that he heard raised voices and that one of those voices was that of the [Claimant] and the other was CS. [Ms Mayes] reported the incident on the Managers return from annual leave as she states she was a witness to [the Claimant's] shouting at CS. The Claimant stated that she did not shout (a) in an aggressive manner; (b) stating that she has to come to work because of CS and (c) stating that this is how you force someone to do something. [The Claimant] states that she used a firm voice. [The Claimant] states that even though CS was shouting she did not have to shout to be heard over her*". Allegation 3 was as follows: *"[the Claimant] states that the neighbours may ring the police if CS continued to shout and that she did not shout out the door for the neighbours to ring the police*". The report made reference to the Claimant raising concerns about her relationship with Ms Mayes "which had not been upheld" and it was concluded that "two members of staff have stated that the [Claimant] did shout" and the report concluded that there was no reason why Mr Temple

would make a false statement and was considered to be a reliable independent witness.

93. The report outcome showed that CS had spoken to Ms Capon-Hyland but no record was made of the conversation. It was confirmed that the allegations in relation to the incidents on the 5 and 9 May should proceed to a disciplinary hearing. It was confirmed that if proven, the incident on the 9 May, would constitute emotional and verbal abuse. The Tribunal compared the letter calling the Claimant to the disciplinary hearing and the way in which the charges were framed against the investigation outcome report. It was noted that the report accurately reflected Mr Temple's evidence as showing that he had heard "raised voices" and one of those was the Claimant. The report's conclusion confirmed that the Claimant denied all three allegations in relation to shouting and stated that she used a firm voice but did not shout.

94. Allegation 3 was accurately recorded from the Claimant's point of view, that she denied shouting out the door for the neighbours to call the police. The investigation report did not include charge 4 that was added to the letter calling the Claimant to a disciplinary hearing. The Tribunal noted that no findings of fact appeared to have been made in relation to allegation 2(a)-(c) and it was noted that the final incident was later denied by Ms Mayes in Tribunal and admitted that she did not know why she wrote it. The Tribunal found as a fact that the subsequent statement made by Ms Mayes on the 20 June made it clear that this was something she had not seen, and it was what she had 'imagined' had happened. There was no clear corroborative evidence to support this allegation. Similarly the allegations at 2(b) and (c) were only referred to in Ms Mayes statement of the 15 May and were not supported by any other corroborative evidence. The charges 2(a) to (c) in total was a reflection of the aggressive nature of the altercation but there appeared to be no corroboration of anything apart from raised voices and the Claimant making a reference to (someone) calling the police which was in the third allegation.

95. The disciplinary hearing was due to take place on the 23 June 2017 but was unable to proceed due to the union representative being unavailable and the Claimant subsequently being signed off sick (the sick note was dated the 26 June 2017 page 141). The hearing finally took place on the 7 July 2017 (page 147) and the notes of the hearing were on pages 156-9. The hearing was conducted by Ms Barrow, who did not give evidence to the Tribunal. The Claimant was accompanied by her union representative.

The Disciplinary hearing.

96. The Tribunal read the notes of the hearing, but they were difficult to follow. The hearing did not appear to go through the evidence with the Claimant. It was noted that the Claimant complained that the statement taken on the 20 June was incorrect, but she was not asked to confirm what parts of the statement were said to be inaccurate and why. There appeared to be no discussion in the hearing to establish the Claimant's recollection of the events of the 9 May and to compare it with the statements of others taken during the investigation. The Claimant's representative complained that no statement had been taken from Jade, a

possible witness to the events of the 9 May but no steps were taken to secure a statement from her.

97. The Tribunal felt that the notes taken at the disciplinary hearing were wholly inadequate as it recorded that some questions put to the Claimant but in many cases no answers were recorded. For example, the Claimant was asked about the support guidelines when dealing with service users but no response was recorded. The Claimant was asked about whether she shouted in an aggressive manner and whether she had said that she has to come in to work because of CS. The Claimant's response was not detailed in the minutes however she confirmed in the meeting that she became involved as the 'fresh person' to deal with the matter, as set out in the support plan (see page 124). In the hearing the Claimant denied that Ms Trumble asked her to come away as alleged by Ms Mayes, she also denied that she said, "this is how you force someone to go out" (page 157). The Claimant said that she strongly denied all of allegation 2. These appeared to be the only questions put to the Claimant that were answered in relation to the incident. The Claimant was told at the end of the hearing that she would be told the outcome by the 14 July 2017 (page 159).

98. Ms Barrow telephoned the Claimant on the 13 July 2017 at 7.30 am and was told she was dismissed with immediate effect (paragraph 48 of the Claimant's statement).

99. The dismissal letter was seen in the bundle at pages 160-3 and was dated the 18 July 2017. It confirmed that allegation 1 was found not to be proven (in relation to the incident on the 5 May) but allegation 2 was proven. It was concluded that the Claimant had acted unprofessionally by opening the front door and shouting that the neighbours should ring the police.

100. The Tribunal noted that although the Claimant was asked in the hearing about shouting in relation to the incident on the 9 May, she was not asked about whether she opened the door and shouted out of it. This matter was not discussed in the hearing and there was a significant dispute between witnesses on the facts in relation to this part of the incident. Despite the fact that the dispute did not seem to have been resolved, this allegation was found to be proven. The reasoning adopted by Ms Barrow was contained under the heading 'Findings of Fact' and under paragraph 2 (pages 161-2), great weight was seen to be placed on the conclusion that the Claimant had been asked by Ms Trumble to come away from the situation, a fact which the Claimant denied and which was never corroborated by Ms Trumble. Ms Barrow also concluded that the Claimant had "changed [the] account of the events" and she reached this conclusion by relying on the contents of the disputed statement dated the 20 June. Ms Barrow also concluded that Mr Temple in his statement had said that he could only hear the Claimant's voice however the Tribunal have found as a fact above that his statement and the investigation outcome confirmed that he had heard raised voices and that one voice was a female service user. Although the Tribunal accepted that the statement taken from Mr Temple was ambiguous, it was clear from reading the statement as a whole (rather than taking individual sentences out of context) that more than one raised voice was heard. The Tribunal

conclude that the decision reached by Ms Barrow was fundamentally flawed and was not consistent with the totality of the evidence before her.

101. In respect of the findings made in the letter at paragraph 3, in relation to the opening of the door and shouting to call the police, the Tribunal could not find any evidence that this allegation was put to the Claimant in the hearing for her to respond to. The conclusion reached in the dismissal letter appeared to focus solely on the fact of opening the door and then not walking outside, which appeared to be irrelevant to the charge of whether she shouted out of the door. Ms Barrow concluded that because the Claimant had not gone out of the door when it was opened "makes me question the validity of your account of this". The Tribunal were rather confused by this conclusion as it appeared that the thrust of the allegation appeared not to be the opening of the front door but the shouting out of an open door. No conclusions appeared to have been reached from the various statements of what the Claimant said about calling the police and where and when it was said and in what tone and volume. The Tribunal conclude from the facts that the dismissal manager had failed to reach a conclusion that was consistent with a careful and considered analysis of all the facts.

102. The letter went on to state that the fourth charge that the Claimant acted in a manner that was "wholly inappropriate" was proven in respect of charges 2 and 3. There was no indication as to what further evidence was relied on to conclude that this further charge should be found to be proven or why they maintained that they had lost trust and confidence in the Claimant for any additional reason. There was no explanation of what additional factor led them to conclude that the Claimant should have been found to have been guilty of the fourth charge and the explanation given in the letter was as follows: "allegation 4 is upheld as it arises out of the other allegations and would lead to the termination of your employment due to loss of trust and confidence". The Tribunal could not follow this explanation or why a separate stand-alone charge had been found to be proven in addition to charge 2 and 3, on no additional evidence or any further aggravating factor.

103. The Tribunal then noted in the dismissal letter under the heading 'mitigation' that firstly it was recorded that the Claimant was not aware that "statements were taken over the phone", however, there was no reference to this being discussed in the hearing. In relation to what was described under the heading of mitigation 2, which was a reference to the Claimant's concern raised about the statement taken on 20 June, she concluded that the Claimant didn't raise any concern in any subsequent communication about this. She concluded that the Claimant did not contact Ms Welsh-Clark on the 20 June as she had requested, however this was contrary to the evidence before her which showed that a statement was taken on that day over the phone (and was confirmed by telephone records before the Tribunal). However, the Tribunal noted that the Claimant raised a concern about the veracity of the statement in the disciplinary hearing but there was no credible evidence that this matter was investigated. Although the letter referred to a conversation with Ms Welsh-Clarke about the statement taken on the 20 June, there were no minutes of any such conversation and there was no evidence to suggest that this point was followed up.

104. Ms Barrow rejected the Claimant's challenge to the veracity of the statement taken on the 20 June, preferring instead the account given by HR concluding that HR would not submit a false statement. Ms Barrow did not seek to challenge HR or to question the accuracy of the statement in any way. The Tribunal noted that this point was central to the Claimant's case and was not a point of mitigation. This was a valid point put forward by the Claimant in the disciplinary hearing about the evidence and this was not pursued or investigated by the dismissal manager before deciding to dismiss on what was clearly disputed evidence.

105. In respect of the last mitigation point, it was concluded by Ms Barrow that she could not see what further questions could have been asked of Ms Mayes and rejected the point, as she understood it, that it was the Claimant's case that Ms Mayes was "not asked the right questions and statements were contradictory". However, looking at the minutes of the hearing, and more particularly at page 157, the point that was being made on the Claimant's behalf was that Ms Mayes "was not asked specific questions in her statement around how she was dealing with the situation.". This point was not dealt with by Ms Barrow in the outcome and she failed to critically analyse the evidence before her to see if any further enquiries were necessary in respect of the incident on 9 May. This the Tribunal found to be surprising as there were a number of matters where contradictory evidence had been given and she failed to reach a conclusion on the inconsistencies. Ms Barrow concluded that the Claimant should be summarily dismissed.

106. The disciplinary hearing appeared to be fundamentally flawed. It failed to record accurately the questions and answers given in the disciplinary hearing, it failed to carry out any further investigation where the Claimant raised concern that witnesses had not been interviewed and the evidence given was contradictory. The disciplinary process failed to reach a conclusion on all the factual aspects of the case. The process failed to reach a conclusion about what happened during the incident when words were spoken and how they were spoken. The written outcome failed to record how the evidence was analysed and why the evidence of Ms Mayes was preferred to that of the Claimant and Ms Trumble. Even though Ms Barrow indicated that she carried out a further investigation, there was no evidence in the bundle that this was the case. The Tribunal therefore conclude that the disciplinary process was procedurally flawed and inadequate for those reasons. We also conclude that the decision reached failed to consider all the evidence and failed to reach a conclusion on the disputed evidence. It was also of concern that Ms Barrow failed accurately to record the evidence given by Mr Temple in the outcome letter. The conclusion reached was unsustainable on the facts. The disciplinary investigation and hearing were procedurally unfair.

The Appeal

107. The Claimant appealed the decision to dismiss and her appeal was seen on page 100 of the bundle dated 24 July 2017. She appealed on three grounds, firstly she doubted the veracity of the statement taken from her on 20 June and particularly with reference to the phrase "yes, Chloe had shouted that you should come away now.". The Claimant confirmed

that no one had said this to her, and this is what she told Ms Barrow in the disciplinary hearing. Secondly, she said that she did not know if anyone could hear her because "I didn't look around at that point". Thirdly, she explained she not appeal the outcome of her grievance because she did not believe it would be dealt with fairly, she did not say that she did not have enough time to put in an appeal which is what she told the Tribunal. The Claimant confirmed in her appeal statement that she felt the outcome was too harsh and unfair.

108. The Claimant's appeal was heard in on the 17 August by Ms Mathers. The minutes were on pages 167-8 of the bundle. The Claimant was represented at this hearing.

109. Ms Mathers evidence in chief at paragraph 11 reflected that she concluded that the Claimant's conduct was gross misconduct because "she was repeatedly heard raising her voice at CS, making inappropriate remarks to CS and shouting out of the front door of the service to neighbours to call the police". These conclusions appeared to place reliance solely on the Incident/ accident report written by Ms Mayes. She denied that this conclusion was related to the Claimant's race. In paragraph 13 of Ms Mathers statement she referred to the fact that the Claimant failed to report the incident and the matter came to light when her colleague escalated her concern, this was felt to be a failure in her responsibilities as an experienced Senior Support Worker and was also seen as a failure to report the incident accurately.

110. The minutes reflected that the majority of the representations were made by the Claimant and her union representative. Ms Mathers asked one prompt question (page 167) asking if she had anything to add and two questions to enquire what she wanted. At the end of the meeting Ms Mathers stated that she "would need to go through other statements and would met (sic) with some of the staff that are part of the investigation". In cross examination Ms Mathers accepted that after the hearing, she interviewed no one and carried out no further investigations. The Tribunal therefore find as a fact that what she told the Claimant was inaccurate (and if she intended to do so at the time but changed her mind, she did not tell the Claimant of this). In questions from the Tribunal Ms Mathers confirmed that she did not speak to anyone directly and didn't do any investigation. She accepted that what she wrote in the letter did not happen.

111. The appeal outcome was dated the 22 September 2017 on pages 171-2 and upheld the decision to dismiss. She concluded that even if the disputed evidence was discounted, the evidence still reflected that the Claimant raised her voice. The letter went on to conclude that if the Claimant held a serious concern about the conduct of her colleagues she should have raised this at the time with the Service Manager or the covering manager. In relation to the second point of the appeal (which the Tribunal noted was the Claimant's first point of appeal), she stated that she found the Claimant "easy to understand" and therefore "had no reason to believe that you were misrepresented". She concluded that even if disputed evidence were discounted the fact remained that both Ms Mayes and Mr Temple "heard you raising your voice towards CS".

112. Ms Mathers dealt with the complaint made about the delay in starting the investigation; it was explained that this was due to obligations of safeguarding reporting but statements were taken within the month. Ms Mathers accepted that she had some previous involvement in the case as she was the Operations Manager and on the 15 May after Ms Mayes had escalated her incident/accident report form she contacted Mr Temple to ask if he had witnessed anything. Ms Mathers was asked about this in cross examination and she was taken to page 97 of the bundle where Mr Temple refers to speaking to Ms Mathers "the other week". It was put to her that this must have been on or around the week starting the 29 May but she first replied that it was the 15 May but when she was taken to page 97 she replied that she could not remember when she spoke to him. On the balance of probabilities, the Tribunal accept that she spoke to him on the 15 May as this was in relation to taking immediate action. Although she did not take a minute of this conversation, it was sufficient to justify suspending the Claimant.

113. Ms Mathers was taken in cross examination to the point in the disciplinary hearing (page 158) where it was identified by the Claimant's representative that no statement was taken from Jade. Ms Mathers accepted that this was something that she missed as it was not something identified in the Claimant's appeal letter. She was asked about the IT problem and the reason why the statement taken on the 20 June was not approved by the Claimant; in reply she said that she accepted what HR had said on this point however there was no evidence that any enquiries were made on this point. The Tribunal noted that both Ms Barrow and Ms Mathers appeared to unequivocally accept the accuracy of the handwritten statement, despite the Claimant's representations to both hearings.

114. Ms Mathers was asked in cross examination how she reached the conclusion that two statements supported the fact that the Claimant raised her voice towards CS and she replied, "*I am not sure, it made sense to me at the time, I am confused*". In re-examination Ms Mathers was taken to all the statements she had before her and was then specifically asked to clarify her thought process in reaching her decision; she was unable to do so.

115. Ms Mathers said in cross examination that it was not for her to conduct an investigation therefore rejected the idea that she should telephone Mr Temple to clarify his evidence. She confirmed in cross examination that this was a review of the decision and at that stage no new investigations were carried out. Ms Mathers confirmed to the Tribunal that she considered the Incident/accident report form to be an allegation of abuse. Ms Mathers confirmed that at no time in the appeal did the Claimant maintain that her dismissal was because of race or whistleblowing, however she confirmed that the whistleblowing policy (page 179) specifically identified abuse of a vulnerable persons as examples of conduct that should be reported under the whistleblowing policy.

116. In relation to the last matter, whether the decision to refer the Claimant to the DBS after dismissal on the 4 March 2019 was an act of race discrimination or a detriment because of making a protected disclosure, the only evidence in relation to this matter was in the Claimant's statement at paragraphs 67-72. The Claimant did not state that the decision to make

the referral was because of race or making a whistleblowing complaint. The Claimant's only complaint about this referral was that she lost a job because of the referral. The Claimant has failed to show any primary facts on which the Tribunal could conclude that she had been treated less favourably.

The Law

Section 43A Employment Rights Act 1996

Meaning of "protected disclosure"

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.]

Section 43B Employment Rights Act 1996

Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

Section 43C Employment Rights Act 1996

Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—

(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

Section 47B Employment Rights Act 1996

Protected disclosures

(1) 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.

(2) … this section does not apply where—

(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of [Part X]).

Section 98 Employment Rights Act 1996

General

(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 subsection (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 subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,

(4) [Where] the employer has fulfilled the requirements of subsection (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.

103A Employment Rights Act 1996

Protected disclosure

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

Section 13 Equality Act 2010

Direct discrimination

(1) 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.

EMPLOYMENT TRIBUNALS EXTENSION OF JURISDICTION (ENGLAND AND WALES) ORDER 1994

7 Time within which proceedings may be brought

[Subject to [*articles 8A and* 8B], an employment Tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

> (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
> (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
> (c) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the Tribunal considers reasonable.

The submissions.

117. Both parties produced written submission and attended and provided oral submissions. They will not be replicated in this decision however they will be referred to in our decision as appropriate.

The Decision

118. The unanimous decision of the Tribunal is as follows:

119. Firstly, on the issue of race, it was noted that the Claimant's evidence on the incidents she replied upon appeared vague and the only corroboration of this being raised as a concern was in her email of the 15 May. The Tribunal took into account that this concern was raised on the same day as the incident/ accident report had been submitted by Ms Mayes and was submitted after she had been suspended. The only complaint raised in her email was referred to in our findings of fact above at paragraph 72 where it was alleged that Ms Mayes had said that Ms Capon-Hyland would secure her dismissal because she is a foreigner (and vegetarian). Although we note that the grievance investigation was cursory, the Claimant raised no concern about this at the time. The grievance outcome did not uphold the complaint and the Claimant failed to appeal the outcome. The Claimant also told the Tribunal that she was not pursuing any issue in relation to the grievance procedure or the outcome.

120. The Claimant failed to refer to her concerns of race discrimination at any stage of the disciplinary investigation, the disciplinary hearing or the appeal. Although it was stated in closing submissions on behalf of the Claimant that the Respondent was guilty of discrimination in the entire handling of the disciplinary case, there was no evidence to support this. Ms Mathers denied that she treated the Claimant less favourably because of race when it was put to her and there was no evidence before us to suggest that this was the case. The Tribunal did not equate an

inadequate or even incompetent appeal process to be indicative of less favourable treatment because of race. It was never put to Ms Welsh-Clark that she carried out the investigation in a manner prejudicial to the Claimant because of her race. There was no evidence to suggest that Ms Capon-Hyland made any findings of fact in the disciplinary process as we have found as a fact that she only took the initial statements in the investigation. The Claimant made no complaint against Ms Capon-Hyland in respect of her handling of these interviews in the disciplinary hearing or the appeal. The Tribunal therefore conclude in the absence of any evidence that the disciplinary procedure although incompetent and procedurally unfair was not a detriment because of race.

121. Although there was some evidence to suggest that Ms Mayes had spoken in a patronising way to the Claimant as suggested by Ms Trumble, she could not confirm to the Tribunal that this was as alleged by the Claimant (i.e. that there was an escalation after the Brexit vote). Ms Trumble indicated that she saw no difference in the relationship between the Claimant and Ms Mayes after that date. The allegation against Ms Mayes in the list of issues was that she made a false statement in her incident report. The Tribunal have reflected the contents of this report above at paragraph 66 and we noted that she made similar criticism of both the Claimant and Ms Trumble. It has also been found as a fact that the incident report was based in fact, even if some of the evidence was exaggerated or inaccurate. There was no evidence to suggest that the evidence Ms Mayes provided to the investigation was a detriment because of the Claimant's race. There was also no evidence to suggest that Ms Capon-Hyland 'encouraged' Ms Mayes to make a false statement as the request to complete an incident report appeared to be consistent with the support guidelines. There was no evidence to support the Claimant's claim that submission of the DBS referral was a detriment because of race.

122. Turning to the issue of whistle blowing, the Claimant in the amended ET1 stated that the protected act was the ABC report (as shown above in the agreed list of issues). It was only in the Tribunal hearing that the Claimant then added that the email complaint of the 15 May 2017 was described as a continuation of her whistleblowing complaint. There was no evidence to suggest that the ABC report was a disclosure of information to the Respondent or that the Claimant intended to make such a disclosure. The evidence before the Tribunal showed that at the time the form was completed, this was a routine file note and reflected that no serious concerns had been raised. The Claimant reported in the disciplinary investigation that there were no concerns and the ABC form was completed correctly and filed and had been discussed with Ms Capon-Hyland on her return, it was not suggested that this was intended to be a whistle blowing complaint. The Claimant in her statement also confirmed that the incident on the 9 May was not reported as a concern due to CS's condition and that at the time the Claimant felt she had insufficient information to escalate any complaint. The Claimant and Ms Trumble were aware of the whistleblowing procedures and no report was escalated in respect of the issues that arose that day. There was also no suggestion in this document that it tended to show that the Claimant was reporting a breach of a legal obligation, a health and safety breach or that the evidence was being or was likely to be concealed.

123. In respect of the email on the 31 May this appeared to be a complaint about the conduct of Ms Mayes and not a whistleblowing complaint. This document was not a continuation of the ABC report, which only referred to the incident on the 9 May regarding CS (as put to the Tribunal in the hearing by the Claimant's representative). The Claimant did not say in her statement that this email was a whistle blowing document. The only reference the Claimant made to this document was in paragraph 21 of her statement, where she referred to it as her complaint against Ms Mayes, which the Tribunal felt was an accurate description of the document. It was not referred to in the amendment to the ET1 as a whistleblowing document. The Tribunal also concluded that the Claimant never informed the Respondent prior to these Tribunal proceedings that she considered herself to be a whistle blower. It was also noted that the document was not a disclosure in the wider public interest, being essentially the Claimant's complaints about Ms Mayes. The Tribunal conclude therefore that the ABC document and the subsequent complaint email were not qualifying and protected disclosures. As the Tribunal have concluded that the Claimant has not make a protected disclosure, her claims of whistleblowing in respect of detriment and dismissal are therefore not well founded and are dismissed.

124. In relation to the claim for breach of contract, the Claimant failed to show to the Tribunal any relevant facts to support this head of claim. There was no evidence that there was a term in the contract that entitled her to a pay rise in April 2016 or that the Respondent had failed to pay an increase due to her in breach of contract. Although it was stated that some of the other staff received a pay rise around this time, there was no evidence to suggest that the Claimant was contractually entitled to receive a pay increase. The Tribunal also considered that had the Claimant held a genuine belief that there had been a breach of contract in April, she raised no grievance or complaint at the time and continued working for the Respondent until the termination of her contract under the disciplinary process on the 13 July 2017. Had there been any evidence of a breach of contract (which there was not) the Tribunal would have found that the Claimant had worked on without complaint and accepted the breach. This head of claim is not well founded on the facts.

125. Turning to the claim for unfair dismissal, we accept the Respondent's evidence that the Claimant was dismissed for misconduct and that was the genuine reason for dismissal. There was no evidence to suggest that the dismissal was for any other reason (discrimination or detriment due to whistleblowing) and this was not a complaint pursued by the Claimant at any time during the disciplinary hearing or appeal. Although the Tribunal noted that Ms Trumble was suspended for similar allegations (raising her voice at CS) and was then subject to a disciplinary procedure, she faced different charges and received a final warning. The Tribunal saw no evidence to suggest that the more draconian sanction of dismissal given to the Claimant was less favourable treatment because of race. The charges faced by Ms Trumble was that she failed to complete an incident report about the 9 May however the charges against the Claimant was in respect of raising her voice to CS. As the charges were different the Tribunal conclude that this was the reason for the different outcomes. We concluded that Ms Trumble was not an appropriate comparator, we

concluded that an appropriate comparator would be an employee faced with the same or similar charges who was British. We conclude that if the allegations were found to be proven by the Respondent, they would also have been dismissed.

126. The next point we must deal with is whether the Respondent believed in the misconduct. We took into account that on the 15 May, both the Claimant (ABC report) and Ms Mayes (Incident/accident report) expressed concern about what happened on the 9 May and a decision was made that two of the employees involved in the incident should be suspended and investigated. At that stage the Respondent held a genuine belief that two people had been identified in the incident report of acting contrary to the support guidelines and that was the genuine reason for commencing the investigation. Ms Mayes in her report had accused Ms Trumble and the Claimant of raising their voices and neither had presented incident reports which was a breach of the guidelines.

127. However, having carried out what we have found to be a wholly inadequate investigation, we conclude that the Respondent did not hold a reasonable belief on reasonable grounds after carrying out a reasonable investigation. We concluded that the investigation was inadequate as a witness who was there was not interviewed (Jade); disputed facts were not clarified with the witnesses and those disputes of fact remained at the date of dismissal and appeal. Statements were taken over the telephone, but the contents not agreed with the Claimant and with Ms Trumble. Both employees faced serious charges, and both had statements taken from them that were not approved which were relied upon by the dismissal and appeals managers. They were treated the same, the Respondent refusing to believe that the contents of the statements taken were in any way inaccurate despite the fact that both the Claimant and Ms Trumble had said they were inaccurate.

128. The conclusions were formulated in the document referred to above at paragraph 92-4 and the Tribunal noted that the evidence of Mr Temple was accurately recorded. We have found as a fact that there was no corroborative evidence to support Ms Mayes' allegations that formed charges 2(b)-(c) and 3. There was evidence of raised voices but the Claimant had been consistent in her evidence that she used a firm voice (and raised her voice to be heard) but did not shout. The conclusions reached by Ms Welsh-Clark of the allegations to put forward to a disciplinary hearing were not supported by the evidence as we have found as a fact above. The report failed to accurately represent all the evidence before her and failed to identify where there was a dispute on the evidence or where an allegation was not supported by corroborative evidence.

129. Although the investigation was inadequate, there was no evidence to suggest that the Claimant was framed as alleged above in the list of issues. It was impossible to conclude that Ms Welsh-Clark, who had never met the Claimant, would have in some way constructed an investigation report specifically to frame her. Although one of the statements taken were not agreed by either the Claimant or Ms Trumble, there was no evidence that they were in some way falsified and the disadvantage impacted equally on the Claimant and Ms Trumble who was British. There was no

evidence to suggest that the Claimant was treated less favourably because of race by Ms Welsh-Clark. Although there was a dispute on the accuracy of what was recorded, the Tribunal did not equate this with a falsification or with discriminatory conduct. A fair process however would have ensured that all statements had been agreed and signed as accurate before being considered at the disciplinary hearing. This was not done and resulted in fundamental unfairness in the process adopted. It was also unfair because relevant witnesses were not spoken to (Jade) who could have given an accurate description of the events of the day, it was confirmed in Tribunal by Ms Welsh-Clark that this was a relevant witness to speak to and she agreed that a statement should have been taken from her. It was also noted that CS had been interviewed but the record of this was not available to the Claimant.

130. Although the Claimant stated that the suspension letter did not refer to the allegations, we did not conclude that this amounted to procedural unfairness in the process. Suspension was a neutral act to complete safeguarding controls and then to carry out an investigation. It was not until after the investigation that the charges had been identified. The suspension letter also failed to refer to the identity of the investigator but the Claimant was aware that firstly Ms Capon-Hyland carried out the initial interview and the process was then taken over by Ms Welsh-Clark. This did not lead to a procedurally unfair process.

131. The Claimant also said that the statements being handwritten was to her disadvantage because English was not her first language, however it was noted that the Claimant was in a senior position and a number of documents produced by her were handwritten (the ABC report). There was no evidence that this placed her at a disadvantage as compared to others. The copies of many of the statements were hard to read and at times unintelligible, this resulted in all parties experiencing difficulties and not just the Claimant.

132. Having concluded that the investigation was unfair and not within the band of reasonable responses, the Claimant then attended a disciplinary hearing which we have made findings of fact about above. We did not hear from Ms Barrow and we concluded that the hearing notes reflected that few questions or answers were recorded, and the hearing appeared to be cursory in nature. We have made comments about the thoroughness of the disciplinary hearing above. The outcome letter did not reach conclusions on all the allegations, it did not provide a reasoned outcome in relation to each part of charge 2. There also appeared to be no consideration of the Claimant's evidence in relation to the outcome of charge 3. It was also noted that the dismissal letter wrongly stated that Mr Temple heard only one person shout which was inaccurate as the investigation report found that Mr Temple had heard raised voices, one of which was the Claimant and one he recognised to be the service user. This reflected the inadequacy of the process followed by Ms Barrow. We conclude on all the evidence that this was a fundamentally unfair process leading to an unfair dismissal.

133. The Tribunal considered whether the unfair dismissal was rectified on appeal and the evidence before us reflected that the process followed by

Ms Mathers was wholly inadequate. The appeal hearing was conducted on the basis that she was not reopening the investigation. It was Ms Mathers view her role was to look at the sanction and any particular matters raised by the Claimant. Ms Mathers only asked two questions in the appeal and failed to conduct any investigation into the matters raised by the Claimant in the hearing. The Claimant had highlighted the discrepancies between the statements and the failure to take a statement from Jade and the harsh outcome, however Ms Mathers failed to consider these matters. She accepted without question the accuracy of the statements taken by HR. Ms Mathers accepted that she conducted no enquiries after the hearing and spoke to no one else (other than HR). Ms Mathers was unable to explain to the Tribunal how she came to her conclusions in the appeal letter (which did not accurately reflect the facts). The Tribunal conclude that the appeal did not overcome the considerable defects in the investigation and disciplinary hearing. The dismissal is unfair.

134. The Tribunal also confirm that as the Claimant did not make a protected disclosure, this was not an automatically unfair dismissal.

135. The Tribunal have also concluded that there was no evidence to suggest that the dismissal of the Claimant was less favourable treatment because of race. The Claimant did not suggest that this was the case in the appeal and has produced no evidence to support this. Although this was a procedurally and substantively unfair process, we do not conclude that this was a discriminatory dismissal.

136. In relation to Polkey, the Respondent has failed to show that had there been a fair procedure, the Claimant would still have been dismissed. The Tribunal noted in the Respondent's submissions at paragraph 37 that they accepted that there was some doubt as to whether the Claimant would have been dismissed if the procedure that was followed was fair.

137. A fair procedure would have taken into account the Claimant's representations about the accuracy of the statements and a fair process would have rectified any inaccuracy in relation to the evidence given in interviews at the disciplinary hearing stage. A fair process would have seen Ms Trumble and the Claimant's evidence compared as there were elements of corroboration between them. The most serious evidence provided by Ms Mayes was in relation to the alleged incident involving physical contact, but in the subsequent interview on the 20 June she did not claim to have witnessed this. The Tribunal refers to our findings of fact about this evidence above at paragraph 88. The disciplinary hearing also would have overcome the obvious shortcomings in the investigation and a statement would have been taken from Jade who was a witness to part of the incident.

138. The Tribunal concludes that as the process resulted in a substantively unfair dismissal, it was impossible for us to predict the outcome had the process been substantively and procedurally fair. On this basis the Tribunal conclude that it is inappropriate to make any deduction for Polkey.

139. In relation to the issue of contributary fault, we accepted that the Claimant raised her voice and this was contrary to the support guidelines. We took into account the Claimant was the most senior person to be involved in this incident and was the person who should have taken over and calmed the situation. She accepted that her voice was raised contrary to what was required in CS's care plan and she failed to escalate the matter using an incident report, which was a requirement in CS's support guidelines when an allegation was made. It was clear that an incident report was required in this situation which the Claimant should have known being the most senior person to attend the incident. The Tribunal therefore conclude that the Claimant should bear a 20% responsibility for her dismissal.

140. Having found in the Claimant's favour in her claim for unfair dismissal, the parties are encouraged to see if they can reach a settlement in this matter to avoid the need for there to be a hearing on the issue of remedy. The Claimant is reminded that the statutory cap applies in this case and the compensatory award is capped at a maximum of one years pay. The parties are given 28 days to see if they can reach an agreement as to the level of compensation.

141. If settlement cannot be reached, the parties are to write to the Tribunal for the case to be listed for a **one-day remedy hearing** before this Tribunal. The parties are to provide dates to avoid for a period of six months. The parties are to prepare for the remedy hearing and the orders in relation to this are as follows:

    a. The Claimant is ordered to provide a witness statement dealing with remedy including covering all attempts to find work and evidence of all jobs applied for, interviews attended and the outcome of all job applications. The Claimant is to provide evidence of all the income earned from the date of dismissal to the date of the remedy hearing. The statement is to be disclosed to the Respondent **4 weeks** before the hearing. The Claimant is ordered to bring sufficient copies of the statement to the hearing.

    b. If the Respondent wishes to call a witness, they are to send to the Claimant a copy of this statement **4 weeks** before the hearing. Any documents that they wish to add to the bundle (in respect of mitigation) should either be attached to the statement or sent to the Claimant to add to the bundle.

    c. The Claimant is ordered to provide a bundle of documents relevant to the issue of remedy to the Respondent **6 weeks** before the hearing and to bring sufficient copies of the bundle to the hearing.

    d. The Claimant is ordered to provide an updated schedule of loss to the Respondent **14 days** after the promulgation of this decision to the Respondent and this is to be updated **8 weeks** before the hearing.

Case No: 2303412/2017

Employment Judge **Sage**

Date 4 December 2019