THE EMPLOYMENT TRIBUNALS

Claimant: **Ms L Fairhall**

Respondent: **University Hospital of North Tees & Hartlepool NHS Foundation Trust**

Heard at: **Teesside Justice Hearing Centre** **On: 19th – 23rd August; 6th – 11th and 16th September 2019**

Before: **Employment Judge Johnson**

Members: **Mr S Wykes**
Mr P Curtis

Representation:

Claimant: **Mr M Rudd of Counsel**
Respondent: **Ms C Souter of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the employment tribunal is as follows:-

1. The claimant's complaint of automatically unfair dismissal for making protected disclosures is well-founded and succeeds.

2. The claimant's complaint of ordinary unfair dismissal is well-founded and succeeds.

3. The claimant's complaint of being subjected to detriment for making protected disclosures is well-founded and succeeds.

4. The claimant's complaint of breach of contract (failure to pay notice pay) is well-founded and succeeds.

REASONS

1. The claimant was represented by Mr Rudd of Counsel, who called to give evidence the claimant herself and her daughter Ms Victoria McGregor. The respondent was represented by Ms Souter of Counsel who called to give evidence the following persons:-

   (a) Julie Parks (Care Group Director)
   (b) Rowena Elaine Dean (General Manager)
   (c) Michelle Taylor (Head of Workforce)
   (d) Christine Mary Grieves (General Manager for Anaesthetics)
   (e) Lynne Taylor (Director of Planning and Performance)

2. The claimant and each of the witnesses had all prepared typed and signed witness statements, which were taken "as read" by the tribunal, subject to questions in cross examination, re-examination and questions from the tribunal panel.

3. There was an agreed bundle of documents marked R1, comprising three A4 ring-binders containing a total of 1,155 pages of documents. Mr Rudd's closing submissions were marked C1 and Ms Souter's closing submissions were marked R2.

4. By a claim form presented on 31st August 2018, the claimant brought the following complaints:-

   (a) unfair dismissal on the grounds of having made protected disclosures
   (b) ordinary unfair dismissal
   (c) subjection to detriment short of dismissal on the grounds of having made protected disclosures
   (d) wrongful dismissal/breach of contract (failure to pay notice pay)

   The respondent defended the claims. In essence they arise out of the claimant's dismissal on or about 17th April 2018, for reasons which the respondent maintains related to her conduct. The claimant denied any such misconduct and maintains that her dismissal was because she had made a series of protected disclosures.

5. The claims and the issues arising from those claims were properly identified by Employment Judge Garnon at a private preliminary hearing which took place on 21st November 2018. Those remain the issues which the employment tribunal was required to decide at this Hearing.

6. Having heard evidence of the claimant, her daughter and the witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of Mr Rudd and Ms Souter, the employment tribunal made the following findings of fact on the balance of probability.

7. The respondent is an NHS Foundation Trust which employees approximately 5,500 employees. It operates from a number of premises in the North Tees and Hartlepool region.

8. The claimant began her employment with the NHS in 1979. From 2008 she was employed as a clinical care co-ordinator for the Stockton region for the District Nursing Service. On 13th June 2013 she was transferred to Hartlepool where she operated from the Masefield and Hartfields premises. The claimant was responsible for the management and provision of high quality patient care in the community and had operational leadership and management of the district nursing team, which included approximately 50 employees. That role included allocating nursing staff, monitoring absences, fielding and relaying nurses concerns and mobilising the workforce to ensure the effective and efficient operation of services in the locality. The claimant also had responsibilities for risk management and identifying safeguarding concerns, in addition to her usual nursing responsibilities. At the time of her dismissal, the claimant had 38 years continuous service with the national health service during which she had a clean and unblemished employment record.

9. Between February and October 2014, the claimant was absent from work due to illness, having been diagnosed with bi-lateral breast cancer. The claimant returned to work in her previous role and with her previous duties and responsibilities. In July 2015 the Care Quality Commission (CQC) undertook a visit and inspection, following which the claimant was personally commended for the manner in which she conducted her team and for the quality of care and leadership skills she demonstrated. The claimant also received positive feedback from the Nursing and Midwifery Council (NMC), in which particular mention was made of the claimant's work and the positivity and enthusiasm of the claimant's team under her management.

10. At around this time, the claimant considered that her team of district nurses had become subjected to an increasing workload as a result of a change in policy by the local authority. That change in policy required the respondent to monitor those patients who had been prescribed medicines, so as to ensure that the correct medicines were being taken at the correct time. This task became known as "meds prompts". It was accepted that this caused a considerable increase in the workload of each individual district nurse. The claimant also required her district nurses to ensure that each patient was properly treated in accordance with their individual care plan and that any problems of potential problems were properly recorded on the NHS "Datix" system.

11. As a result of this increased workload, considerable pressure was placed upon those district nurses undertaking this work. Incidents of absences due to stress and anxiety began to increase. That in turn put additional pressure upon those district nurses who remained at work. In addition, there were further difficulties with the respondent's IT system, which increased those levels of stress.

12. The respondent operates a "risk assessment register", which all employees are encouraged to utilise. The system is designed to enable those employees who have genuine concerns to record those concerns insofar as they amount to a risk of any kind. The risk register is examined by the senior management team (SMT) whose duty it is to implement those steps necessary to ensure that such risks are minimised or removed. The claimant began to express concerns about a number of matters which she believed were impacting upon her team of nursing staff and

thus upon the quality of care being provided to patients. The claimant began to raise those concerns with her managers, either verbally or in writing, or by making entries on the risk assessment register. It is the claimant's case that between 21st December 2015 and 21st October 2016, she reported 13 matters in terms which she alleges amounted to qualifying and protected disclosures, as defined in paragraph 114 below.

13. (PID1). On 21st December 2015 the claimant recorded an entry on the risk register (page 716 – 717). The claimant recorded that a recent requirement to undertake med prompts was putting pressure on the district nursing services resources. This related to a sudden increase in approximately 1,000 extra visits per month by the service, with no extra resources.

14. (PID2). On 25th May 2016 during a meeting with Julie Parks, the claimant set out her concerns regarding the staffing situation and the effect this was having on patients safety. The claimant also referred to the respondent's failure to retrain care assistants and the failure to engage occupational health top manage and assess staff's stress levels, as the claimant had previously requested. Miss Parks in her witness statement at paragraph 3 acknowledges that this meeting took place and these matters were discussed.

15. (PID3). On 1st August 2016 the claimant attended a meeting with Lindsay Robertson (Associate Director) and Caroline Fitzsimmons (Senior Clinical Matron). During that meeting the claimant informed managers of her concerns about staff attending university, which reduced the number of staff available to attend patients and the effect this was then having on patients` safety. These matters were acknowledged by Ms Robertson as having been discussed at page 533 in the bundle.

16. (PID 4). On 5th August 2016 the claimant recorded an entry on the risk register (page 716 – 717) regarding the reduction in staffing resources in Hartlepool district nursing. That entry was rated 12 on the register which means "possibly major harm or likely severe harm". The reason for the entry was because staff were being moved around the Trust, which was not under the claimant's control and which the claimant believed endangered those members of the public who were using the respondent's service. Furthermore, the staffing resource concerns also put further pressure on the existing nurses who became increasingly unwell and insufficiently supported.

17. (PID5). On 11th August 2016 at a meeting between the claimant, Steve Pett (General Manager, Specialist Services and Partnership) and Julie Parks, the claimant again expressed her concerns about staffing levels and requested additional funding to engage additional healthcare assistants. Ms Parks accepted under cross examination that these matters had been discussed at this meeting.

18. (PID6). On 5th September 2016 in an e-mail to Caroline Fitzsimmons (Assistant Director of Nursing) the claimant complained about the lack of action regarding healthcare assistants being retrained in supporting patients with medication, the lack of support from occupational health to undertake a team-wide stress risk assessment, that staff were struggling with the volume and complexity of calls,

that staff were being unable to function adequately in their roles as Band 6 staff (which resulted in mandatory training suffering with Band 6 staff being unable to complete their Datix investigations) and the team generally being unable to undertake clinical supervision as required by the respondent's policy. The claimant drew further attention to increasing staff sickness and absence, informal complaints from patients, changes in the management of the influx of calls and how that impacted on front-line staff, the number of near misses over that weekend (where patients may not have received the call they needed) and general concerns for patient safety as "the situation is no longer sustainable and is causing staff unnecessary stress".

19. (PID7). In a second e-mail dated 5th September 2016 to Caroline Fitzsimmons, Emma Campbell and Steve Pett, the claimant expressed concerns generally regarding the staffing situation and the effect this was having on patients safety, failure to retrain healthcare assistants and failure to engage occupational health as requested.

20. (PID8). On 12th September 2016 in an e-mail to Caroline Fitzsimmons, the claimant expressed concerns about covering for staff when they had to attend university, which increased pressure on remaining staff, whose workload would become unmanageable.

21. (PID9). On 8th October 2016 at a meeting with Steve Pett, Emma Campbell (Head of Nursing) and Mel Cambidge (Senior Clinical Matron) the claimant informed those persons that, as a result of the decrease in staff levels, the nurses and staff were now unable to function in their roles. This meeting had been triggered by the death of a patient on 4th October 2016, which the claimant felt may have been preventable, had her earlier concerns been properly addressed.

22. (PID10). On 13th October 2016 in an e-mail to Melanie Cambidge, Emma Campbell and Steve Pett, the claimant reported that the use of bank staff was failing to provide continuity and was thus a risk to patients safety.

23. (PID11). On 14th October 2016 in an e-mail to Melanie Cambridge, Emma Campbell, Steve Pett and Kirsty McKay (HR Advisor) the claimant reported her team's sickness records and staff absences as a result of work-related stress and asked for a stress risk assessment to be carried out.

24. (PID12). On or about 14th October 2016 the claimant met with the respondent's safeguarding lead nurse, Mr Stuart Harper-Reynolds and reported to him the concerns on the quality of care delivered to a patient and expressed concerns generally regarding what was happening with the increase in safeguarding issues in the Hartlepool district.

25. (PID13). On 21st October 2016 at a meeting with Mr Stuart Harper-Reynolds, the claimant asked for her previous complaints to be properly addressed particularly her concerns in respect of staff sickness and work-related stress. The claimant also drew Mr Harper-Reynolds attention to the failure to provide additional funds and staff support.

26. The claimant took a period of annual leave from 26th October 2016 to 30th October 2016. Upon her return to work on 31st October 2016, the claimant was informed that she was being suspended for a period of 10 days with effect from 31st October 2016. The notice of suspension letter appears at page 492 in the bundle and states as follows:-

> "This notice is to inform you that you are suspended from duty for a period of 10 days with effect from 31st October 2016. This suspension is to allow an investigation to take place following allegations of potential gross misconduct relating to concerns regarding your leadership and also concerns in relation to inappropriate and unprofessional behaviour including bullying and harassment."

No further details of the allegations were set out in the letter.

27. The respondent's principle witness about the circumstances behind the claimant's suspension, was Ms Julie Parks, Care Group Director. Ms Parks first met the claimant on 25th May 2016, shortly after Ms Parks had been appointed to that role. Ms Parks intention was to meet the various community teams on an informal basis. A number of matters were discussed, including the claimant's concerns about the meds prompts and the impact upon the team's workload which that had caused. Following that meeting, Ms Parks thanked the claimant "for her enthusiasm, commitment and professionalism".

28. Ms Parks was then copied into the claimant's e-mail of 5th September 2016 (PID7). Ms Parks then met the claimant and her team on 28th September 2016, having promised to do so at the first meeting in May. In her statement at paragraph 9, Ms Parks confirmed that during this meeting, the team raised concerns relating to staffing levels, workload pressures and IT issues. Ms Parks then goes on to state as follows:-

> "I had some concerns on leaving this meeting; nothing about what was tangibly said, however, body language, eye contact and how the meeting was conducted somewhat orchestrated. Following this meeting I was due to attend a GP evening engagement event; I expressed my concerns to Emma Campbell (Head of Nursing) and requested her to individually meet with staff starting with the Band 6 nurses to talk to them about their concerns and their views as to what could be done to improve the service. Subsequently I understand that a number of staff sent Emma Campbell a text message to the effect they were not allowed the time by Linda to meet Emma and could they meet her after work."

At paragraph 10 of her statement, Ms Parks states as follows:-

> "In order to begin to address the concerns raised I asked Emma Campbell, Steve Pett and Lynne Morgan and Mel Cambidge to support the team". No details are given of the "concerns raised". Those could only relate to Ms Parks assessment of "body language, eye contact and the meeting feeling somewhat orchestrated".

At paragraph 11 of her statement, Ms Parks states as follows:-

> "It is important for me to state, that prior to this series of events, albeit I had heard some negativity in relation to Linda from my time spent in Manvale House the then office base for community services, in my interaction initially I had found to be helpful, she articulated good ideas and was knowledgeable."

In paragraphs 12 – 14 of her statement, Ms Parks then goes on to make a number of less flattering comments about the claimant such as:-

> "Linda did not appear always to be positively engaged. When assistance was offered by peers this was not willingly accepted. Linda seems to have a perception that it was interfering. I was concerned that Linda was openly critical of the district nursing teams in Stockton and Billingham. There was a tangible feel of unease from the staff, there was always a negative. I did not see evidence of tangible support from Linda. I did not see attempts by Linda to calm the situation or provide reassurance. I was concerned that issues were being someone else's fault with Linda pointing the blame at peers or management. I believe that Linda had no insight into her behaviour with attempts to discuss support being seen as criticism. Some of the staff individually voiced concerns about culture and behaviours (favouritism and bullying) within the Hartlepool nursing team and examples of Linda's own behaviours were evidenced in working with senior colleagues – this gave cause for concern. Following a serious untoward incident involving a patient, these behaviours became more apparent."

When pressed about these matters by Mr Rudd in cross examination, Ms parks was unable to provide any examples of the kind of behaviour she purported to describe. When pressed, Ms Parks had to agree that she could give no specific examples of the claimant not positively engaging with her action plan. Ms Park had no notes of any meetings with any of the members of staff and confirmed under cross examination that she had not witnessed any examples of the kind of behaviour she describes in her statement. All she could state was that there was a "perception" from Steve Pett and Emma Campbell about the claimant's behaviour. When asked to describe the kind of behaviour she refers to at paragraph 13, Ms Parks described the claimant as "strident, angry, over-assertive. Some of her demeanour and body language". Again, no specific examples were provided. Ms Parks simply stated that she expected the claimant to act as a role model for her team and to make sure that she did not display those traits. When pressed about the meeting on 21st October, Ms Parks accepted that this had been an extremely difficult team meeting at which the claimant had become visibly upset. Ms Parks somewhat reluctantly conceded that she had not personally witnessed the claimant's reaction in the meeting of the 21st October. Ms Parks accepted that her description in paragraph 13 of her statement that "these behaviours became more apparent" was inaccurate because only those examples set out in paragraphs 12 and 13 were relevant. The tribunal found that Ms Parks had exaggerated her description of the claimant's allegedly negative behaviour.

29. It was immediately following this meeting that the claimant was due to go on annual leave from 26th to 30th October. At paragraph 17 of her statement Ms Parks states as follows:-

> "Mel Cambidge and Debbie Griffiths continued to support the team. Further concerns were raised in relation to how the team was functioning, how calls were being managed that Band 6 nurses appeared to be disempowered and not accurately informed of the management action taken to support the team. Some members of the team spoke about divisiveness in the team; favouritism and extreme reactions by Linda to what would appear to be reasonable requests. Working practices by capable individuals appeared dysfunctional."

When pressed again in cross examination, Ms Parks was unable to describe the "concerns" which had been raised, nor was she able to state by whom they had been raised, when they were raised, what they were about. Ms Parks was unable to produce any notes of any such discussions. She was unable to provide any examples of favouritism or extreme actions of the claimant. All Ms Parks could tell the tribunal was that she believed there were "themes" about the claimant's behaviour which had become apparent. Ms Parks referred to 1.1 meetings between Emma Campbell and certain members of staff, but there were no notes of those meetings. No examples were given of "favouritism" and Ms Parks was unable to give any specific examples of bullying or harassment. The only matter to which Ms Parks referred (but which was not in her statement) was a telephone call which had been received from the husband of Anne Horsfield (a district nursing sister) stating that he did not wish his wife (then absent through illness) to receive a home visit from the claimant. That home visit was instead carried out by Steve Pett and Emma Campbell. Ms Parks was unable to explain why two such senior managers had considered it appropriate or necessary to carry out a home visit to a Band 6 nurse who was absent through illness.

30. The suspension itself is dealt with at paragraph 18 of Ms Parks statement. That paragraph states as follows:-

> "Once I identified these concerns in relation to Linda's management of the team, these were discussed with the Director of Nursing and Patient Safety who we had ensured was kept up to date with the issues and actions taken (also as part of the broader Trust quality, safety and governance process). Any decision to suspend a registered nurse can only be made by the nursing director. As an outcome of our concerns, a decision was taken to commission a disciplinary investigation and to suspend Linda to allow the investigation to take place."

"These concerns" were those referred to in paragraphs 15 – 17. The Director of Nursing and Patient Safety is Ms Julie Laing. Asked in cross examination to explain "our concerns" Ms Parks referred to concerns about "bullying, controlling behaviour and favouritism". Again she could provide no specific examples. When asked to identify the "we" who had kept Ms Parks up to date with the issues, Ms Parks confirmed that it was herself and Lindsay Robertson (Deputy Director of

Nursing). Ms Parks confirmed that they had agreed on 21st October "to try and release the claimant from operational duties so that she could support her team". Ms Parks confirmed that there were no notes of the meeting which took place with Julie Laing, but that she had informed Ms Laing of a telephone call from Anne Horsfield's husband, what had been said at the subsequent welfare visit to Anne Horsfield and that Ms Parks had "told Julie Laing of some of the comments of the Hartlepool staff". Ms Parks stated in cross examination that the decision to suspend had been made by Julie Laing, but was based upon the information provided by Ms Parks. Ms Parks accepted that a decision to suspend a Band 7 nurse was a serious and crucial decision. Ms Parks insisted that it was done because "we wanted a transparent investigation".

31. Ms Parks was referred to the suspension letter at page 492 which refers to no more than "allegations of potential gross misconduct relating to concerns regarding your leadership and also concerns in relation to inappropriate and unprofessional behaviour including bullying and harassment." Ms Parks accepted that these were generic terms and that the letter did not set out actual reasons for the claimant's suspension. Ms Parks accepted that at this stage the claimant had no idea why she was being suspended.

32. Ms Parks was somewhat confused about the respondent's policy relating to suspension. She insisted that only Ms Laing in her capacity as Director of Nursing, was authorised to suspend a Band 7 nurse. Ms Parks was unable to refer the tribunal to any part of the respondent's policy which says that. In fact the policy states, "only a member of the Trust's senior management may take the decision to suspend an employee". Ms Parks accepted that the claimant and other members of staff would not know that only Ms Parks could suspend one of the nurses.

33. At page 61, paragraph 3.7 of the respondent's disciplinary process relating to suspension states:-

> "a suspension meeting will be held. Staff who are not on duty and are to be suspended must be contacted by telephone or in person and asked to attend the meeting which should be arranged at the earliest convenience and before they report for duty."

At paragraph 3.9, the policy goes on to state:-

> "at the suspension meeting the suspending manager will give a broad outline of the allegation that is to be investigated and why suspension is appropriate. The member of staff may be asked to collect any personal belongings and to leave the premises without delay."

34. Section 2 of the disciplinary policy "Formal Investigation" at page 60 states as follows:-

> "2.1 the general manager/senior manager for the area concerned in conjunction with HR will be responsible for identifying and contacting appropriate managers to conduct a formal investigation and agreeing

> the scope of the investigation. Investigating officers will agree the arrangements for the administration of the investigative process. The investigation should take no longer than 20 working days wherever possible."

Ms Parks confirmed that she and Steve Pett were responsible for identifying and contacting the manager who was to conduct the investigation and to agree the scope of the investigation. Ms Parks informed the tribunal that she discussed with Ms Laing who would do the investigation. Discussion took place after the decision had been made to suspend the claimant. Again, Ms Parks was unable to produce any notes of her discussions with Ms Laing as to who would carry out the investigation. She was unable to produce any notes about her discussion as to what was to be the scope of the investigation. She was unable to produce or indeed refer to any letter to the investigating officer setting out the scope of the investigation. When asked how the officer was to know the scope of the investigation, Ms Parks simply referred to "allegations of bullying and harassment", which she again accepted was a generic term. Ms Parks accepted that specifics about any allegations were never given to the investigating officer. At this stage, the only detail was that set out in the suspension letter. When asked in cross examination how an employee could possibly defend allegations which had not been properly set out, Ms Parks accepted that they could not.

35. Ms Parks was then referred to paragraph 2.4 of the disciplinary process, again relating to the investigation, which is also at page 16 of the bundle and states:-

> "Where the investigation outcome is likely to be of a disciplinary nature and the employee concerned has a case to answer, the investigation officer will refer the case to the manager who originally requested the investigation for a decision regarding referral to a disciplinary hearing."

Ms Parks confirmed that the "manager" in this case would be Julie Laing. Ms Parks was unable to state whether the matter had ever been referred back to Julie Laing and was unable to refer to any letter or e-mail dealing with the matter.

36. Clause 2.5 of the procedure states as follows:-

> "In either case, the employee will be informed of the outcome of the investigation in writing within five working days of the conclusion of the investigation."

It was put to Ms Parks in cross examination that the investigation report was completed in April 2017, but was not sent to the claimant until October 2017.

37. It was put to Ms Parks that the claimant had originally been suspended on 31st October 2016 and that her suspension thereafter continued for some 18 months until she was dismissed on 16th April 2018. Ms Parks was aware that the respondent's policy states that suspension will last for no more than ten working days, although this may be reviewed or extended at the discretion of the trust. It was accepted that the suspension had been extended by letter dated 9th November 2016 (page 436) and again on 6th December 2016 (page 507). On

neither of these occasions had Julie Laing's permission being sought to extend the suspension. Ms Parks was unable to produce any further documentation confirming further extension of the claimant's suspension.

38. At paragraph 22 of her statement, Ms Parks states that she understood the claimant was due to be interviewed on 10th January 2017. Ms Parks accepted under cross examination that even by this stage, she knew that the claimant still did not have details of the allegations against her. Ms Parks accepted that she did not mention this as she "assumed it had been done by HR". Ms Parks was also referred to other discrepancies in correspondence between the respondent and the claimant, including reference in the letter at page 656 dated 2nd March 2017 which refers to Steve Pett as the suspending officer and the letter of 14th March 2017 which refers to Ms Parks as the disciplining officer. When asked why it was necessary to suspend the claimant, Ms Parks referred to the potential for the claimant to have impacted upon the investigation. Ms Parks could not explain how the claimant's continued presence at work could impact on an investigation which had not yet begun. Ms Parks was referred to her letter of 24th May 2017 to the claimant's trade union representative, when Ms Parks states that a review had been undertaken on 2nd March 2017 when, "it was felt that the continued suspension was appropriate in each circumstance". In cross examination, Ms Parks accepted that she had no direct knowledge of those circumstances and that simply put her name to and signed a letter prepared by HR. Ms Parks accepted that she could and should have checked with HR before signing the letter, but had not done so.

39. Ms Parks accepted that no specific grievance or indeed specific complaint about the claimant had been raised by any member of staff before the claimant was suspended. However, when the claimant raised a formal grievance about other members of staff, none of those were suspended. Ms Parks insists that the reason why the claimant had to be suspended was due to the nature of the "allegations of bullying by Linda Naylor and Anne Horsfield".

40. Ms Parks was asked by the tribunal whether she had considered whether any concerns about the claimant's performance would be better being dealt with under the respondent's performance management procedure. Ms Parks insisted that the respondent's concerns about the claimant related more to her conduct than her capability. Ms Parks accepted however that her "series concerns" about the claimant had never been specifically raised with the claimant prior to her suspension. Ms Parks position remained that the trigger for the claimant's suspension was the conversations with Anne Horsfield and Linda Naylor. Those, in addition to the "themes" which came out of the meetings with the district nurses, was sufficient for Ms Parks to consider that suspension and disciplinary action were appropriate.

41. The investigation into the allegations against the claimant was conducted by Lesley Wharton (Assistant Director of Nursing) with the assistance of Helen Grant (HR Business Partner). The investigation report appears at pages 718 – 743 in the bundle. It is dated "April 2017". It is clear from the appendices that the first interview of staff members took place on 2nd December 2016 and that last on 14th March 2017. There are notes of meetings with 23 employees in addition to the

claimant. Nowhere in the report is there any mention of any instructions to the investigating officer as to what was to be the scope of the investigation. Nowhere in the appendices is there any mention of the letter of suspension dated 31st October 2016. Paragraph 1.1 of the investigation report headed "Summary Report", states as follows:-

> "An investigation was conducted into allegations relating to concerns around Linda Fairhall's leadership and in relation to inappropriate and unprofessional behaviour including bullying and harassment displayed by Linda Fairhall towards colleagues. This report was produced by Lesley Wharton, Investigating Officer, and Helen Grant, HR Business Partner at the request of Julie Parks, Associate Director, out of hospital care, in line with the trust disciplinary policy (HR 24) (Appendix 1)."

On page 25 of the report (P742 in the bundle) there's a final paragraph headed "Conclusion" which states:-

> "7.1 It is the view of the investigating officer that there is evidence of ineffective leadership and inappropriate behaviour by LF which could be seen to constitute gross misconduct.
>
> 7.2 LF described herself consistently as a flexible manager who supported staff, however the majority of witnesses interviewed perceived her management style in a different way and felt disempowered and undervalued."

Nowhere in that conclusion is there any mention of "bullying" or "harassment". No examples are given of the alleged "ineffective leadership" and how that could possible amount to gross misconduct. No examples are given of the "inappropriate behaviour", or again how that could amount to gross misconduct.

42. Ms Wharton in her capacity as investigating officer was not called by the respondent to give evidence to the employment tribunal. There were no witness statements submitted on her behalf. No explanation was given by the respondent as to why Ms Wharton did not give evidence to the tribunal, particularly when the conduct of the investigation and the contents of the report were clearly being challenged by the claimant. No explanation was given to the tribunal as to the delay between the claimant's suspension on 31st October 2016 and the first interview (with Mr Steve Pett) on 2nd December 2016. No explanation was given as to why Lisa Naylor and Anne Horsfield (alleged to be the principle complainants) were not interviewed until 11th January 2017 and 3rd March 2017 respectively. No explanation was offered as to why it took until "April 2017" for the investigation to be completed and no explanation as to why the investigation report was completed in April 2017, but not sent to the claimant until October 2017.

43. The Respondent`s disciplinary procedure HR24 appears at page 59 in the bundle. Set out below are the relevant extracts insofar as they apply to the claimant's case.

1.8 Before a full investigation is requested, the line manager should take the following points into consideration in order to ascertain that this is the best course of action:-

- What is the allegation? What has allegedly been breached or what misconduct has allegedly been committed? Does this fall outside of the trust for investigation purposes?
- What specifically happened and what was the impact?
- Did the person that reported the issue witness the incident?
- Are there any witnesses to the incident?
- Are there any underlying issues or mitigating circumstances?
- Is the issue totally out of character and an isolated incident or are there any patterns of the behaviour and is there a comprehensive order trail?

2 Formal investigation

2.1 The general manager/senior manager for the area concerned in conjunction with HR will be responsible for identifying and contacting appropriate managers to conduct the formal investigation and agreeing the scope of the investigation. Investigating officers will agree the arrangements for the administration of the investigative process. The investigation should take no longer than twenty working days wherever possible.

2.2 The investigating officer will write to the employee to inform him/her of:-

- The allegation made against him/her
- To advise that an investigation is taking place in accordance with the trust's disciplinary policy
- That the investigation is not disciplinary action itself
- To inform the employee that they are required to attend an investigatory meeting
- To confirm the right to be represented by a work colleague employed by the trust or a trade union representative

2.4 If the investigation outcome is likely to be of a disciplinary nature and the employee concerned has a case to answer, the investigating officer will refer the case to the manager who originally requested the investigation for a decision regarding referral to a disciplinary hearing.

2.5 In either case the employee will be informed of the outcome of the investigation in writing within five working days of the conclusion of the investigation.

44. The letter notifying the claimant of her suspension dated 31st October 2016 was sent to the claimant by Steve Pett and copied to Helen Grant. There is no letter from Helen Grant as the investigating officer to the claimant in accordance with paragraph 2.2 above. There is no evidence that Ms Grant referred the case back to Julie Laing or Julie Parks for a decision regarding the referral to a disciplinary hearing. The claimant was not informed of the outcome of the investigation within

five working days of its conclusion. The investigation itself took far longer than twenty working days. No explanation was given to the tribunal about any of these matters.

45. Another matter of concern raised by Mr Rudd with the respondent's witnesses was the nature of the questions which were put to the persons interviewed by Lesley Wharton. Examples of the questions put are as follows:-

- LW asked LM if she has had any personal experience or if anybody has come to her to talk about any incidences where LF has displayed inappropriate behaviour
- LW asked if EC witnessed LF speaking inappropriately to CCCs and members of the team
- LW asked if LF was critical of the way district nursing was run at Stockton
- DG was asked if she had experience personally or witnessed LF's behaviour that could be classed as bullying or inappropriate in terms of leadership
- LW asked if there was anything else that LN had felt LF had said that was inappropriate or felt as if she was bullying
- LW asked EN if she had witnessed or experienced any incidents which could have been perceived by bullying by LF
- LW asked JH if she had witnessed any behaviour by LF which could be deemed as inappropriate or bullying or had experience of this personally
- LW asked BS if she had witnessed any incidents where it could be deemed LF had acted unprofessionally/bullying
- LW asked DR if she had personally experienced or witnessed any behaviour by LF which could be deemed as unprofessional or bullying
- LW asked WL if she had experienced or witnessed any behaviour displayed by LF which could be perceived as inappropriate or bullying
- LW asked JNC if she had personal experience or witnessed any behaviour by LF which could be perceived as unprofessional or inappropriate
- LW asked if CW had experienced/witnessed any behaviour which she viewed as bullying or inappropriate
- LW asked AH if she had experienced or witnessed Linda Fairhall displaying inappropriate behaviour which could have misconstrued as bullying
- LW asked AF if she had personally witnessed or experienced any behaviour by LF which could be described as inappropriate or unprofessional

46. In the absence of the investigating officer herself, Mr Rudd put to Ms Grieves (the dismissing officer) that these were effectively "closed" questions, designed to indicate to the interviewee that they were being required to provide such examples. Ms Grieves initially resisted Mr Rudd's suggestion that these were unreasonable questions. She did however, somewhat reluctantly, concede that a more open question may have produced a more open response which was not limited to providing negative information about the claimant. Ms Grieves also accepted that there is an obligation upon an investigating officer to look for matters which may exculpate the employee with the same vigour as those which may convict him. In the absence of the investigating officer and on the basis of the evidence put before it, the tribunal found that the nature of the questions put to those interviewed indicated that the respondent was unreasonably slanting its

investigation to obtain information which would substantiate any disciplinary action against the claimant.

47. Section 5.1 of the investigation report is headed "Concerns regarding the leadership of Linda Fairhall". This part of the report again refers to "themes", without providing any meaningful or specific details of the criticism of the claimant's leadership. The report deals with health rosta/rotas, the Datix system, care plans, risk assessments and med prompts. The report suggests that the claimant had a somewhat controlling nature and that as a result many of her subordinates felt "disempowered". Criticism is made of the failure of the claimant to recruit additional health care assistants, to properly book agency staff and to properly arrange leave for staff who were to go on secondment or study leave. Criticism is made of sickness within the team, which again put further pressure on those who remained at work. The report suggests that the claimant could have managed these matters more efficiently if she had escalated her concerns to the senior management team. The report suggests that those at the Masefield Road site felt micromanaged by the claimant who was based there, whilst those at Hartfield's felt unsupported. It was suggested that this produced a "them and us" culture, with those at the Hartfield site referring to themselves as the "raggy dolls" because they felt like "rejects". There were suggestions that there were inconsistencies in the way leave was allocated, with those favoured by the claimant being granted leave in circumstances where others would not be granted leave. The claimant provided an explanation for each of these allegations. The claimant insisted that there was no favouritism whatsoever and that at all times she properly and fairly implemented the respondent's policies. The claimant insisted that she had appropriately escalated matters to the senior management team and provided specific examples of when she had done so. When those matters were put to the respondent's witnesses at the tribunal, those witnesses conceded that the claimant had in fact done so. The respondent's witnesses also conceded that the entire department was working under incredible pressure because of volume of work and lack of human and other resources. None of the respondent's witnesses could explain why any perceived shortcomings in the claimant's performance would not more properly have been dealt with under the respondent's performance management policy/procedure. The tribunal found that no reasonable employer in all the circumstances of this case would have concluded that the allegations against the claimant in this regard were such that they could possibly amount to gross misconduct. Nothing was put before the tribunal to show that the investigating officer had even contemplated whether the capability procedure should have been followed, rather than the disciplinary policy.

48. Section 5.2 of the report is headed "Inappropriate and unprofessional behaviour including bullying and harassment". Under that heading the report deals with the district nurse meetings, interviews of Lisa Naylor, Anne Horsfield, Jenny Harper**,** Debra Royal and Wendy Linley. As those are the only interviewees mentioned in this part of the report, the tribunal found that those were the only ones whose evidence to the investigating officer could possibly amount to inappropriate behaviour, unprofessional behaviour or bullying or harassment.

49. The allegation by Lisa Naylor was that she had not been allowed to self-certify for sick leave when her daughter was ill with leukaemia, had not been given a graduated return to work following that illness and that she had been told at a meeting when she had challenged the claimant, "you just need to stop winging and get on with it".

50. Anne Horsfield alleged that she had been told by the claimant "you need to go to OHD" when she had informed the claimant that she was stressed. The claimant was alleged to have told Anne Horsfield to "stop crying" whilst on sick leave. The claimant is alleged to have telephoned Anne Horsfield to say such things as "you know I've done everything I could – I'm not leaving district nursing. I've got things to do. I'm not leaving my girls". Anne Horsfield had also been told by a colleague that she (the colleague) had been told by the claimant that she (the claimant) had been summoned to HR to be suspended because she believed Anne had said she had not been properly supported. Ms Horsfield alleged that she "felt controlled" by the claimant.

51. Jenny Harper alleged that the claimant had questioned her about why she had gone on a joint visit with another colleague and that this had been put to her in front of the rest of the team which made her feel "belittled". Ms Harper felt that her "card" had been marked following a disagreement with the claimant regarding community matrons who had been involved in the care of a patient.

52. Debra Royal complained that she had been told by the claimant that she was being sent to work in another area from the following Monday and that this was not open for discussion. Ms Royal also alleged that the claimant had asked care home staff to rate the district nursing staff "out of ten" and that the district nursing staff were then asked to rate the care home staff in the same way. That is alleged to have made all the staff feel uncomfortable and which Ms Royal described as "bizarre".

53. Wendy Linley complained the claimant insisted that if any of the sisters had an issue with another sister then they should deal with it through the claimant rather than deal with it themselves. Ms Linley believed that she had subsequently been moved to another team as a consequence of that conversation.

54. In each case the claimant gave an explanation about these matters. The claimant's case was that it was her role to manage her team and that she had to do so in extremely difficult and stressful circumstances. The claimant denied that any of her actions **could** be described as unprofessional, inappropriate, bullying or harassment.

55. On the evidence before it, the tribunal found that no reasonable employer in all the circumstances of this case could have categorised the claimant's behaviour, even if as alleged by the nurses, as either bullying or harassment. If it amounted to inappropriate or unprofessional behaviour, no reasonable employer would have categorised it as gross misconduct.

56. Section 6 of the report is headed "Summary of findings". Nowhere in that summary are there any examples given of what could reasonably be described as

bullying. Those interviewed said that they felt they would not be able to work with the claimant again. The claimant claimed that a number of staff (three in particular) were disrespectful to her and that the behaviour of MC and DG towards her was inappropriate.

57. The tribunal found that there were no meaningful specific findings made by the investigating officer which could reasonably be categorised as potential gross misconduct.

58. This lack of detail or particularity continued throughout the disciplinary process. The letter inviting the claimant to a disciplinary hearing is dated 12th October 2017 and appears at page 461 in the bundle. It states as follows:-

> "You are required to attend a disciplinary hearing in accordance with the trust's disciplinary policy and procedure HR24. The meeting has been arranged for the investigation into the allegations regarding your leadership and inappropriate and unprofessional behaviour including bullying and harassment. A copy of the investigation report and the trust disciplinary procedure are enclosed."

Nowhere in that letter is there a single example of what is said to constitute poor leadership, inappropriate behaviour, unprofessional behaviour, bullying or harassment. It was put to each of the respondent's witnesses in cross examination that at no time during the investigation process was the claimant ever made aware of the precise nature of the allegations against her. The respondent's witnesses agreed that she had not been made aware. It was put to them that the claimant remained unaware of the precise nature of the allegations when she received the letter inviting her to the disciplinary hearing. All again conceded that the claimant remained unaware. It was also put to them that by the time of the disciplinary hearing itself, the claimant remained unaware of the precise nature of the allegations against her. Again, all conceded that the claimant remained unaware. The respondent's witnesses did initially maintain that the claimant would be able to extract from the investigation report, exactly what the allegations were. However, under vigorous cross examination by Mr Rudd, all conceded that it was unfair on the claimant not to be specifically informed as to what each individual allegation was, as without that information the claimant could not properly prepare her defence.

59. Although the investigation report was complete in April 2017, it was not sent to the claimant until 12th October 2017. The next material step in her chronology was a formal grievance raised by the claimant on 7th May 2017. The grievance hearing took place on 6th July 2017 and the grievance outcome letter was dated 20th December 2017. The claimant appealed against that outcome by letter dated 4th January 2018 and the appeal hearing took place on 19th March 2018. The appeal was rejected by letter dated 29th March 2018. The respondent's evidence to the tribunal was that the disciplinary proceedings against the claimant were originally intended to be heard on 7th September but had to be postponed due to the bereavement of the claimant's long-term partner and because it was considered appropriate to hear the claimant's grievance before dealing with the disciplinary hearing. The grievance procedure is dealt with later in this judgment, because in

the intervening period a further allegation of misconduct was raised against the claimant.

60. On 24th October 2017 Alison Blakey (Clinical Care Co-ordinator) was clearing out filing cabinets while searching for some missing files. One of the filing cabinets in question had been used by the claimant and remained locked. It was accepted that the claimant on the occasion of her suspension, had not been given the opportunity to remove any personal belongings from her desk or filing cabinet. It was further accepted that no attempt was made to contact the claimant to enquire as to the whereabouts of the keys for the cabinet and the drawers, or to give the claimant the opportunity to be present when the cabinet and drawers were open. Ms Blakey decided to open the drawers and the filing cabinet using a knife from the kitchen. This was done in the presence of Laura Bralisford, Julie Morfitt and Victoria Bonner, all of whom are staff nurses. When the drawer was opened, it was found to contain a number of envelopes containing cards and money. The money comprised coins and notes. Ms Blakey removed everything from the drawers and took them to an office in the presence of the staff nurses to check the contents. Those contents included a letter referring to a donation of £220.00 from a patient's family, a folded piece of paper with patient details and an amount of £30.15 written on it and a total of £780.00 in cash. The contents of the drawer were then given to Caroline Fitzsimmons for safe-keeping. General Manager Linda Hunter was informed of the contents. Formal statements were provided by those who had been present and appear at pages 822 – 826 in the bundle. By letter dated 27th November 2017 (page 855) the claimant was invited to attend an investigation meeting "following concerns regarding allegations that you failed to adhere to the trust's standing financial instructions and charitable funds procedures handbook".

61. Notes of the investigation meeting between the claimant and Marion Gowland appear at page 870 – 873 in the bundle. At the start of the meeting the claimant was informed that a set of locked drawers in the office had been found to contain items which related to charitable donations. The claimant confirmed that she had one set of drawers which were locked and that she had never loaned or given the keys to anyone else. When asked if she understood the formal procedure relating to charitable donations, the claimant confirmed that "she would not accept any money from patients or relatives as this is against the NMC code of conduct. However two members of staff had accepted monies, Louise Siddle and Danielle. On another occasion Barbara Swan had a period of absence during which time money had been found in her drawer and this had been there for some considerable time. The claimant confirmed that she had taken these monies to protect the members of staff and subsequently discussed handling of charitable donations at a **staff** meeting, giving staff the finance code for the appropriate fund and reminding them that they could not accept money as they could be accused of dishonestly handling funds.

62. The claimant was shown the thank-you card, post-it note and plastic wallet and was told the amounts of cash which each had contained. The claimant had confirmed that one of the envelopes (a cash donation of £260.00) had been seen by her because that was the one Barbara Swan had received. The claimant confirmed that she and Barbara Swan had counter-signed the envelope to confirm

that the money had been paid in. The claimant confirmed that she remembered the donation of £220.00 by cheque. The claimant stated that she didn't have any knowledge of the card with a cash donation of £200.00, the envelope containing £80.00, the donation slip relating to £30.15 and the post-it note relating to a cash donation of £221.95. A further envelope shown to the claimant was confirmed by her to relate to monies for the sale of cards on behalf of Macmillan nurses as well as the claimant's own Macmillan charity donations. The claimant was asked about an "IOU" on the reverse of one of the envelopes in the sum of £10.00. The claimant confirmed that she had used to £10.00 to purchase kneeling mats for the staff, but these had been funded from the claimant's own money. The claimant denied knowledge of sums up to £800.00.

63. A further investigation meeting took place on 4th January 2018. Notes appear at pages 911 – 916. The investigating officer was again Marion Gowland. The claimant confirmed when asked that she had only accepted cash donations on two occasions. The claimant identified two of the envelopes, but could not explain why they referred to £260.00 and £220.00. The claimant insisted that she was unaware that there had been £800.00 in the drawer and said if she had known it was that sum, then she wouldn't have been able to sleep at night. It was put to the claimant that £48.00 had been "borrowed" from the drawer and the claimant was asked to confirm that this was from her own money. The claimant was unable to recall exactly how long the money had been in the drawer. It was put to the claimant that the amounts of money indicated on the envelopes and documents totalled £892.10, whereas the money found in the drawer (not including the plastic envelope of money) totalled £861.95. There was accordingly a shortfall of £30.95. Marion Gowland went on to say "it looked like miscellaneous use of £38.00 and the use of £10.00 from LF's own money, but with no receipt – MG asked LF if she was able to provide an explanation. LF responded with "no way". The IOUs were to remind her and it was in relation to her own money. The claimant accepted that she had failed to follow "due process in relation to the charitable donations" but that pressure of work had meant that she could not go straight to University Hospital North Tees to pay the money into the appropriate office.

64. With regard to these monies, the allegation raised by the respondent against the claimant was that she had failed to follow the appropriate policy with regard to the acceptance of charitable donations. At no stage during the investigation, the disciplinary hearing or the appeal hearing relating to the outcome of the disciplinary hearing, was it ever suggested that the claimant had committed any act of dishonesty. It was never put to the claimant that she had been in any way dishonest in the handling of this money and there was never any finding at any stage that the claimant had been dishonest in her handling of the money. Nowhere in the respondent's pleaded case in the tribunal proceedings is it alleged that the claimant had been dishonest. The tribunal found that the investigation into these matters was carried out in a reasonable manner in all the circumstances of the case. The tribunal found that it was reasonable for the investigating officer to recommend that the matter should be referred to a formal disciplinary hearing as a result of the claimant's admitted breach of the respondent's policy relating to charitable donations. That allegation was

eventually dealt with at the same time as the earlier allegations which were dealt with in the investigation report by Lesley Wharton.

65. The claimant raised a formal grievance by letter dated 7th May 2017, a copy of which appears at page 751 – 755 in the bundle. The grievance letter is a well-constructed and detailed document which sets out the history of the claimant's alleged treatment of the respondent from September 2015 up to the date of the grievance letter. The claimant refers to the various occasions when she "raised serious concerns in relation to the health and safety of patients and colleagues" and that she had been advised by Caroline Fitzsimmons (Senior Clinical Matron) to "stop escalating those concerns". The claimant goes on to allege that she was "isolated and bullied" by senior management and other colleagues. She referred to an incident where Steve Pett had said to the claimant's daughter that the claimant "was not sane". The claimant refers to "the vexatious nature of the investigation and long suspension without being given any firm allegations against me". The claimant refers to the "fact-finding" meetings and complains that none had given her a clear explanation to support any allegation of potential gross misconduct. The claimant complains that the investigation could not be seen as a neutral act. The claimant complains about members of staff being interviewed who "are at a very low level of morale due to a sudden increase in workload with no extra staffing". The claimant complains about "inappropriate and insensitive questioning of staff" in relation to the claimant's leadership. In that letter, the claimant refers at paragraph 3.2, "I have also had to listen to rumours that I've been found to have committed a fraudulent act, an allegation that is totally untrue and very distressing and damaging to my professional reputation."

66. Ms Rowena Dean (Care Group Manager) was appointed to the investigate the claimant's grievance. She was appointed on 18th May 2017, by e-mail from Lisa Johnson the respondent's HR and workforce design lead. Ms Dean said that she had no previous knowledge of the claimant. By letter dated 13th June 2017 Ms Dean wrote to the claimant inviting her to attend a grievance investigation meeting on 6th July. Ms Dean also interviewed Caroline Fitzsimmons and Emma Campbell on 12th July, Debbie Griffiths and Mel Cambidge on 13th July, Lindsey Robertson on 13th September, Steve Petter on 17th September and Julie Parks on 27th September.

67. The grievance outcome letter is dated 20th December 2017 and appears at pages 897 – 903 in the bundle. Ms Dean states, "the concerns outlined in your letter have been used to structure the response to the grievance which is detailed in the following sections of the letter." Ms Dean then goes through the individual points raised by the claimant. The letter concludes, "I would like to thank you for your raising the concerns and allowing them to be independently investigated. Due to the information provided by witnesses I am not able to uphold your grievance".

68. Mr Rudd for the claimant took Ms Dean through the contents of her letter and her decision not to uphold any part of the grievance. Mr Rudd criticised Ms Dean for not making any specific finding in respect of a number of the claimant's allegations. Ms Dean conceded that she had not made any specific findings in respect of a number of those allegations. Mr Rudd took Ms Dean through a number of documents in the bundle and to a number of the statements which had

been taken from witnesses. Ms Dean conceded that she had not gone through the grievance letter with the claimant, as the respondent's policy requires to do. Under vigorous cross examination, Ms Dean conceded that her finding about the claimant not always following up actions as requested, was in fact not true. Ms Dean was frequently unable to refer to the material which she says supported her findings. Ms Dean conceded that where there was a conflict between what the claimant alleged and what was said by the respondent's witnesses, she had no reason not to believe the claimant. Ms Dean accepted that on a number of occasions in her outcome letter she had failed to deal with the claimant's version of events or her evidence and had not set out why she had chosen not to believe the claimant. Ms Dean had prepared a list of questions to ask Steve Pett during her interview with him, but was unable to explain why she had not asked the majority of those questions. Ms Dean accepted that the list had been prepared based upon the contents of the claimant's grievance letter, but that many of the questions had not been put to Mr Pett. Ms Dean accepted that Mr Pett had not made an unequivocal denial about allegedly having told the claimant's daughter that the claimant was "not sane". She could not explain why no-one had interviewed the claimant's daughter about that. Ms Dean accepted that, had the comment been made, it may well have amounted to bullying or harassment of the claimant. Ms Dean accepted that the claimant had said she found this comment to be humiliating and that it could thus be construed as bullying, even it had been said "in jest" as Mr Pett had suggested. Ms Dean further accepted the claimant had not in fact been informed of the allegations against her in the disciplinary proceedings, by the time she had raised her grievance. Ms Dean accepted that she should have upheld that part of the grievance. Ms Dean accepted that she had not properly investigated that part of the grievance. With regard to the complaint that the claimant had not been told of the expected date of completion of the investigation and disciplinary process, Ms Dean again accepted that she should have upheld that part of the grievance. Ms Dean was unable to explain why the disciplinary process was delayed pending the grievance hearing and its outcome. Ms Dean was unable to state who had made that decision. The tribunal found Ms Dean to be a generally unreliable witness, whose evidence under cross examination differed considerably from what she had put in the grievance outcome letter and her witness statement. The tribunal found the investigation into the claimant's to have been unreasonably superficial in all the circumstances of the case. Ms Dean had accepted what she was told by the respondent's witnesses without properly testing that evidence against the evidence of the claimant.

69. The claimant appealed against the outcome of the grievance by letter dated 4th January 2018 (page 907 – 910). That was the same day that the claimant attended the first formal investigation meeting into the allegations relating to the charitable donations found in her filing cabinet.

70. The grievance appeal was conducted by Michelle Taylor (Head of Workforce). By letter dated 8th February (page 941) the claimant was invited to an appeal hearing on 6th March 2018. The appeal was heard by both Julie Clennel (Associate Director or Risk and Clinical Governance) and Michelle Taylor.

71. At paragraph 8 of her statement Ms Taylor states that she was given an "appeal pack" ahead of the hearing, which included Ms Fairhall's statement of case for the appeal and the management statement of case. The appeal hearing was subsequently rearranged for 19th March. Ms Taylor met Julie Clennel at 9.15 and the appeal hearing began at 9.30. The hearing was finished at just before 12 noon and was followed by an adjournment of approximately thirty minutes before the hearing was reconvened at 12.25 when the claimant was told the appeal was dismissed. When asked how it could possibly have only taken two and a half hours to hear the appeal and thirty minutes to consider the outcome, Ms Taylor insisted that she and Ms Clennel had the appeal pack in advance and were therefore fully acquainted with the points which needed to be dealt with. In his cross examination of Ms Taylor, Mr Rudd concentrated particularly upon paragraphs 16 and 17 of her statement which states as follows:-

> "We explained that the purpose of the appeal hearing was to consider the grounds of appeal set out in Ms Fairhall's appeal letter and statement of case. Ms Fairhall`s summarised grounds of appeal were that she felt dissatisfied and that the processes she had have faced since October 2016 were unfair. Ms Fairhall felt that there were inaccuracies in the investigation, specifically in relation to the actions and duties that she'd been asked to carry out and that these were explained in detail in the presentation of her full statement of case."

Ms Taylor insisted that this was the "essence" of the claimant's appeal. Mr Rudd put to Ms Taylor that she had done little more than distil the entire letter of appeal into five lines. Ms Taylor insisted that there were in fact only two "themes" arising from the claimant's appeal. When pressed by Mr Rudd, Ms Taylor conceded that all of the headings in the claimant's letter amounted to individual grounds of appeal and that she had not properly dealt with them individually. Ms Taylor initially insisted that she had dealt with all of the grounds of appeal, but then accepted that the tribunal could never be satisfied that she had done so when no mention is made of them in the outcome letter. Mr Rudd returned to the fact that Ms Taylor had spent no more than thirty minutes considering all of the grounds before dismissing the appeal. Ms Taylor insisted she had taken all of the claimant's grounds of appeal seriously. Ms Taylor somewhat reluctantly conceded that the claimant's complaint about delay should have been upheld. Ms Taylor was unable explain why the claimant's daughter had not been questioned about the comment allegedly made to her by Steve Pett about the claimant "not being sane". Ms Taylor accepted that, had the comment been made, it could well amount to harassment. She could not explain why that specific point was not dealt with in the outcome letter. It was put to Ms Taylor that the appeal outcome letter should have set out each individual ground of appeal, then set out the appeal panel's findings in respect of each ground and then gone on to state whether or not that ground of appeal was upheld. Ms Taylor accepted that this should have been done, but had not been done.

72. The tribunal found Michelle Taylor to be an unreliable and unpersuasive witness. The tribunal found that she had failed to deal with the claimant's grievance appeal in a reasonable manner and had displayed inappropriate elements of pre-judgment.

73. The disciplinary hearing itself finally took place on 16th and 17th April 2018. The claimant was accompanied by her RCN representative. The hearing was conducted by Christine Mary Grieves (General Manager for Anaesthetics). Ms Grieves says in her statement that the hearing was originally arranged to consider allegations "regarding Ms Fairhall's leadership and inappropriate and unprofessional behaviour including bullying and harassment" as referred to in the original investigation report. Ms Grieves goes on to say that in the middle of October 2017 she was made aware of a further investigation in relation to charitable funds cash which had been found in Ms Fairhall's drawer. Ms Grieves goes on to say that the hearing scheduled originally for 26th October was postponed to allow further investigations into those allegations. The disciplinary hearing was rearranged for 16th and 17th April to consider both investigation reports and both sets of allegations.

74. The respondent's statement of case was presented by Lesley Wharton and Helen Grant. Ms Fairhall requested the attendance of three witnesses, Jill Jackson, Steve Pett and Lisa Johnson.

75. At paragraph 19 of her statement Ms Grieves sets out ten "areas of concerns" in relation to the claimant's management. Those were:-

    75.1 Health rosta system
    75.2 Datixes
    75.3 Care plans
    75.4 Risk assessments
    75.5 Medication prompts
    75.6 Healthcare Assistant vacancies
    75.7 NHS professional bookings
    75.8 Staff secondments
    75.9 Sickness absence management of staff
    75.10 Escalation of concerns

76. At paragraph 20 of her statement Ms Grieves states, "The investigating team presented evidence that there had been unequal treatment of staff between the bases of Macefield Road and Hartfields – the two areas within Ms Fairhall's responsibility. This unequal treatment related to how incidents and complaints were managed by Ms Fairhall." When pressed by Mr Rudd in cross examination, Ms Grieves was unable to identify any specific examples of unequal treatment other than the staff at Hartfields referring to themselves as "the raggy dolls", as they believed themselves to be out of favour with the claimant. At paragraph 21 Ms Grieves refers to "evidence from several district nurses in relation to the allegation of bullying harassment against Ms Fairhall including a significant number of examples of this behaviour." Again, Ms Grieves was unable to point to any specific examples of such behaviour.

77. At paragraph 22 of her statement, Ms Grieves refers to "evidence of ineffective leadership and inappropriate behaviour with the majority of witnesses interviewed demonstrating that they had felt disempowered and undervalued by Ms Fairhall's

management." Again, Ms Grieves could not provide any specific examples which led her to come to that conclusion.

78. In cross examination by Mr Rudd, Ms Grieves was asked why the investigation report had been completed in April 2017 but not sent to the claimant until October 2017. Ms Grieves was unable to provide any explanation. She did however accept that the delay was not fair on the claimant. When asked what were the specific allegations of bullying against the claimant, Ms Grieves was unable to provide any specific examples. She simply said that there were "themes" which had emerged from the investigation. Ms Grieves was asked to identify where in the investigation, the report or the disciplinary hearing any of these specific allegations had been put to the claimant so that she could provide a response. Ms Grieves conceded that they had never been put to the claimant. She simply said that the claimant would have all the information in the investigation report and in the "pack" which had been sent to her. Ms Grieves accepted that the allegations had only been put to the claimant in general terms, but that no specifics had ever been put to her. When asked by Mr Rudd whether she considered this to constitute a fair process, Ms Grieves simply said that the claimant had the opportunity to respond to "perceptions of the staff in the pack". Ms Grieves accepted that it was important for managers on occasions to have to make tough decisions and that a member of staff saying "I have been bullied or harassed", is not enough without specifics. Ms Grieves agreed.

79. With regard to the allegations relating to the charitable monies, Ms Grieves accepted that the claimant was first made aware of this on 6th December 2017, although the respondent first became aware of the situation on 24th October. Ms Grieves accepted that there was no letter ever sent to the claimant setting out this particular allegation. Ms Grieves accepted that it was only fair that an employee should know in advance of any disciplinary meeting exactly what was involved. Ms Grieves accepted that this was a breach of the respondent's policy at page 60 in the bundle. Ms Grieves was unable to explain who had requested an investigation into the charitable monies found in the drawer, but suspected that it might be Steve Pett or Julie Parks. When asked to explain exactly what was the claimant's breach of the charitable fund policy (225 -234) Ms Grieves stated that it was taking the cash from the donor and not banking it with the cashier as soon as possible. Ms Grieves accepted that Barbara Swan had done precisely that, but had not been disciplined.

80. Of particular concern to the tribunal was Ms Grieves` response to questions put to her by Mr Rudd about the claimant's honesty. It has been the respondent's case throughout the disciplinary process and indeed these employment tribunal proceedings, that the claimant had not been dishonest in her handling of these monies. Ms Grieves accepted that it had never been put to the claimant that she had been dishonest and there had never been any finding that the claimant had been dishonest. It was then put to Ms Grieves that in all the circumstances, this particular incident could never amount to "gross misconduct". Ms Grieves insisted that it was gross misconduct as the claimant had failed to follow the respondent's policy, which meant that there was no audit trail in respect of the money. It was again put to Ms Grieves by Mr Rudd that, this must also mean that Barbara Swan was equally guilty of gross misconduct. Ms Grieves declined to answer, on the

basis that she did not know the circumstances surrounding Barbara Swan's involvement. It was put to Ms Grieves that the claimant had accepted that she should have paid the money into the cashier immediately. Ms Grieves was asked whether she had taken into account the claimant's explanation about how she had accepted the money from Barbara Swan and another employee with the intention of banking it as soon as possible, but simply had not got round to doing so because her work pressures were given priority. Ms Grieves said that she had taken those matters into account, but insisted that the claimant could and should have consulted her own line manager to find a way to get the money into the trust account. It was then specifically put to Ms Grieves that the claimant had simply forgotten to bank the money and had left it in the filing cabinet drawer. Ms Grieves readily accepted that the claimant had probably simply forgotten to bank the money. Nevertheless, Ms Grieves insisted that this amounted to a breach of the respondent's policy. She did however concede that this allegation was never specifically put to the claimant, so as to enable her to give an explanation.

81. Ms Grieves was referred to the investigation report into these monies at page 955 - 965 in the bundle. Ms Grieves was specifically asked whether the only allegations of which the claimant was made aware were those at 6.3, 6.4 and 6.5, namely:-

- LF has been on suspension since October 2016. It was substantiated that LF only used these drawers and stated she kept them locked and no one else had access to them or her keys
- The investigation acknowledged that LF felt aggrieved her drawers had been opened and she states that she had been "stitched up", however the investigation could not substantiate this claim or prove there could have been an opportunity for someone else to deposit charitable monies in LF's drawers while she was absent from duty
- The investigation could not substantiate that LF had accepted all the cash donations found in her drawer but it did establish that she had accepted cash donations for items 4 and 5. It looks likely that **????** had accepted the cash donation of item 3

Ms Grieves accepted that only those three cash items were involved in the allegations against the claimant. Ms Grieves accepted that the other items did not form part of the decision to dismiss the claimant.

82. As cross examination Ms Grieves was referred to the dismissal letter at page 1050 dated 19th April 2018 and in particular those extracts at page 1054:-

> "There was inadequate audit trail related to the fund raising charitable funds and the evidence of IOUs which the panel believes amounts to misappropriation of trust funds"

Ms Grieves was asked by Mr Rudd to provide her interpretation of "misappropriation". Ms Grieves said that she considered misappropriation to involve an element of dishonesty. Mr Rudd then reminded Ms Grieves that she had already informed the tribunal that she was satisfied that the claimant had not guilty of any dishonesty. Ms Grieves then stated she and the panel had decided

that the claimant had been dishonest and that this was a matter they had taken into account dismissing the claimant. This complete reversal in Ms Grieves evidence triggered further questions from the tribunal panel. Again, Ms Grieves stated that she considered "misappropriation of funds" to mean that the claimant had been dishonest and that the claimant had effectively been dismissed "partially for dishonesty". Ms Grieves then went on to say that this dishonesty of itself was sufficient to justify the respondent's summary dismissal of the claimant. It was then put to Ms Grieves that if there had been no other allegations relating to the claimant's performance, allegations of bullying, would the claimant still have been dismissed for this dishonesty. Ms Grieves insisted that she would still have dismissed the claimant. Ms Grieves was then asked whether the claimant would have been dismissed at all, had she not been considered by the panel to have been dishonest. Ms Grieves answer was that in those circumstances, she would have considered redeployment or a final written warning.

83. The dismissal letter appears at page 1050 – 1056 in the bundle. It is dated 19th April 2018. On page 1 it states as follows:-

> "The hearing was held to consider two investigation into the following allegations regarding:-
>
> - Your leadership and inappropriate and unprofessional behaviour including bullying and harassment (investigation 1).
>
> - You failed to adhere to the trust's charitable funds procedure's handbook and the NMC's The Code (Professional Standard of Practice and Behaviour for Nurses and Widwives) (investigation 2).
>
> - The full details of these were provided to you in advance of the hearing and subsequently formed the management statement of case. This pack was delivered to your staff side representative in advance of the hearing."

Nowhere in the dismissal letter are there any specific allegations of poor leadership or inappropriate or unprofessional behaviour including bullying and harassment set out. No details are given of the trust's charitable funds procedure handbook and the NMC's code. Ms Grieves accepted under cross examination that no specific details of any of those allegations were ever given to the claimant.

84. The letter goes on to page 1051 to deal with the outcome of "investigation 1". It states:-

> "In relation to the allegation regarding your leadership, the investigating team presented their findings on a number of areas of concerns including your involvement in and management of the health rosta system: Datixes: care plans: risk assessments: medication prompts: healthcare assistant vacancies: NHSP bookings: staff secondments: sickness absence management of staff and escalation of concerns.

> In relation to the allegation regarding inappropriate and unprofessional behaviour, including bullying and harassment, the investigation team presented evidence to conclude that there had been different treatment of staff between the basis of Macefield Road and Hartfields, in terms of how incidents and complaints that you had responsibility to manage were conducted.
>
> The investigation team presented evidence from a number of DNS' in relation to the allegation of bullying and harassment including a significant number of examples of this behaviour.
>
> The investigation team concluded that they had obtained evidence of ineffective leadership and inappropriate behaviour, with the majority of witnesses interviewed demonstrating that they had felt disempowered and unvalued by your management."

This is the only evidence contained in the dismissal letter which relates to the allegations about "investigation 1".

In respect of the allegations under "investigation 2", the letter sets out the following:-

> "The investigating team presented a management statement of case and presented to the panel the eight items which were found in your designated drawer, this included the envelopes and thank you letters and cards from patients. The investigating team advised that you had confirmed that you had knowledge of the trust's charitable fund procedure. It was established that you accepted cash donations on two occasions; there appeared to be a record of unofficial spending as there was no evidence of personal donations or receipts of any spending, borrowing or evidence that IOUs had been repaid. It was also presented that you had stated that donations could be remain in your designated drawer for some time because there was no longer a cashier's office on the Hartlepool site; you were too busy to go to the North Tees cashier's office as you were addressing staff issues constantly and patients safety was your priority. The investigating team explained that you make regular monthly donations to your chosen charities and that you had used your designated drawer for your own money and the patient donations and in hindsight you stated that you should have kept these separate. You did not provide a statement of case in relation to this investigation, however during your presentation of case to the panel you've outlined that you admit that you had not followed trust policy, but you did not recognise some of the items that had been found in your designated drawer and stated that you had been "stitched-up."

85. Nowhere in that summary is there any mention of a suggestion that the claimant had been dishonest or that there had been any "misappropriation" of this money.

86. The letter then sets out the decision of the dismissing panel in the following terms:

- In relation to the concerns regarding your leadership and considering your response in relation to this allegation, the panel concluded that you were not compliant with the trust nurse rostering policy (HR62V2) by way of creating your own way of working on the belief that it was a fair model to use, however, this was not in line with trust policy and we believed that this had an impact on the team's perception of your controlling management style.

- The panel believed there was a significant delay between December 2015 and May 2016 in relation to your escalation of concerns regarding staffing ability to absorb the demands placed on the service due to the increase on visits and workload as a result of medication prompts.

- The panel were unable to substantiate the allegation in relation to the HCA vacancy process as you did not have access to the EVCF recruitment process; however the panel was concerned that as a Band 7 manager we would have expected you to be able to do so. The panel also had concerns around your communication regarding the number of applicants and the length of time the advert was left open when there were limited applications which the panel believed constituted a leadership failure on your behalf.

- The panel believed in relation to staff leaving the service to go on secondment, that there was a clear opportunity afforded to you to minimise the potential opportunity by not allocating the full numbers of staff to the secondment and you had made the decision to support the allegation to the university.

- The panel believed that there was opportunity for you to support staff prior to the sickness becoming a significant issue which then added to the significant pressures on the department and organisational risk.

- In relation to escalation of concerns, the panel believe there was inadequate escalation of concerns by yourself between December 2015 to May 2016 and the summer of 2016 where it would appear you claimed to have escalated concerns, the manner in which you approached this, the panel felt would have appeared to have provided a level of assurance that you were managing the situation.

- The panel believed that there were inconsistencies by you in dealing with staff from Masefield Road and Hartfields and reviewed evidence which indicated that there was a significant perception of favouritism to one of the sites which the panel believe could have impacted on the collaborative working across the services. The panel were concerned they could not see each other's duties which could also have had implications for the team's collaborative approach. The panel were concerned to note that you had an appraisal for a considerable time, which appeared to reflect the culture of the working environment.

- In relation to the allegation of inappropriate and unprofessional behaviour including bullying and harassment, the panel believed that this allegation is

substantiated, secondary to the significant concerns expressed on how you carried out your role, such as walking out of Band 6 meetings, inappropriate comments about or to staff in front of colleagues, staff reporting feeling controlled by you, your relationship to the clinical care co-ordinations and evidence of you having favourites.

In relation to the second investigation, that you failed to adhere to the trust's charitable funds procedures and the NMC code, the panel believe this allegation was substantiated. The panel considered the following in reaching this decision;

- Your own admittance that you have not followed trust policy.
- Your senior position with the organisation and significant years of experience.
- There was an inadequate audit trail relating to the fund raising charitable funds and the evidence of IOUs which the panel believes to misappropriation of trust funds.
- You failed to demonstrate evidence of ensuring your team were fully equipped with the knowledge and understanding of how to manage charitable donations.
- You have neglected to follow trust procedure, which you have acknowledged you were aware of and understood, which potentially created a risk for the reputation of the organisation.

At page 1055 the letter states:-

> "As a result, the panel had reasonable belief that your actions fell short of what is expected of a healthcare professional and given the issues detailed above and the allegations substantiated, the panel believe this constituted an act of gross misconduct. You were therefore advised that you were summarily dismissed from your employment with immediate effect and as such your employment would terminate on 17th April 2018.

87. Nowhere in the dismissal letter is mention made of any specific allegations relating to "investigation 1", nor are there any specific findings of fact in respect of any such allegation. Nowhere in the allegations of findings is there any mention of "dishonesty" relating to the charitable donations or any inclination as to why the inadequate audit trail and evidence of IOUs amounted to "misappropriation" of trust funds.

88. In the dismissal letter, the claimant was advised of her right of appeal. The claimant submitted an appeal by letter dated 1st May 2013, a copy of which appears at page 1057 – 1061 in the bundle. The appeal letter sets out ten specific grounds of appeal, as follows:-

- The non-adherence to the trust disciplinary policy which in turn is a breach of the ACAS code of practice on disciplinary and grievances rendering my dismissal procedurally unfair.

- The lack/absence of objective evidence referred to that formed the basis of the panel's decision to substantiate gross misconduct, ineffective leadership and bullying and harassment rendering my dismissal substantively unfair.

- The non-adherence to trust capability policy ie harsh immediative punitive/slash formal action with no consideration for alternatives to immediate suspension.

- The panel's misperception of what constitutes whistleblowing.

- Bias and complete lack of independence from using the same panel for two separate investigations.

- My previous 39-year professional conduct, length of service/experience in community nursing/leading teams throughout the NHS leading to undeserved extremely harsh punitive measures which is outside the band of reasonable responses.

- My commendations on leadership from the NMC in 2015/Area of Good Practice from CQC Inspection 2015.

- Consideration of the detriment suffered at a time when I was extremely vulnerable and that this could not be viewed as a neutral act.

- My dismissal was detriment as a result of me making a protected disclosure as the trust had a pre-determined view to dismiss me and remove me from the trust because I had made protected disclosures only 10 days before my suspension.

- I strongly refute that I did not escalate concerns.

89. The appeal was heard by Ms Lynne Taylor, (Director of Planning and Performance). The appeal hearing took place on the 15th June 2018 before Miss Taylor. Mr Kevin Scollay (Deputy Director of Finance), Mr Jonathan Erskine (Non-Executive Director of the Trust) and Ms Fiona McCoy (Head of Nursing Quality). HR support came from Elizabeth Morrell (Employee Relations Manager). Ms Grieves (the dismissing officer) and Helen Rainsby (Workforce Business Partner) attended to present the management side. The management statement of case was provided by Ms Grieves and Helen Rainsby (HR support).

90. In her written statement, Ms Taylor states that before the appeal hearing she read through the appeal pack which contained the claimant's letter of appeal, the dismissal appeal statement, the disciplinary investigations together with the notes of the disciplinary hearing and the disciplinary outcome letter. The disciplinary hearing began at 13.20 and ended at 16.28 with a short adjournment between 14.23 and 14.58. The appeal was accordingly dealt with in approximately two and

a half hours. The appeal panel's deliberations lasted thirty-one minutes. Ms Taylor's witness statement runs to forty-five paragraphs and seven and a half pages. Ms Taylor summarises the claimant's appeal case in the following terms:-

- Ms Fairhall said that she had not been provided with the detail of the allegations until she had received a copy of the investigation report which was prior to the disciplinary hearing on the 16th and 17th April 2018.

- She also felt that the grievance submitted by her in May 2017 should not have halted the disciplinary investigation process.

- Ms Fairhall raised further concerns regarding the length of the period of suspension which she considered to be a further breach of the policy.

- Ms Fairhall was concerned that she had not been allowed the opportunity to access her work drawer following the suspension meeting and that had she been given this opportunity she would have been able to delegate responsibility for the charitable donations that were in her drawer to a colleague.

- Ms Fairhall said that none of her colleagues had ever submitted a formal complaint of bullying and harassment.

- Ms Fairhall believed that the decision to suspend her and commence a disciplinary investigation was in direct response to having made a protected disclosure in accordance with the Public Interest Disclosure act. She explained that she had been suspended ten days following her most recent declaration and she therefore felt the two were directly linked.

- Ms Fairhall said that there had been two separate investigating officers to investigate two separate allegations. By using the same panel to hear both investigations she considered this to be unfair and stated that this could have created bias within the panel by creating a detrimental impression of her character and professional integrity.

- Ms Fairhall said that she had made numerous requests for documentation, however these had not been disclosed to her, with the outstanding documents having been provided during the appeal hearing.

Ms Taylor then summarised the "management response" in the following terms:-

- Chris Grieves confirmed that day 1 of the (disciplinary) hearing was to consider the investigation findings relating to allegation 1 and day 2 was to consider the investigation findings relating to allegation 2. **????** reiterated that the decision-making process had been fair and cited examples of where the panel had not upheld certain elements of the investigation.

- Ms Grieves acknowledged that Ms Fairhall had been suspended for a significant point in time and whilst there had on occasions been genuine reasons for the delays, the overall time-frame was unacceptable.

- Despite this, the disciplinary panel had found no evidence that this was a deliberate attempt to prevent from preparing for the hearing and Ms Grieves advised that Ms Fairhall had been provided with a summary of the allegations in the notice of suspension letter and the invitation to the investigation letter.

- In response to the allegation that personal statements could be subjective, Ms Grieves that all individuals had agreed their statement to be a true reflection and, given that a significant number of the statements had contained many similarities, the panel considered this to be further good evidence.

- Ms Grieves said that some of the charitable donations which had been located within Ms Fairhall's personal drawer dated as far back to September 2015 and contained evidence of IOUs being issued. She advised that the panel considered this to be a clear breach of the trust's charitable funds procedure handbook.

- Ms Grieves accepted that Ms Fairhall had escalated concerns regarding the district nursing service and that these concerns were documented. However the disciplinary panel had felt that the documentation had demonstrated that Ms Fairhall was personally managing the concerns and therefore rather than escalating the concerns for further action she was simply notifying management for information purposes only.

- Ms Grieves also confirmed that the disciplinary panel had considered her allegation that the trust had retaliated to her having made a protected disclosure and had found no evidence to support this allegation.

- Ms Grieves accepted that at the time of her suspension Ms Fairhall had not been given the opportunity to return to her desk – however when questioned, Ms Fairhall accepted that she had not asked for access to her desk.

91. The appeal was dismissed and the reasons for the dismissal are set out in a single paragraph in Ms Taylor's statement in the following terms:-

> "43 The appeal panel reviewed the points it had heard. We did not think that hearing the two sets of allegations together had been unfair. We accepted that there had been serious concerns that had prompted the initial investigation and did not accept that her suspension had the investigation had come about because of her disclosure. We further accepted that the disciplinary had been reasonable in believing that Ms Fairhall was guilty of gross misconduct and that the sanction of summary dismissal was a fair and appropriate one."

92. In cross examination, Mr Rudd put to Ms Taylor very similar questions to those he had put to Ms Grieves. In answering those questions, Ms Taylor conceded the following:-

- She had not read all of the notes of the investigation, only those matters referred to in her statement.

- With regard to that information which she had looked at, she had "flicked through as much as was relevant". She could not recall when she had been appointed to deal with the appeal could not produce a copy of the letter of appointment.

- She could not explain why the appeal had been dealt with three days outside the eight-week period fixed by the respondent's policy.

- The appeal panel had used a combination of a number of respondent's disciplinary policies because they had changed during the course of the process.

- No specific allegations had ever been put to the claimant. In particular, no specific allegations of bullying or harassment were ever put to the claimant.

- The claimant never received any details of any allegations of bullying or harassment.

- The investigation report was not sent to the claimant until eight months after the investigation was concluded.

- The appeal outcome letter did not address the claimant's complaint about the delay in sending the investigation report, nor the complaint about the lack of any specific allegations relating to bullying or harassment.

- The appeal outcome did not deal with the claimant's complaint about suspension and the length of suspension.

- She should have upheld the appeal on the grounds that no formal complaint about her had ever been made.

- That she should have upheld the complaint about the claimant not having been provided with documents during the process and particularly when the appeal panel had seen them.

- The claimant's complaint that the respondent had failed to follow its own procedure or the ACAS code of practice had not been dealt with in the appeal.

- The appeal panel had not considered whether the allegations against the claimant could and should have been dealt with under the respondent's capability policy.

- The outcome letter makes no mention of any consideration having been given to the claimant's thirty-nine years unblemished service to the respondent.

- The outcome letter makes no reference about whether the suspension amounted to a neutral act.

- The outcome letter does not deal with the claimant's allegation that her suspension was a direct result of her having recently made protected disclosures.

- During the appeal hearing Ms Grieves had referred to "misappropriation" of funds amounting to "dishonesty", but that the panel had found that it had been mismanagement of the funds and that there had been no dishonesty. However, none of that is mentioned in the outcome letter. That finding should have been in the outcome letter.

- The respondent did not believe that the claimant had used any of the money herself and that the appeal panel found there was no dishonesty by the claimant. However this is not mentioned in the outcome letter.

93. The outcome letter appears at pages 1110 – 1114 in the bundle. At page 1110 the letter clearly states, "the purpose of the appeal hearing was to consider the grounds of appeal set out by yourself in your letter of appeal dated 1st of May 2018 and also within your statement of case." Ms Taylor had to concede that the appeal panel had not in fact done so. At page 1111, the letter sets out the claimant's grounds of appeal in eight bullet points and then set out in Ms Grieves summary of the disciplinary panel's response to those points, again in nine bullet points. At page 1114, the outcome of the entire appeal process is set out in the following terms:-

> "The appeal panel took an adjournment to carefully consider the facts of the case and the evidence presented by both parties. The meeting was reconvened and it was confirmed to you that the points raised during your appeal had been carefully considered in turn, along with the responses provided by management. It was considered that the disciplinary panel had acted in accordance with the trust's disciplinary policy and that by conducting the hearing with both investigations using the same panel this had been a reasonable decision with no evidence of bias. Your belief that you have suffered a detriment as a result of having raised a protected disclosure has been considered seriously, however the panel believe that there had been clear evidence of concerns to have necessitated the disciplinary investigation. The panel was satisfied that the disciplinary panel had considered a range of evidence to support both allegations and they therefore held a reasonable belief that you had committed these acts when making their decision. The panel accepted the appropriate sanction for an act or acts of gross misconduct is dismissal and on this basis you were informed at the appeal panel upheld the disciplinary panel's decision to dismiss. It was confirmed to you that the appeal process is complete and the outcome to uphold the decision to dismiss is final."

94. The claimant presented her complaints to the employment tribunal on 31st August 2018.

<u>The law</u>

Employment Rights Act 1996

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 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,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

Section 103A Protected disclosure

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

Section 43A 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 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, 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 Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--

(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.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Section 47 Protected Disclosures

(1) A worker has the right not 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.

(1A) A worker (“W”) has the right not be subjected to any detriment by any act or any deliberate failure to act, done-

(a) by another worker of W’s employer in the course of that other worker’s employment, or
(b) by an agent of W’s employer with the employer’s authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker’s employer.

(1C) For the purpose of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker’s employer.

(1D) In proceedings against W’s employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker –

(a) from doing that thing, or
(b) from doing anything of that description

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subject W to detriment if –

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
(b) it is reasonable for the worker or agent to rely on the statement

But this does not prevent the employer from being liable by reason of subsection (1B)

(2) This section does not apply where –

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

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K

95. Where the employer's reason for dismissing the employee relates to the employee's conduct, the tribunal must first consider whether the respondent has established that its reason (or if more than one its principal reason) for dismissing the employee, was for a reason related to his or her conduct. The tribunal then goes on to consider the fairness of the dismissal for that reason. Guidance in such matters was set out in the well-known authority of **British Home Stores Limited v Burchell [1980 ICR303].** In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair the tribunal has to decide whether the employer entertained a reasonable suspension amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief – that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

96. In **Weddel and Company Limited v Tepper [1980 IRLR96]** the Court of Appeal reiterated that employers suspecting an employee of misconduct justifying dismissal, cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had

carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably.

97. It is now accepted that the tribunal is to apply a band of reasonable responses test as laid down in **Iceland Frozen Foods Limited v Jones [1983 ICR17],** at paragraph 24:-

> "(i) the starting point should always be the words of Section 98 for themselves
>
> (ii) in applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair
>
> (iii) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer
>
> (iv) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another
>
> (v) the function of the tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if a dismissal falls outside the band, it is unfair."

98. It is now trite law that the range of reasonable responses test applies as much to the question of whether an investigation into the suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason **(Sainsburys Supermarkets Limited v Hitt – 2003 IRLR23].** Furthermore, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the enquiries should focus no less than any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. **[A v B – 2003 IRLR405].** It is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in

his or her chosen field of employment is potentially apposite **(Salford Royal NHS Foundation Trust v Roldan [2010 IRLR721].**

99. The ACAS code of practice on disciplinary and grievance procedures states as follows:-

> (9) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence which may include any witness statements with the notification.

100. In **Slater v Leicestershire Health Authority [1989 IRLR16]** the Court of Appeal said that the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attached, although a breach will clearly be an important matter when the employment tribunal considers the questions raised in Section 98(4). The employment appeal tribunal held in Khanum v Mid Glamorgan Area Health Authority [1978 IRLR215] that there are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary enquiry. Firstly, the person should know the nature of the accusation against him, secondly he should be given an opportunity to state his case and thirdly the disciplinary panel should act in good faith.

101. A dismissal is unfair if the employer unreasonably treats his reason as a sufficient reason to dismiss the employee, either when he makes the original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal. In the present case the respondent's appeal procedure states:-

> "An appeal hearing will take place at which employee will have the opportunity to explain his/her grounds of appeal. The appeal hearing will follow the format outlined in Appendix 4. An appeal will usually involve a review of all the relevant documentation including the employee's grounds for appeal. The appeal panel will not hear the case. The "appeals procedure" at Appendix 4 states:-
>
> "1 Management side will present their case first, explaining the reasons for the action they have taken, including calling of any witnesses.
>
> 2 The employees side will then be able to ask any questions about the case management side presented.
>
> 3 The appeal panel members will also have an opportunity to ask any questions.
>
> 4 The employees side will then be asked to present their case to the panel, including calling of any witnesses.

5 The management side may then wish to ask the appellant any questions about their case.

6 The appeal panel members will also have the opportunity to ask any questions.

7 Both parties would have the chance to sum up their case.

8 There will then be an adjournment when both sides will be asked to leave the room while the appeal panel consider the information they have heard and reach their decision.

9 The decision of the panel will be communicated to both parties verbally following the adjournment wherever possible and in any case will be confirmed later in writing no later than five working days after the appeal hearing.

102. In **Taylor v OCS Group Limited [2006 IRLR 613]** the Court of Appeal said that it an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether an internal appeal is technically a rehearing or a review, only whether the disciplinary process as a whole is fair. The tribunal will want to examine any subsequent proceedings with particular care. Their purpose in so doing will be to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an early stage.

103. It was also held by the Court of Appeal in **Stoker v Lancashire County Council [1992 IRLR75]** that a reasonable employer can be expected to comply with the full requirements of the procedure in its own disciplinary code.

104. When dealing with the claim of unfair dismissal, the issue before the employment tribunal is not whether the claimant did the alleged acts of misconduct, but did the respondent have reasonable grounds for believing that she did. There cannot be reasonable grounds unless there has been a reasonable investigation. The position is slightly different when dealing with the allegation of wrongful dismissal. Where a respondent dismisses its employee without notice due to the employee's alleged misconduct, the tribunal must decide on the available evidence before it whether the employee had committed gross misconduct so as to justify summary dismissal. The tribunal must consider whether the claimant's conduct was capable as a matter of law of amounting to gross misconduct. The tribunal must consider whether that misconduct, for someone with such long and unblemished service, justified dismissal without notice. Those issues were considered by Lord Justice Elias in the Court of Appeal in **Adesokan v Sainsburys Limited [Court of Appeal 13th December 2016].** Lord Justice Elias referred to the Court of Appeal's decision in **Sinclair v Nayber 1967 2QB279]** when it was said that it is sufficient for the employer, if he could, in all the circumstances, regard what the employee did as being something which was seriously inconsistent or incompatible with his duties in the business in which he was engaged. In cases

where there is an allegation of dishonesty, the tribunal should consider whether, even if falling short of dishonesty, the employee's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant such as would render the servant unfit for continuance in a master's employment and give the master the right to discharge him immediately. The question is therefore whether an employee's conduct is "so grave and weighty" as to amount to a justification for summary dismissal. The determination of the question whether that misconduct falls within the category of gross misconduct warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment. It ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policies, constitutes such a grave act of misconduct as to justify summary dismissal."

105. In terms of whether or not the claimant had been "dishonest" in her handling of the charitable monies, the tribunal takes its guidance from its observations of the Supreme Court in **Ivey v Genteng Casinos Limited [2017 UKSC-67]**. The test to be applied to the claimant is to ask whether she was dishonest by the objective standards of ordinary, reasonable and honest people, armed with all the relevant information.

106. Automatically unfair dismissal for making protected disclosures

The wording of **section 103A of the Employment Rights Act 1996** follows the wording of **section 98** in that the whistleblowing must have been a reason or principal reason for dismissal. In **Kuzel v Roache Products Limited [2008 EWCA-CIV-380]** the Court of Appeal said that if the employer fails to establish its alternative reason for the dismissal, it will often by the case that the employment tribunal will find the claimant's automatically unfair reason (for example whistleblowing) established, but that is not a rule of law – it may still be the case that the tribunal finds another reason established on the facts, which can still defeat the claimant's claim. In **El-Megrisi v Azad University** [**UKEAT/0448/08]** the employment tribunal held that, where an employee alleged that she has been dismissed because she made multiple public interest disclosures, **section 103A** does not require the tribunal to consider each such disclosure separately and in isolation, as their cumulative impact can constitute the principal reason for the dismissal. This is so even where some of the disclosures have taken place more than three months before the claimant's dismissal. Where the tribunal finds that the disclosures operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal.

107. The first requirement of a "qualifying disclosure" is that the worker must disclose information and not merely state an opinion or make an allegation. It is accepted that sometimes the provision of information and the making of an allegation are intertwined. In **Cavendish Munro Professional Risks Management Limited v Geduld [2010 IRLR38]** and **Kilraine v London Borough of Wandsworth [2016 UKEAT/0260/15/JOJ]** the question of what constitutes disclosure of "information" was considered. Langstaff J in the Employment Appeal Tribunal in **Kilraine** stated:-

> "I would caution some care in the application of the principal arising out of Cavendish Munro. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other, when reality and experience suggests that very often information and allegation are intertwined. The court of appeal went on to say in Kilraine:-
>
> > "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity which is capable of intending to show one of the matters listed in subsection (1). Whether an identified statement or disclosure in any particular case does or does not meet that standard, will be a matter for an evaluative judgment by the tribunal in the light of all of the facts of the case. It is a question that is likely to be closely aligned with the other requirements set out in section 43B (1) namely that the work in making the disclosure should have the reasonable belief that the information that he or she disclosures does tend to show one of the listed matters."

As was explained by Underhill LJ in **Chesterton Global Limited v Nurmohamed** this has both a subjective and objective element. If the worker subjectively believes that the information that he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief. In **Babula v Waltham Forest College [2007 IRLR346]** the Employment Appeal Tribunal held that the fact that the information disclosed turns out to be wrong may be relevant, but is not fatal to the claimant's case. The tribunal's task is to determine whether the employee's belief is reasonable in all the circumstances. The Employment Appeal Tribunal said in **Phoenix House Limited v Stockman [2017 ICR84]** that it is possible for disclosure to be made in good faith but without good reason to believe that they were correct. In those circumstances, the statutory test would not be satisfied.

108. The fact that the person to whom the information is disclosed was already aware of that information does not mean that its further disclosure does not amount to a qualifying and protected disclosure.

109. **Section 43B (1) (b)** refers to failure to comply "with any legal obligation". If such a breach is alleged, then the source of the obligation should be identified and should be capable of verification as actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance, without being in breach of a legal obligation **[Eiger Securities LLP v Korshunova – 2017 IRLR115].**

110. In relation to **section 43B (1) (d),** if it alleged that the health and safety of any individual has been, is being or is likely to be endangered, then the term "likely" requires more than a possibility or a risk [**Kraus v Penna Plc – 2004 IRLR260].**

111. "Detriment" under **section 47B** is to be viewed subjectively, from the viewpoint of the worker. The correct test is whether a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his disadvantage. The statute states that the right is not one to be subjected to any "detriment, by any act or any deliberate failure to act". Any such failure must therefore be deliberate, such that the employer has made a conscious choice to act or not to act. That can be inferred if the employer has done something inconsistent with such an act or from prolonged indecision. A failure to step into prevent a state of affairs from continuing can amount to "subject" a whistleblower to a detriment, even if that failure is not directly causative of the disadvantage.

112. The statute requires the imposition of the detriment to be "on the ground that" worker has made a protected disclosure. Plus it is necessary to undertake an analysis of the mental processes (conscious or subconscious) which caused the decision maker to act in that way. It is now accepted that the same principles apply to whistleblowing detriment claims as in discrimination claims – it is necessary to look at the mental processes of the particular decision maker who is said to have subjected the claimant to the detriment **[Malik v Cenkos Securities PLC – UKEAT/0100/17].** "On the ground that" means "materially influenced the decision", in the sense of being more than a trivial influence **[Fecitt v NHS Manchester – 2012 ICR372].**

113. Once the claimant has established the protected disclosure and that she has been subjected to any detriment, under **section 48 (2)** "it is for the employer to show the ground on which any act, or any deliberate failure to act, was done." This statutory provision means that the tribunal may uphold the claim if the employer is unable to show the ground on which the act was done **[Kuzel v Roache Products Limited** above]. This means that the employer must show that the detrimental treatment was "in no sense whatsoever" on the ground of a protected disclosure. Effectively, where an employer has a variety of motives for its actions, it is sufficient that one of the motives was a response to a protected disclosure.

114. It is the claimant's case that the alleged disclosures made by her did indeed convey information to the respondent. Ms Souter for the respondent submitted that they either did not contain information or did not contain sufficient factual content and specificity which is capable of tending to show one of the matters listed in **section 43B (1).** Furthermore, Ms Souter submits that the none of the alleged disclosures show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject or that the health or safety of any individual has been, is being or is likely to be endangered. Dealing with each of the alleged disclosures in turn:-

    (i) 21st December 2015 the claimant recorded an entry on the risk register (5497) that a requirement to undertake medication prompts was putting pressure on resources in the Hartlepool District Nursing Services as there had been approximately one thousand extra visits per month by the service with no extra resources. The tribunal found that this was a disclosure of information with sufficient factual content and specificity to show that the health or safety of patients and staff was being or was likely to be endangered.

(ii) 25th May 2016 the meeting with Julie Parks, the claimant relayed information that there were still issues with staffing which continue to have an effect on patient safety. There was a failure to retrain health care assistants and failure to engage occupational health for the staff, as had been requested earlier. The tribunal found that this was a disclosure of information which contained sufficient factual content and specificity and which tended to show that the health or safety of patients and staff was likely to be endangered.

(iii) 1st August 2016 the meeting between the claimant, Lindsay Robertson and Caroline Fitzsimmons, the claimant raised the issue of members of her staff attending university, thus reducing the number of staff available to attend to patients and the adverse effect this was having on patients safety. The tribunal found this to be a disclosure which contained sufficient factual content and specificity and which tended to show that the health or safety of patients or staff was likely to be endangered.

(iv) 5th August 2016 the claimant recorded an entry on the risk register (5567) stating that the reduction in staffing resources in the Hartlepool district was a risk to patients safety. The tribunal found this to be a disclosure of information which contained sufficient factual content and specificity and which tended to show that the health or safety of patients or staff was likely to be endangered.

(v) 11th August 2016 a meeting with Steve Pett and Julie Parks the claimant again raised caseload management, lack of funding and staffing levels. The tribunal found this to be a disclosure of information containing sufficient factual content and specificity which tended to show that the health or safety of patients or staff was likely to be endangered.

(vi) 5th September 2016 in an e-mail to Caroline Fitzsimmons at page 425 the claimant reported the following matters:-

(a) a number of staff were visibly distressed

(b) Healthcare Assistants were not being retrained

(c) No time-wide stress risk assessment had been carried out

(d) Staff were struggling with the volume and complexity of calls

(e) There was a massive impact on the service due to staff being unable to function adequately, including the completion of Datix

(f) The inability of the team to undertake clinical supervision

(g) That staff sickness was increasing

(h) That some staff were attending work when they were really too ill to be at work

(i) Complaints from patients were increasing

(j) Frontline staff were undertaking management tasks

(k) Near misses had taken place over that weekend

(l) Ongoing IT problems were affecting patients safety

(m) Staff were being caused unnecessary stress

The tribunal found that this was a disclosure of information containing sufficient factual content and specificity which tended to show that the health or safety of patients or staff was likely to be endangered.

(vii) 8th October 2016 in a meeting between the claimant, Steve Pett, Emma Campbell and Mel Cambidge the claimant stated that, as a result of the decreasing staff levels, the nurses and staff were now unable to function in their roles. The tribunal found that this was a disclosure of information with sufficient factual content and specificity which tended to show that the health or safety of patients or staff was likely to be endangered.

(viii) 13th October 2016 in an e-mail from the claimant to Mel Cambidge, Emma Campbell and Steve Pett, the claimant stated that the use of bank staff was a risk to patient safety in terms of continuity and what was being documented. The claimant formerly requested that two more senior members of staff should be provided so as to alleviate pressure. The tribunal found that this was a disclosure of information with sufficient factual content and specificity and which tended to show that the health or safety of patients or staff was likely to be endangered.

(ix) 14th October 2016 in an e-mail to Mel Cambidge, Emma Campbell, Steve Pett and Kirsty McKay, the claimant stated that the number of staff on sick leave (including six on work-related stress) and how this remained an on-going concern. The claimant made a formal request for a stress risk assessment to be carried out. The tribunal found that this was a disclosure of information which contained sufficient factual content and specificity and which tended to show that the health or safety of patients or staff was likely to be endangered.

(x) 14th October 2016 in a meeting with Stuart Harper-Reynolds (Safeguarding Lead Nurse) the claimant reported that the quality of care delivered to a patient who had been discharged inappropriately and who had died two days later. The claimant also raised general concerns regarding safeguarding issues in Hartlepool. The tribunal found this was a disclosure of information which contained sufficient factual content and specificity and which tended to show that the health or safety of patients or staff was likely to be endangered.

(xi) 21st October 2016 in a meeting between the claimant and Stuart Harper-Reynolds, the claimant repeated her request for her previous complaints to be actioned and she repeated her concerns in respect of staff sickness, work-related stress and the respondent's failure to provide additional funds and staff support. The tribunal found that this was a disclosure of information containing sufficient factual content and specificity which tended to show that the health or safety of patients or staff was likely to be endangered.

115. The tribunal found in each of the above disclosures, the claimant had a genuinely held and reasonable belief at the time of making the disclosures, that they were true and that the disclosures were made in the public interest. Alleged deficiencies in standard of care provided by the National Health Service must always be a matter of public interest. The tribunal found that the claimant was at the forefront of a team of nursing staff which was operating under considerable pressure and suffering from a lack of resources to meet the demands of the volume of work imposed upon them. The tribunal found that each of the above amounted to a qualifying and protected disclosure.

116. Following those disclosures and shortly after the patient`s death, the claimant made it clear to Julie Parks in the meeting on 21st October 2019 that she wished to instigate the respondent's formal whistleblowing procedure. The claimant requested a meeting with Julie Parks as a matter of urgency. The claimant then took a short period of annual leave between the 26th and 31st of October and upon her return to work on 31st October was informed that she was being suspended.

117. The tribunal found that the respondent's suspension of the claimant was unjustified and unreasonable in all the circumstances of the case. The suspension letter at page 492 refers to "an investigation to take place following allegations of potential gross misconduct relating to concerns regarding your leadership and also concerns in relation to inappropriate and unprofessional behaviour including bullying and harassment". The tribunal found that at the time of the suspension there had been no such "allegations" which could justify suspension at that stage. Nowhere in any of the documents is there any note of what was alleged to have been said by Anne Horsfield or her husband. No specific "allegations" were made by Emma Campbell or Linda Hunter. No evidence was given as to why it was necessary to suspend the claimant to enable any such investigation to be carried out. Julie Parks insisted that the decision to suspend the claimant was taken by Julie Lane at a meeting between Ms Lane, Steve Pett and Ms Parks. Ms Parks insisted that the decision to suspend could only be taken by Ms Lane in her capacity as the director of nursing. No explanation was given by the respondent as to why Ms Lane was not called to give evidence about the respondent's reasons for suspending the claimant in those circumstances.

118. No meaningful or adequate explanation was given to the tribunal by the respondent as to why the claimant's suspension lasted from 31st October 2016 until she was dismissed on 17th April 2018. The tribunal found that to be an inordinate and unreasonable length of time for an employee of the claimant's

seniority and length of service to be suspended. During that time the claimant was never provided with any specific details of the allegations against her, despite raising a formal grievance, which included included the need for and the length of her suspension.

119. The tribunal found the respondent's investigation into the claimant's alleged misconduct to be inadequate and unreasonable in all the circumstances of the case. No explanation was given for the unreasonable delay in interviewing the relevant witnesses, particularly those who are said to have expressed concerns about the claimant'' behaviour. No explanation was given as to what was to be the remit of the investigation or of any instructions given to the investigating officer. No explanation was given as to why the investigating officer was not called to give evidence to the tribunal. The allegations of misconduct for which the respondent says it dismissed the claimant were never specifically put to the claimant, so that she was never given a fair opportunity to prepare her case or to respond to them. The respondent's witnesses referred to little more than "themes" or "perceptions" by the staff, none of which contained a level of detail which would have enabled the claimant to respond. Many of the questions put to the staff contained what are commonly called "closed questions" which the tribunal found to be indicative of a requirement from the questioner that the interviewee would actively seek to identify any matters which may be detrimental to the claimant. When the investigation was completed and the report produced, it should have been sent to the claimant in accordance with the respondent's policy. No explanation was given by the respondent as to why the report was not sent to the claimant until October. The tribunal found that no reasonable employer in all the circumstances of this case, would have conducted the investigation in this manner.

120. The tribunal found that the disciplinary hearing itself was unfair and unreasonable from the outset, in that it did not set out with any precision the allegations of misconduct which the claimant was expected to answer. The tribunal found it unreasonable for the respondent to say in these proceedings that the claimant could and should have been able to discover the nature of the allegations by reading the investigation report. Bearing in mind the size of the respondent's administrative resources and in particular its dedicated HR resources, that was an unreasonable approach to adopt. The tribunal notes that, under cross examination, Ms Grieves conceded that there were a number of flaws and defects in the disciplinary hearing. Despite those concessions, Ms Grieves insisted that the disciplinary hearing had been fair and that those flaws did not adversely affect the fairness of the outcome. The tribunal found Ms Grieves to be an unpersuasive and unreliable witness. In assessing credibility, the tribunal took particular note of her sudden introduction of a finding by the disciplinary panel that the claimant had been dishonest in her handling of the charitable monies. Equally alarming was Ms Grieves evidence that it was this finding of dishonesty which led to the claimant being dismissed, as she would not have been dismissed solely in respect of the allegation relating to her professional behaviour. It was put to Ms Grieves in cross examination by Mr Rudd that this revelation was no more than an attempt by her to "beef-up" the respondent's case, which she could now see to have been seriously eroded by the answers given in cross examination by earlier witnesses. Ms Grieves denied that she was so doing. In the absence of any

meaningful explanation as to why there had never been any allegation of dishonesty made against the claimant and why that finding was not recorded anywhere in the dismissal letter, the tribunal found that Ms Grieves was indeed trying to "beef-up" the respondent's case. The tribunal found that Ms Grieves was being less than candid with the tribunal.

121. The tribunal found that the decision of the disciplinary panel to dismiss the claimant for gross misconduct was not supported by the evidence before the panel. The reasoning behind the decision was systematically dismantled by Mr Rudd in his cross examination of Ms Grieves.

122. The tribunal found that the appeal process conducted by Lynne Taylor was similarly flawed. The tribunal found that no reasonable appeal officer could possibly have fairly and reasonably addressed all of the claimant's grounds of appeal in the time taken to hear the appeal and particularly for the panel to undertake its deliberations. The defects in the investigation report were put to Ms Taylor who, albeit reluctantly, accepted that a number of the claimant's grounds of appeal should have been upheld. Ms Taylor said in her evidence that she could recall Ms Grieves saying at the appeal hearing that the dismissing panel had taken into account the claimant's "dishonesty" in coming to its decision to dismiss the claimant. Again, no mention is made of that in the minutes of the appeal hearing or in the letter dismissing the appeal. The tribunal found that the appeal process and the appeal hearing had not been conducted in a fair or reasonable manner.

123. In terms of the unfair dismissal claim, the tribunal was not satisfied that the respondent had established that its reason or its principal reason for dismissing the claimant was a reason related to her conduct. Those responsible for the claimant's dismissal and the dismissal of her appeal did not "genuinely believe" that the claimant had committed any acts of misconduct which are now alleged. There could be no such genuine belief because there were no reasonable grounds for that belief. There could be no reasonable grounds because there had not been a reasonable investigation. The respondent's decision to dismiss the claimant fell outside the range of reasonable responses open to an employer in all the circumstances of this case. This was an employee of thirty-eight years unblemished service who was suspended from her role in circumstances where that suspension was unjustified and unreasonable. The investigation which followed that suspension was inadequate and unreasonable. The investigation did not produce any qualitative evidence which could have led a reasonable employer to decide to dismiss the claimant in those circumstances, for reasons related to her conduct. The procedure followed by the respondent was unreasonable and unfair. For those reasons the claimant's complaint of unfair dismissal is well-founded and succeeds.

124 Turning now to the claimant's complaint of wrongful dismissal, the tribunal is not satisfied that the respondent has established that the claimant's conduct amounted to gross misconduct which could possibly have justified summary dismissal. Nothing which the claimant was accused of doing could be described as seriously inconsistent or incompatible with her duty as a clinical care co-ordinator. On an evaluation of the primary facts, the tribunal was satisfied that

nothing done by the claimant could be described as conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between the claimant and the respondent such as would render the claimant unfit for continuance in the respondent's employment and give the respondent the right to discharge her immediately. With regard to the allegations of professional conduct, inappropriate behaviour, bullying and harassment, there were simply no facts which could lead the respondent to come to that conclusion. With regard to the allegations relating to the charitable monies, the tribunal found that the claimant's failure to deposit those monies with the respondent's cashier was no more than an oversight and which did not involve any element of "dishonesty", applying the objective standards of ordinary reasonable and honest people armed with all the relevant information. For those reasons the claimant's complaint of wrongful dismissal is well-founded and succeeds.

125. The tribunal has found that the respondent has failed to establish a fair reason for dismissing the claimant. The claimant asserts that the real reason why she was dismissed, was because she had made protected disclosures. The wording of section 103A adopts the usual unfair dismissal formula that the whistleblowing must have been the reason or principal reason for the dismissal. The difficulty for any claimant in such circumstances is that he or she must establish that the whistleblowing impacted upon the mind or decision-making process of the dismissing officer to such an extent that the tribunal is satisfied that the whistleblowing was the principal behind the dismissal. The reason or principal reason therefore means the employers' reason in an unfair dismissal claim. However, possible complications may arise if the dismissing officer was genuinely unaware that any protected disclosures had been made or the dismissing manager has been manipulated and/or misled by a fellow manager, who is the one who really objected to the disclosure and then engineered a false (non-disclosure) case against the employee so as to engineer a dismissal. It is the latter situation which has formed the subject matter of considerable judicial discussion in **Orr v Milton Keynes Council [2011 EWCA-CIV-62], Co-operative Group Limited v Baddeley [2014 EWCA-CIV-658] and Royal Mail Group Limited v Jhuti [2016 IRLR854]** and later in the Court of Appeal in [**2017 EWCA-CIV-1632].** In **Jhuti,** the employment tribunal dismissed the claimant's complaint of automatic unfair dismissal under **section 103A**, finding that the decision-maker was unaware that Ms Jhuti had made a protected disclosure, having been given incomplete and misleading information by another manager. Thus, the protected disclosure formed no part of the decision-maker's motivation and was not the reason for the dismissal. The Employment Appeal Tribunal overturned that decision, holding that there was "no reason why the reason held by the manipulator of an ignorant and innocent decision-maker could not be attributed to the employer any more than the unfairness of his or her motivation." However, the Employment Appeal Tribunal decision was then overturned on further appeal by the Court of Appeal. The Court of Appeal referred to **Orr v Milton Keynes Counci**l, where the Court of Appeal had held that the focus must be on the knowledge or state of mind of the person who actually took the decision to dismiss. As was said by Underhill LJ in **Jhuti,** the essential ratio in **Orr** was as follows;

" The answer to the question "whose knowledge or state of mind was for this purpose intended to count as the knowledge or state of mind of the employer?" will be " The person who was deputed to carry out the employer`s function under **S.98**"

126. In the claimant's case before this tribunal, Ms Fairhall had made a number of protected disclosures to a number of different people within the respondent's hierarchy. That hierarchy included Julie Lane (Director of Nursing), Julie Parks (Associate Director of Community Services) and Steve Pett (General Manager). It was those three senior managers who met immediately after the claimant expressed her intention to invoke the formal whistleblowing policy, and decided that the claimant should be suspended. From the date of that decision, the respondent's substantial HR resources were engaged in the administration of the suspension, investigation, disciplinary process and appeal process. Those same HR resources were also engaged in the administration of the claimant's grievance, the grievance hearing and the grievance appeal. The claimant made it known to Mary Grieves and Lynn Taylor that she believed the reason why she was suspended, investigated, disciplined and dismissed, was because she had made those protected disclosures. Ms Grieves and Ms Taylor both confirmed under cross examination that they were aware that the claimant had raised a grievance, but both denied that they were aware of the exact contents of the grievance. Both denied that their respective decisions to dismiss the claimant and dismiss her appeal against dismissal, were in any way influenced by the fact that she had made those protected disclosures. The tribunal did not accept their evidence in that regard. The original decision to suspend the claimant and to instigate a formal investigation was taken by the most senior member of the hierarchy, Julie Lane. The tribunal found it likely that thereafter, the task of investigating the claimant, instigating disciplinary proceedings and ultimately dismissing her, were influenced by that hierarchy to such an extent that it was appropriate to attribute their motivation to those carrying out the process which led to the dismissal. The respondent has failed to produce any evidence to explain the claimant`s treatment and provided unsatisfactory explanations for other matters.

127. In **Kuzel v Roache Products Limited,** Mummary LJ said that if the employer fails to establish its alternative reason, it will often be the case that the employment tribunal will find the claimant's automatically unfair reason, such as whistleblowing, to be established. However, that is not a rule of law – it may be still be the case that there is in fact another reason established on the facts of the case which could still defeat the claimant's claim. In Mrs Fairhall's case, the tribunal has found that the respondent has failed to establish that it was reasonable to suspend the claimant in October 2016, to dismiss her in April 2018 and to dismiss her appeal in June 2018. The respondent has failed to establish that the claimant committed any act of misconduct which could justify dismissal. As Ms Souter said in her closing submissions, the approach advocated in **Kuzel v Roache** is as follows:-

(i) Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason? Has she raised some doubt as to that reason by advancing the section 103A reason?

(ii) If so, has the employer proved his reason for dismissal?

(iii) If not, has the employer disproved the **section 103A** reason advanced by the claimant?

(iv) If not, dismissal is for the **section 103A** reason.

In answer to those questions, the tribunal found:-

(i) The claimant has shown that there is a real issue as to whether the reason put forward by the respondent is a real issue as to whether the reason put forward by the respondent was not the true reason. The tribunal has found that the misconduct was indeed not the true reason.

(ii) The tribunal found that the respondent has not proved its "misconduct" reason for dismissing the claimant.

(iii) The respondent has not disproved the **section 103A** reason advanced by the claimant.

(iv) Accordingly, the tribunal is satisfied that the principle reason for the claimant's dismissal was a **section 103A** reason, namely that she had made protected disclosures.

128. In coming to that conclusion, the tribunal particularly takes into account the close proximity in time between the last of the claimant's disclosures and the declared intention to formerly engage the respondent's whistleblowing policy, and the decision to suspend the claimant. The tribunal also takes into account the unreasonable nature of the investigation, the delay in undertaking the investigation and the length of the suspension. The tribunal particularly takes into account lack of credible evidence from the respondent's witnesses who gave evidence to the employment tribunal. The tribunal found that Ms Grieves in particular was disingenuous in attempting to "beef-up" the respondent's case by stating that the dismissing panel had in fact found the claimant to have been dishonest with regard to the charitable monies and that it was this "dishonesty" which led to her dismissal. Lynn Taylor's evidence was little better, when she stated under cross examination that she did recall Ms Grieves mentioning at the appeal hearing that they considered the claimant to have been dishonest, yet there was no mention of such dishonesty anywhere in the notes of the hearing, the outcome letter, anywhere in Ms Taylor's witness statement or indeed in any part of the respondent's pleaded case. Ms Souter drew the tribunal's attention to the decision of the court of appeal in **Maund v Penwith District Council [1984 IRLR24]** where it was said that if the employer appears to show a reason for dismissal, then the burden passes to the employee to show that there is a real issue as to whether that was the true reason. The employee cannot do this by merely asserting an argument that it was not the true reason – an evidential

burden rests upon him or her to produce some evidence that casts doubt upon the employer's reason. The graver the allegation, the heavier will be the burden. Once this evidential burden is discharged, however the onus remains on the employer to prove the reason for the dismissal.

129. In all the circumstances of the present case, the tribunal considered it reasonable to infer from all of the surrounding facts, that the claimant had discharged the burden of proving that the principal reason for her dismissal was because she had made protected disclosures.

130. In addition to the complaint of automatic unfair dismissal for making protected disclosures, the claimant has also presented a complaint that she was subjected to detriment on the ground that she had made protected disclosures. Where the allegation is one of detriment short of dismissal, the claimant is required to show that the making of the protected disclosure "materially influenced the decision" to implement the detriment. An employee is entitled to rely upon the statutory protections relating to detriment right up to the effective date of termination, when the dismissal in question becomes effective. Only after that moment in time do the provisions relating to dismissal come into play.

131. Detriment is established if a reasonable worker would or might take the view that the treatment accorded to him of her had in all the circumstances been to their detriment or put them to a disadvantage. The tribunal found that the following treatment administered to the claimant by the respondent was done on the ground that she had made protected disclosures:-

(i) the suspension
(ii) the length of the suspension
(iii) the delay in the investigation process
(iv) the manner in which the investigation was conducted
(v) the failure to provide the claimant with specific details of any allegations
(vi) the unreasonable manner in which the grievance (and appeal) were conducted
(vii) the unreasonable manner in which the disciplinary hearing (and appeal) were conducted

132. The tribunal found that the decisions taken in each of the above matters was materially influenced in each case by the fact that the claimant had made protected disclosures.

133. Each of the following complaints is therefore well-founded and succeeds:-

(i) automatic unfair dismissal
(ii) ordinary unfair dismissal
(iii) being subjected to detriment for making protected disclosures
(iv) wrongful dismissal

134. A private preliminary hearing will be convened as soon as possible, to consider such further case management orders as may be appropriate to arrange for a final remedy hearing as soon as possible.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 January 2020

JUDGMENT SENT TO THE PARTIES ON

8 January 2020

AND ENTERED IN THE REGISTER

Miss K Featherstone

FOR THE TRIBUNAL