EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107420/2018

Held in Glasgow on 4, 5, 6 and 7 February 2019 (Final Hearing); and 30 May 2019 (Members' Meeting)

Employment Judge I McPherson
Tribunal Member Mrs J Ward
Tribunal Member Ms N Bakshi

Mrs Helen Hendrie	**Claimant** **In Person**
Templeton Care LLP	**Respondents** **Represented by:** **Mr Ed McFarlane - Employment Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that: -

(1) The claimant did not make any qualifying protected disclosures to the respondents as alleged, or at all, in terms of **Section 43B of the Employment Rights Act 1996.**

(2) The claimant was not dismissed by the respondents, but she resigned from their employment, with effect from 27 December 2017, further to her letter of 21 December 2017 to the respondents' director, Mr Paul Tatla, as part of a mutually agreed termination of her employment with the respondents.

(3) The claimant was not dismissed by the respondents, either expressly or constructively, on the grounds that she had made any qualifying protected disclosures to the respondents.

(4) Accordingly, the claimant's complaint that she was automatically unfairly dismissed by the respondents, contrary to **Section 103A of the Employment Rights Act 1996** is not well-founded, and that complaint having failed, it is dismissed by the Tribunal.

(5) In these circumstances, the claimant's complaint against the respondents is dismissed in its entirety, and she is not entitled to any compensation from the respondents, as sought in her Schedule of Loss provided to the Tribunal, as alleged, or at all.

(6) In particular, there being no proper claim before the Tribunal of any failure by the respondents to pay any holiday pay accrued to the claimant, but unpaid as at the effective date of termination of employment, the claimant's claim for £6,663 is refused by the Tribunal.

REASONS

Introduction

1. This case called before us, as a full Tribunal, on the morning of Monday, 4 February 2019, for a four-day Final Hearing for full disposal, including remedy if appropriate, further to a Notice of Final Hearing previously intimated to both parties by the Tribunal under cover of a letter dated 22 October 2018.

2. It had previously called before me, as an Employment Judge sitting alone, on Tuesday, 9 October 2018, for a Case Management Preliminary Hearing, following which my written Note and Orders (making various case management orders in relation to the case, and assigning it for Final Hearing, dated 11 October 2018) was issued to both parties under cover of a letter from the Tribunal dated 16 October 2018.

Claim and Response

3. By ET1 claim form, presented by the claimant acting on her own behalf, on 10 June 2018, following ACAS Early Conciliation between 26 March and 10 May 2018, the claimant, formerly employed by the respondents a Home Manager at Templeton House, Ayr, complained of being automatically unfairly

constructively dismissed by the respondents, for making a protected disclosure, and she indicated that, in the event of success with her claim, she sought compensation and a recommendation from the Tribunal.

4. At the Case Management Preliminary Hearing before me, on 9 October 2018, the claimant confirmed that, in the event that her complaint was upheld by the Tribunal, she sought to be compensated for injury to feelings, and for any financial loss, together with a declaration from the Tribunal that she had been automatically unfairly constructively dismissed by the respondents, for her making a protected disclosure. Further, she withdrew her request for a recommendation from the Tribunal, as one of her preferred remedies, as previously indicated in her ET1 claim form, accepting that her claim was not a complaint under the **Equality Act 2010**, and thus the Tribunal's power to make a recommendation under **Section 124 of the Equality Act 2010** does not apply.

5. As the claimant did not have the necessary two years' continuous service with the respondents, to bring a complaint of ordinary unfair dismissal, contrary to **Sections 94, 95 and 98 of the Employment Rights Act 1996**, it was her whistleblowing claim, under **Section 103A**, which does not require her to have that qualifying service, that was accepted by the Tribunal, on 15 June 2018, and copy of her ET1 claim form served on the respondents on that date for reply by 13 July 2018.

6. On 13 July 2018, Mr Ed McFarlane, Consultant with Deminos, Gateshead, lodged an ET3 response on behalf of the respondents resisting the claim. While, in her ET1, the claimant had identified the respondents as Windyhall Care Home LLP, the ET3 response explained that Templeton Care LLP is the legal entity which was previously named "***Windyhall Care Home LLP***". The respondents, who do not admit that the claimant was dismissed, explained that she resigned from their employment, and they denied that they had unfairly dismissed her as alleged, or at all, and they sought to have her claim dismissed in its entirety.

Final Hearing before this Tribunal

7. In advance of this Final Hearing starting, the claimant had produced a detailed Schedule of Loss, as ordered at the Case Management Preliminary Hearing. It was provided on 5 November 2018, seeking **£15,551.25** total compensation from the respondents, and thereafter the respondents provided a Counter-Schedule, on 27 November 2018, accepting that the claimant had, to that date, made reasonable efforts to mitigate her loss.

8. While, at the Case Management Preliminary Hearing, the Employment Judge had asked parties to co-operate and seek to agree a mutually agreed List of Issues for determination by the full Tribunal at this Final Hearing, and intimate that to the Glasgow Tribunal office, no later than seven days prior to the start of this Final Hearing, no agreed List of Issues was presented to the Tribunal by both parties.

9. When, in correspondence with parties, the Tribunal raised its concern over the lack of an agreed List of Issues, the respondents' representative, Mr McFarlane, wrote to the Tribunal, on 1 February 2019, explaining that he did not receive a reply from the claimant regarding the draft List of Issues sent to her, and he would not wish to have put her under any pressure as an unrepresented party, but he enclosed, for the Tribunal's consideration, his draft List of Issues.

10. These were discussed with both parties, at the commencement of this Final Hearing before us, and subject to revisions proposed by the Employment Judge, and accepted by both parties, thereafter agreed. We refer to these List of Issues later in these Reasons, at paragraph 21 below.

11. As per the Orders made at the Case Management Preliminary Hearing, we were provided with an agreed Joint Bundle of Documents comprising 26 documents, duly indexed, and paginated, from pages 1 to 138, in an A4 ring binder. During the course of the Final Hearing, additional documents were added to this Joint Bundle as documents 10B, 12A, 25A, 25B, 27, and 28.

12. Further, and again as ordered at the Case Management Preliminary Hearing, we were provided with signed witness statements from the claimant and the respondents' three witnesses, being **Mr Paul Tatla** (Director), **Ms Sunny Dail**

(HR Advisor); and **Ms Jacqueline Weston**, (Regional Manager), which had been mutually exchanged between the parties, and copies provided to the Tribunal, on 22 January 2019.

13. As ordered at the Case Management Preliminary Hearing, witness statements were taken as read, as per **Rule 43 of the Employment Tribunal Rules of Procedure 2013,** and we pre-read those witness statements, on the morning of day one of the Final Hearing, on Monday 4 February 2019. Thereafter, we proceeded to hear the evidence of each witness, from cross examination onwards, including questions of clarification raised by the Tribunal.

14. While the claimant had indicated, at the Case Management Preliminary Hearing, that she intended to lead three other witnesses (identified as **Louis Lusk** (maintenance), **Katrina Thomson** (Unit Deputy manager), and Lorna **Bryce** (agency night nurse)), she did not do so, and we had no witness statements from any of them. Though advised at the Case Management Preliminary Hearing of her right to seek a Witness Order in regard to these three potential witnesses for her, the claimant made no such application prior to the start of this Final Hearing, nor at this Final Hearing.

15. As dismissal was denied by the respondents, on the basis that they submitted that the claimant had resigned from their employment, the Employment Judge had previously ordered, at the Case Management Preliminary Hearing, that the claimant and her witnesses would be heard first at this Final Hearing, followed by witnesses for the respondents.

16. While, at that Case Management Preliminary Hearing, the Employment Judge had discussed whether either party sought any order for privacy, or restriction of disclosure, under **Rule 50 of the Employment Tribunals Rules of Procedure 2013,** and / or for redaction of information identifying residents / service users of the respondents' business, given Tribunal Judgments are now published online, we were not asked to make any **Rule 50** order, and we did not consider it appropriate to do so, of our own initiative, when the terms of this Judgment and Reasons do not identify any such residents by name.

17. We note and record, in this regard, that on 2 November 2018, Mr McFarlane, the respondents' representative, had written to the Tribunal advising that there was no need for an anonymisation key to be provided, and any redaction of resident's names would be made in respect of documentary productions. On that basis, he stated there was no need for any **Rule 50** Order, and he sought the claimant's comments in that regard. We discussed this issue with both parties, at the start of this Final Hearing, and that was an agreed approach. Finally, we note and record that the claimant was accompanied at the Final Hearing by her husband, Mr Ronnie Hendrie, for moral support, but he was not called as a witness on her behalf.

18. The claimant's witness statement was not set out in numbered paragraphs, despite the express direction to that effect made in the Tribunal's previous case management orders. We note that point as an observation, and not as a criticism of the claimant, as an unrepresented, party litigant. At the start of the Final Hearing, the clerk to the Tribunal provided all parties, and the Tribunal, with a copy of the claimant's witness statement, duly annotated by the Judge, adding on the outside left column of each page, handwritten paragraph numbers from (1) to (19). This annotation aided navigation through the claimant's witness statement, and it was of assistance to both the Tribunal, as well as parties, and witnesses, in the course of evidence being led before us at this Final Hearing.

Findings in Fact

19. We have not sought to set out every detail of the evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal. On the basis of the sworn evidence heard from the various witnesses led before us over the course of this Final Hearing, and the various documents in the Joint Bundle of Documents provided to us, the Tribunal has found the following essential facts established: -

(i) The claimant was formerly employed by the respondents as Home Manager, of their Templeton House, at 40 Racecourse Road, Ayr. She commenced employment with the respondents, then known as "***Windyhall Care Home LLP***", on 1 April 2016, following her acceptance on 8 March 2016 of an offer letter issued on 7 March 2016.

(ii) That offer letter detailed the outline of her terms and conditions of employment with the respondents, including a salary of £50,000 per annum, her working hours, notice entitlement (3 months either way after a probationary period of 6 months), and subject to a forthcoming contract of employment, which was not, in fact, ever issued to her. Copy offer of employment was produced to the Tribunal at pages 86 to 88 of the Joint Bundle.

(iii) Her salary was increased to £52,500 per annum, with effect from 25 September 2017, by letter from the respondents' HR Advisor, Ms Sunny Dail, dated 6 October 2017, a copy of which was produced to the Tribunal at page 93 of the Joint Bundle. That letter thanked the claimant for her "***ongoing commitment and appreciate your dedication to the continuing development and growth of the company***."

(iv) The claimant's employment was thereafter terminated on 27 December 2017, following the respondents' acceptance of her post-dated resignation letter to Mr Paul Tatla, the respondents' Director, intimated in writing on 21 December 2017, as per the copy resignation letter produced to the Tribunal at page 100 of the Joint Bundle, and replicated at page 103.

(v) Her resignation was not followed up in writing by an acceptance from the respondents, although Ms Dail had intended to do so. The claimant was paid in lieu of her notice entitlement of 3 months' pay, and copy of her final payslip from the respondents was produced to the Tribunal, as part of the Joint Bundle, at page 133. In particular, she was paid £8,364.43 net, comprising 3 months' salary @ £13,125 gross, and

gross holiday pay of £302.85, less deductions of PAYE tax and NI, and employer and employee pension contributions.

(vi) A copy of the claimant's P45 from the respondents, issued on 22 January 2018, and copy produced to the Tribunal as additional document 28 added to the Joint Bundle, shows the claimant's leaving date as 27 December 2017.

(vii) The respondents are a limited liability partnership, which operate about 40 care homes across the United Kingdom, and the legal entity, for the care home business where the claimant was employed, was previously named Windyhall Care Home LLP.

(viii) It was a matter of agreement between the parties that notwithstanding the change of name of the limited liability partnership, the claimant had continuity of employment with the respondents from her commencement of employment on 1 April 2016, until its termination on 27 December 2017.

(ix) As such, it was a further matter of agreement, that the claimant did not have sufficient qualifying service to claim ordinary unfair dismissal under **Sections 94 and 108 (1) of the Employment Rights Act 1996**. Her claim before the Tribunal proceeds under **Section 103A**.

(x) Templeton House, Ayr, is a care home, operated by the respondents, providing residential, respite, dementia and 24-hour care for residents, and it has, on average, 80 employees and 50 residents at Templeton House.

(xi) The claimant was employed there by the respondents as the Home Manager. While she never received a formal, written contract of employment, she did receive a 5% pay increase, in September 2017, confirmed to her by letter from the respondents on 6 October 2017, a copy of which was produced to the Tribunal in the Joint Bundle, at page 93.

(xii) Excerpts from the Windyhall Nursing Home Policy and Procedure Manual (undated) were produced to the Tribunal at pages 46 to 85 of the Joint Bundle, including policy No.432 ("***Whistle Blowing***"), at pages 201 and 202 of the Manual, being pages 76 and 77 of the Joint Bundle.

(xiii) As a consultant then engaged by the respondents, Jackie Weston, had, on 4 October 2017, visited Templeton House, and Ms Weston and the claimant had discussed concerns then arising, and Ms Weston drew up an Action Plan / Intervention Record to address matters. The claimant had highlighted a complaint about the nurse call system at Templeton House, and a pager system, as opposed to an audible alarm, was discussed between Ms Weston and the claimant.

(xiv) A copy of this Action Plan, highlighting issues raised, and proposed actions, was produced to the Tribunal at pages 91 and 92 of the Joint Bundle.

(xv) On 29 November 2017, the claimant emailed Jackie Weston (Regional Manager), Paul Tatla (Director), and Manpreet Johal (another Director), about a meeting. A copy of this email was produced to the Tribunal at pages 94 and 95 of the Joint Bundle.

(xvi) In that email, the claimant raised a number of issues, stating that the respondents needed to address expectations from the local Council, and the Care Inspectorate, and: "***I am banging my head against a brick wall and can't get any peace from the home***."

(xvii) In December 2017, the respondents appointed a new Regional Manager, Ms Jackie Weston, who commenced her employment with a visit to Templeton House, on Monday, 4 December 2017.

(xviii) She thereafter made eight visits in total, six of which were when the claimant was at work, and two when she was not present, on which occasions Ms Weston met the deputy manager, Katrina Thomson.

(xix) On 4 December 2017, Ms Weston drew up a further Action Plan / Intervention Record, with the claimant, a copy of which was produced to the Tribunal at pages 96 and 97 of the Joint Bundle.

(xx) Thereafter, on Tuesday, 5 December 2017, Ms Weston again visited Templeton House, and discussion with the claimant, and the deputy manager, focused on an on-call protocol, with a view to improving management's work-life balance.

(xxi) One week later, on Tuesday, 12 December 2017, Ms Weston visited Templeton House to discuss marketing of the service and that evening, Ms Weston visited Templeton House again to coordinate the evacuation of 59 residents from another care home in the respondents' operations following a fire at the Crossgates care home in Kilmarnock.

(xxii) That incident was a challenging time, for the respondents, and their management, involving coordinating the transport of 59 residents to Templeton House, and to other care homes, and all residents at the Kilmarnock care home, which had gone on fire, were safely evacuated, and relocated.

(xxiii) There were seven residents from the evacuated care home who could not be found beds, and they were provided with temporary beds at Templeton House, and staff from the evacuated home attended at Templeton House to ensure that the care needs of those evacuated residents were met by the respondents.

(xxiv) On Friday, 15 December 2017, Ms Weston visited Templeton House to support the deputy manager, as the claimant was on pre-arranged annual leave that day. Ms Weston was made aware that day of a safeguarding issue, an adult protection claim, raised by the local authority, which related to medication, a matter that the claimant had been asked to coordinate on Thursday, 14 December 2017, and these concerns required an investigation and response to the local authority.

(xxv) On Monday, 18 December 2017, on a further visit to Templeton House, Ms Weston discussed the medication issue with the claimant, and her deputy. The claimant gave a verbal account, and she was asked to provide a written statement. The complaint was upheld, but it did not lead to disciplinary action, being regarded as a learning opportunity.

(xxvi) At that meeting, the claimant expressed her discontent and unhappiness at being responsible for 16 extra residents at Templeton House who had been displaced by the fire at the evacuated care home, on 12 /13 December 2017, and she expressed a concern about staff at Templeton House.

(xxvii) In reply to the claimant's concerns, Ms Weston suggested providing additional management support from a peripatetic manager, Tom Johnston, who could manage the 16 residents as a self-contained unit at Templeton House, relieving the claimant of any managerial responsibility for them.

(xxviii) The claimant was again on pre-booked annual leave, on Tuesday 19 December 2017, and thereafter she was on self-certified sickness from 20 to 27 December 2017. A copy of her self-certified absence form, dated 20 December 2017, was produced to the Tribunal at pages 104 and 105 of the Joint Bundle. She stated that: "***I feel isolated, unsupported and very anxious."***

(xxix) The claimant complained of "***work related stress***." She further stated, in the brief detail supplied by her on that date, that she felt "***very upset with no communication to me and rumours are rife around the home that I have been sacked, suspended, off sick with stress, all coming from Crossgate staff. This has made it not an environment for me to work in."***

(xxx) In support of her evidence before this Tribunal, the claimant lodged as productions, at pages 106 to 123 of the Joint Bundle, copy WhatsApp messages on various dates, including 20 December 2017, with Katrina Thomson, deputy manager, and Lewis Lusk, maintenance.

(xxxi) The claimant contacted Ms Weston by email on the morning of 20 December 2017 alleging that there had been no communication with her, and alluding to rumours being rife about her being sacked or suspended, and being off sick with stress. A copy of this email was produced to the Tribunal, at page 98A of the Joint Bundle, albeit that copy is shown as sent on 19 December 2017 at 21:09, notwithstanding it is addressed: "***Good morning Jackie…"***

(xxxii) While off sick, the claimant agreed to a meeting with the respondents' Director, Mr Paul Tatla, who had a meeting, and conversation with her, at Templeton House, on 20 December 2017. That conversation was documented, and it was held on an informal "***without prejudice***" basis, although there was no dispute between the parties, and it was not a "***pre-termination negotiation***" under **Section 111A of the Employment Rights Act 1996.**

(xxxiii) According to Mr Tatla's evidence to the Tribunal, supported by evidence from Ms Weston, the conversation between the claimant and Mr Tatla arose because of the respondents' concerns about the claimant's performance. While the respondents acknowledged that the claimant had made various improvements in Templeton House, they stated that there were concerns around the high turnover of staff, and, particularly in light of the challenges that had arisen due to the fire at the other care home, and the evacuation of residents to Templeton House. Mr Tatla expressed concerns to the claimant that her performance was not at the level expected.

(xxxiv) There was produced to the Tribunal, as document 13 in the Joint Bundle, at page 99, a typewritten "***private and confidential***" proforma note, with manuscript insertions, showing the date, 20 December 2017, and stating "***I would like to confirm that a meeting was held between myself Paul Tatla (director) and Helen Hendry (home manager at Templeton) on 20 Dec 2017 at Templeton House. This meeting was held Without Prejudice***." The note was signed, and dated, by both Mr Tatla, and the claimant, on 20 December 2017.

(xxxv) Further, there was also produced to the Tribunal, as document 14, at page 100 of the Joint Bundle, a copy of the claimant's handwritten resignation letter, post-dated to 27 December 2017, and reading as follows:

> "***Dear Paul,***
>
> ***I am resigning from my position at Templeton House as home manager under the agreement of a good reference and 3 month salary paid in a lump sum on next pay run."***

(xxxvi) That letter was signed by the claimant. It was handed to Mr Tatla at the meeting with him on 21 December 2017.

(xxxvii) Further, there was also produced to the Tribunal, as document 15, at pages 101 to 102 of the Joint Bundle, a letter to the claimant, entitled "***Resignation Acceptance***", confirming acceptance of the claimant's resignation, and associated emails between Sunny Dail, HR advisor, Paul Tatla (director), and Jackie Weston, on 20 December 2017.

(xxxviii) The proposed letter addressed to the claimant, included in Ms Dail's email to Mr Tatla of 20 December 20017 at 12:09:15 GMT, stated as follows:

> "***Dear Helen,***
>
> ***Resignation Acceptance***
>
> ***I would like to confirm that Windyhall Care Home Limited will pay the following amounts on the receipt of a written resignation.***
>
> ***(a) All pay up to and including the effective date of termination of your employment from the 27th December 2017.***
>
> ***(b) A sum in respect of accrued but untaken annual leave entitlement (if applicable).***

(c) Payment of 3 months' notice made payable to you in the next pay run on 28th January 2018.

Regards

Sunny Dail

HR Adviser

Care Concern Group."

(xxxix) On 21 December 2017, Caitlin Murray, administrator at Templeton House, emailed Sunny Dail, with copy of the claimant's resignation letter, as per page 103 of the Joint Bundle.

(xl) On 4 January 2018, the claimant emailed Sunny Dail, HR advisor at the respondents, on the matter of references. A copy of this email, and further emails in a chain to 10 January 2018, were produced as document 19, at pages 124 to 126 of the Joint Bundle.

(xli) In particular, as shown by the copy email of 4 January 2018, at page 126 of the Joint Bundle, the claimant wrote to Sunny Dail as follows:

"***Subject: references***

Good morning Sunny

I hope you are well. As you are aware that I agreed to resign from my position in Templeton House. I was sick the first week but resigned from the 27th December. It's a shame really after all the hard work I put in there however, Paul had already made up his mind and I knew I couldn't work with Jackie. I asked Paul about who had given me the reference and he said him or you but whoever I felt comfortable with. I feel more comfortable with you. I have a few interviews booked for the next few weeks so I just wanted to let you know that I will give them your email for my references. Paul assured me that it would be a good reference as he also told me he knows I worked hard!!! Yet still wanted me to resign. These interviews are for management positions

so they do need to be more than started and finished etc. I am sorry you are now in this position as Paul also said you wanted to wait until I was not as upset and sick but that's where we are at now. I agreed to resign if I received good references and three month salary paid as a lump sum at the end of January. I am sorry again and I will miss Templeton but it is now pastures anew. Thank you in anticipation for my references. Can you send me a copy of any references given.

Regards,

Helen."

(xlii) In her evidence to the Tribunal, Ms Dail stated that she believed references had been given to the claimant's prospective new employers, but none were produced to the Tribunal in the Joint Bundle, and the claimant advised us that she had never received any copy reference written by the respondents about her.

(xliii) The claimant kept in contact with the respondents after her resignation. She informed the respondents of her new employment on 24 January 2018, and she received her final payslip detailing the payment in lieu made to her. She queried her holiday entitlement in respect of the payment in lieu of notice, but the respondents had calculated her holiday entitlement up to the effective date of termination.

(xliv) That day, 24 January 2018, the claimant had also been informed of the outcome of another Employment Tribunal case involving a former employee of the respondents, a Mr McCreadie, and she was thanked for her support during that case, in which she had attended at the Tribunal as a witness for the respondents, in a claim against the respondents, then known as Windyhall Care Home LLP.

(xlv) Copy email chain between the claimant, and Sunny Dail, on 24 and 25 January 2018, was produced to the Tribunal, at documents 20 and 21, at pages 127 to 129 of the Joint Bundle.

(xlvi) There was also produced to the Tribunal, as additional document 28, added to the Joint Bundle copy P45 (details of employee leaving work) certificate issued to the claimant, by the respondents, but under their former name of Windyhall Care Home LLP, dated 22 January 2018, showing the claimant's leaving date as 27 December 2017.

(xlvii) Post termination of employment with the respondents, the claimant secured new employment, with a number of employers. Initially, she started with Lornebank Care Home, Hamilton, on 7 February 2018, leaving that employment on 9 April 2018. Thereafter, she started with Chester Park, Govan, Glasgow, on 16 April 2018, until 17 September 2018.

(xlviii) Since 18 September 2018, the claimant has been employed by Hamberley Care, Newton Mearns, Glasgow and she is earning more than she had been earning when employed by the respondents, where, as at the effective date of termination of her employment, on 27 December 2017, her annual gross salary was £52,500. Her gross salary in her current employment is now £57,000 per annum.

(xlix) A copy of the claimant's mitigation evidence, including documentation relating to these new employments, post termination with the respondents, was produced to the Tribunal, as additional document 25A, added to the Joint Bundle.

(l) A copy of the claimant's payslips from the respondents, from December 2017, to January 2018, were provided to the Tribunal, as document 24, at page 133 of the Joint Bundle albeit still showing the employers name as the company's former name, Windyhall Care Home LLP.

(li) Her final payslip, dated 25 January 2018, as produced at page 133 of the Joint Bundle, shows that she was paid 3 months' gross salary, plus holiday pay, producing a net payment of £8,364.43.

(lii) That final payslip used a monthly salary of £4,375 gross, whereas the previous month's payslip, dated 28 December 2017, showed a gross monthly payment of £4,971.67, producing a net monthly pay of £3,355.37.

(liii) While it was a matter of agreement between the parties, that by letter of 6 October 2017, from the respondents, to the claimant, as produced at page 93 of the Joint Bundle, she received a pay increase, with effect from 24 September 2017, increasing her salary to £52,500 gross per annum (producing a monthly gross of £4,375) her December 2017 gross pay had been paid at a higher rate. At this Final Hearing, neither the claimant, nor the respondents' witnesses, could explain why that was so.

(liv) According to the respondents' Counter-Schedule, as produced to the Tribunal at document 26 of the Joint Bundle, at pages 137 and 138, the claimant's annual gross salary of £52,500 produced a monthly gross of £4,375, or £1,009.62 per week gross.

(lv) The claimant's own Schedule of Loss, produced to the Tribunal as document 25, was at pages 134 to 136 of the Joint Bundle, and it stated as follows:

"*Schedule of Loss as at 30/10/20018*

Constructive dismissal – after whistleblowing

Basic award

Effective date of termination *27/12/2017*

Age at EDT *53*

Number of years' service at EDT *1 year 9 months*

I was given 3 months' notice of pay. Covered until March 2018

Compensatory award

I started looking for work after Christmas

I earned at EDT 52,500 pa

I started with Lornebank Care home 7 February 2018 35,000 pa

I left this employment on the 9th April as my salary was only 35,000 until 6-month probation was over and as I am the main earner I had to find a better paid job. Had not been told it was for 6 months.

I earned £673.00 I would have earned 1,009 loss of £336.00

I started with Chester Park on the 16th April earning 47,000 for the first 3 months and then to 50,000 after that.

Earned £10,846 would have earned £12,115 loss of £1,269

I was on 50,000 for 22 weeks until 18th September

Earned 21,153 – would have earned 22,211 loss of 1,058

No further loss from income from the 17th September as now being paid £57,000 pa

Pension Loss

There was no pension contribution from Jan the 2nd 2018 until July 2018 from employers

Employers contribution 80.00 loss of £480.00

Job further away so loss of fuel costs until the 17th September 2018
35 weeks at 30.00 a week loss is £1,050

Holiday pay I felt I never had any holiday time although I was off, it was like working at home answering calls every day and on some days being phoned in.

Loss of £6,663

Uplift for not following that ACAS code

Never offered to listen to a grievance hearing just stated part company.
10% of loss of total loss claim £1085.60

Loss of statutory rights

Having to wait 2 years for full entitlement Loss of £500

Total £12,441

Uplift for failure to follow investigations/disciplinary hearing in that a decision was taken without discussions or a statement from me when it was against me and was told "I don't like investigations or disciplinary's so it's time to part company" and you state an outcome in your response so no appeal offered either.

Total Loss for failures in no grievance, no investigation not following ACAS code hurts, stress and loss of confidence.
I claim 25% of total loss £12,441 which is £3,110.25

***full total compensatory claim including uplifts £15,2551.25**"*

(lvi) In their Counter Schedule, the respondents accepted that, if liability was established, the claimant had, to that date, made reasonable efforts to mitigate his loss, and further that she had received £302.85 gross for outstanding holiday pay in her final pay for 11.25 hours.

(lvii) Given the statutory limit on the amount of a week's pay, at £489 per week, the respondents also accepted that, if liability was established, the claimant had a basic award restricted to £733.50, being 1.5 weeks' pay given her age and length of service.

(lviii) The respondents further argued that as there is no dismissal, the ACAS Code of Practice is not engaged, and that the claimant should face a 25% reduction in any compensatory award for unfair dismissal for her failure to pursue a grievance with the respondents.

(lix) Protected disclosures relied upon by the claimant

(lx) At this Final Hearing, further to the detail of claim provided by the claimant in her ET1 claim form (copy produced to the Tribunal, as document 1, at pages 1 to 14 of the Joint Bundle), the Tribunal allowed the claimant to add to the Joint Bundle, at pages 45A/E, her Case Management Preliminary Hearing agenda, where, at section 2 of that agenda, the claimant had stated: " ***I tried to tell Paul Tatla that I did not agree with J Weston's intentions in that she allowed a resident with pressure sores to stay in a wheelchair overnight also she wanted me to silence buzzers – then she starting attacking me."***

(lxi) While no specification was then provided of when this disclosure relied upon was made, the claimant's PH agenda stated that she believed it disclosed information tending to show that a person had failed to comply with a legal obligation, and a criminal offence was being committed, and she further stated that the disclosures had been made in the public interest "***for safety reasons and welfare of residents."***

(lxii) Further, at pages 45F/G, the claimant was allowed to lodge her handwritten note of what she regarded as her disclosures to the respondents, stated to be between 12 December 2017 and 20 December 2017, but including one on 29 November 2017 (at No.6), as follows: -

(1) I made a protected disclosure to J. Weston about not silencing the buzzer on three separate occasions. (oral) to J. Weston (paragraph 2) statement (d)

(2) The night of the fire 12th December I made a disclosure that I was not happy to have a nurse who we didn't think was acceptable for Templeton House as we had to let her go in probation but was now working for Crossgates. (oral) to J. Weston (paragraph 7) statement (d)

(3) Residents sleeping in a wheelchair, I discussed with J. Weston that I was not happy with resident with pressure issues slept in a wheelchair all night (oral) 13th December (paragraph 9) statement (d)

(4) 20th December I sent J. Weston an email stating I was going home sick after the stress of the last few days and rumours currently going round the home. On this email I reported the four missing Tramadol (written). Statement (d) and (b). *(Copy email was produced to the Tribunal at page 98A of the Joint Bundle)*

(5) 12th Dec. Asked J. Weston to move residents straight from Crossgates to save them discomfort. A Fire Regulations evacuation not in place. (paragraph 6) statement (d) and (1a)

(6) Email to directors 29th Nov. I was stressed to P. Tatla in email, looking for respite & support (written) (paragraph 3) statement (d). *(Copy email was produced to the Tribunal at pages 94 and 95 of the Joint Bundle).*

(7) Disclosed to P. Tatla everything that was going on but he wasn't interested (oral) (paragraph 18) statement (d)."

(lxiii) In that handwritten note, the references to "***paragraphs***" are to paragraph references in her witness statement lodged with the Tribunal, and her reference to "***statements***" are to the relevant

paragraphs of **Section 43B(1) of the Employment Rights Act 1996**, as referred to in the final agreed List of Issues before this Tribunal., being (a) criminal offence ; (b) breach of legal obligation; and (d) health and safety.

Tribunal's Assessment of the Evidence

20. In considering the evidence led before the Tribunal, we had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Joint Bundle of Documents lodged and used at this Final Hearing, which evidence and our assessment we now set out in the following sub-paragraphs: -

(i) **Mrs Helen Hendrie: Claimant**

(a) The claimant was the first witness heard by the Tribunal on the afternoon of Monday, 4 February 2019, and concluded at the close of proceedings the following day. We had pre-read her witness statement, extending to 19 paragraphs, over five pages. Aged 54, she was the respondents' Home Manager at Templeton House, Ayr.

(b) To put her evidence in context for the Tribunal, albeit it had pre-read her witness statement, and those of the respondents' three witnesses, the claimant was asked by the Judge about a number of matters by way of some structured and focused questions from the Judge.

(c) As per the footnote to page 5 of her witness statement, the clamant stated that: ***"... this is a true account of my memory of the treatment in my last month or so at Templeton House care home."***

(d) These questions asked of her by the Judge were designed to clarify matters arising from her witness statement and get

appropriate cross references to relevant documents from the Joint Bundle, given her witness statement had not cross-referenced, despite the Judge's earlier orders. We note that point as an observation, and not as a criticism of the claimant, as an unrepresented, party litigant.

(e) When the claimant spoke of her claim for a 10% uplift on any compensatory award, we adjourned to allow her, as an unrepresented, party litigant, to borrow the Judge's bench copy of "***Butterworths Employment Law Handbook.***" After an adjournment, she advised us as to which parts of the ACAS Code of Practice of Disciplinary and Grievance Procedures she specifically alleged the respondents had unreasonably failed to comply.

(f) In giving her evidence to us, the claimant advised us that she was a good Home Manager, and how her treatment by the respondents had caused her stress, and a loss of confidence, but she was now working again, with a new employer, and proving she can do her job.

(g) When the claimant was asked by the Judge about the protected disclosures, on which she was relying in her whistleblowing claim against the respondents, and the call on her, at paragraph 32 of the Judge's earlier Case Management Preliminary Hearing Note and Orders to try and provide better specification, within 28 days to the respondents, and the Tribunal, the Judge noted that she had not done so, and in reply, she explained the difficulty she had had in getting external assistance from the Royal College of Nursing, or elsewhere, to assist her in these Tribunal proceedings.

(h) In further reply to the Judge, when the claimant stated that she had a written note of the protected disclosures on which she was relying, the Judge stated it would be of assistance to the Tribunal, and to the respondents, if she could list and identify them, for the avoidance of any doubt. We allowed her an adjournment to do so, following which she produced, and we added to the Joint Bundle, an additional document, at pages 35F/G, being her handwritten statement of the seven disclosures she was relying upon at this Final Hearing. We have narrated its terms in our findings in fact above.

(i) Likewise, we allowed the claimant to lodge, and add in to the Joint Bundle, her Case Management Preliminary Hearing Agenda, dated 21 June 2018, which we labelled as pages 45A/E. It provided details of her claim about whistleblowing at Sections 2.1 to 2.5.

(j) Arising from the Judge's questions of clarification to the claimant, when proceedings adjourned, at 4.00pm that first day, the claimant was allowed to bring any further, additional documents she wanted to add to the Joint Bundle in respect of her mitigation evidence, in time for the start of proceedings the next day, Tuesday, 5 February 2019.

(k) While she had lodged a Schedule of Loss, she had not provided any mitigation evidence earlier, despite the Tribunal's earlier orders. We note that point as an observation, and not as a criticism of the claimant, as an unrepresented, party litigant.

(l) On Tuesday, 5 February 2019, the claimant attended, and resumed her sworn evidence to the Tribunal. She produced mitigation evidence, which we added to the Joint Bundle, as document 25A, as also document 25B, the latter being her

handwritten note of how she alleged that the respondents had unreasonably failed to follow the ACAS Code of Practice.

(m) An issue then emerged about the claimant's wish to lodge a document from the Care Inspectorate about changes made in notifying adverse events involving controlled drugs, and records that all registered care services (except childminding) must keep and guidance on notification reporting.

(n) A further issue emerged about whether or not document 5 in the Joint Bundle, at pages 46 – 85, being excerpts from the respondent's Policy Procedure Manual for Windyhall Nursing Home, was or was not an agreed document.

(o) After an adjournment, the respondents agreed, on the basis of proportionality, and so as to not waste time, to the Care Inspectorate a document being added to the Joint Bundle, and we labelled it as document 27, but we stated that its relevancy was reserved for parties' closing submissions. Neither party, however, addressed us further on the document in their closing submissions to us.

(p) As regards the Policy and Procedure Manual, the claimant insisted that what was in the Joint Bundle was not the same as the copy she had prepared at Templeton House, but the respondent's representative, Mr McFarlane, advised that what was lodged in the Joint Bundle was what was on the current Home Manager's laptop, inherited from the claimant, and, in those circumstances, both parties then both agreed that we would work on the basis that what was in the Joint Bundle was an agreed document.

(q) The claimant was cross-examined by Mr McFarlane, the respondent's representative, thereafter, for a period of just over 2½ hours in total, excluding the lunch break, and she was then asked some questions of clarification by the lay members of the Tribunal, before evidence concluded at 3.48pm that afternoon, and the case was continued to the following morning, for the respondents' first witness, Ms Jacqueline Weston.

(r) In giving her evidence to the Tribunal, the claimant did so, in answering the Judge's questions of clarification, about her witness statement testimony, in a relatively calm and relaxed manner, but when cross-examined by the respondents' representative, she became more restrained and, at certain points, appeared defensive of her own position.

(s) We put that down to her nervousness in giving evidence in a formal setting, against her former employers, and not to any evasiveness on her part. She was doing her best to answer questions asked of her, whether by the Judge, Mr McFarlane, or the lay members of the Tribunal, and in doing so, answering to the best of her recollection.

(t) In giving her evidence, the claimant did so, very much as she saw matters, and she did not necessarily always see the bigger picture, and she sometimes failed to take that bigger picture into account. In recalling events, her own recollection was not always accurate. By way of example, she insisted she had not asked for help with a letter of complaint from a resident's relative, in or about November 2017, but the evidence produced by the respondents (at page 95A of the Joint Bundle) showed that she had, and accordingly we felt this episode of her testimony to the Tribunal reflected on her reliability, rather than her credibility.

(u) We feel that the claimant had a perception about her role and responsibility, and that of Jacqueline Weston, and that the claimant resented the new management structure with Ms Weston as the incoming Regional Manager, and that she did not want her present at the meeting with Paul Tatla. Further, despite suggestions from Ms Weston appearing to us to be reasonable, we felt that the claimant was very entrenched in her own views, and she seemed unable to take on board any suggestions, whether or not they were reasonable in the circumstances.

(v) We felt that the claimant felt her own experience, skills and attributes as a Manager meant her suggestions should automatically be taken on board by the new Regional Manager, and so the claimant appeared as non-receptive to other ideas or views that were not the same as hers.

(w) The claimant was clearly doing her best, as an unrepresented party litigant, and while we did not believe the accuracy of everything she said to us in the evidence, we did not doubt her honesty in giving her best recollection of events some time ago, which she clearly still finds difficult even now in recounting. It seemed to us that it was a case of misperception, rather than deception.

(x) It was clear to us that the claimant was passionate about her claim, and while she had been involved as a witness in an earlier Employment Tribunal against the respondents, then Windyhall Care Home LLP, by a Mr McCreadie, in January 2018, she had not been at that Employment Tribunal as a representative for the respondents, but as a witness, whereas

here she was representing herself, and not represented by her trade union, the Royal College of Nursing.

(y) She spoke, in her closing submissions, about her case being "***based on principle***", and while the "***legal technicalities***", as she referred to them, were a matter for us as the Tribunal, she stated that she regarded this process as being cathartic, and part of her process to move on from her time with the respondents.

(z) In particular, the claimant advised us that she recognised this Final Hearing as a necessary part of that process. While even Mr McFarlane, the respondents' representative, in his own closing submissions to us, recognised that she had not been treated fairly by Mr Tatla, which he described as being "***far from ideal in good industrial relations***", we as the Employment Tribunal dealing with this case recognise that there is a distinction between fairness, as that term is generally and commonly understood, and how, applying the relevant law to the facts before us, we must deal with this case.

(ii) **Ms Jacqueline Weston: Respondents' Regional Manager**

(a) The first witness for the respondents was Ms Weston. We heard her evidence on the morning of Wednesday, 6 February 2019. We had pre-read her witness statement, extending to 21 paragraphs, over 10 pages. Aged 44 years, her witness statement told us that she is the Director of Care for the Care Concern Group. She had been employed by the respondents as a Consultant for about 1½ years before her employment with them, effective from December 2017.

(b) She confirmed the terms of her witness statement, and she was then cross-examined by the claimant. She gave her evidence referring, when appropriate, to relevant documents in the Joint

Bundle. While her witness statement read well, when she was cross-examined by the claimant, certain issues emerged, which caused us to have some doubt about her reliability, and credibility.

(c) As became clear from the evidence led before us, there was a tension between the claimant and Ms Weston on various matters, and in their working relationship. The witness's witness statement by Ms Weston discloses her consulting role with the respondents, pre-employment with them commencing on 4 December 2017 onwards, and it says nothing about her previous involvement with the claimant while she was engaged by the respondents as a consultant, when there was an Action Plan put in place for the claimant.

(d) Her witness statement also does not mention, as emerged in evidence at the Final Hearing, and in the documents produced to us, her receipt of the claimant's e-mail of 29 November 2017 (at pages 94 and 95), and what action she took thereafter, despite the respondents lodging documents in the Joint Bundle about such matters involving her.

(e) In her evidence, she stated that she had not spoken to Paul Tatla, but we doubt that she would not have told him about the claimant being absent on 20 December 2017. When we heard later from Paul Tatla in his own evidence, he said that he had not been aware of the claimant's e-mail to Ms Weston on the morning of 20 December 2017. We doubt that that was so, particularly as she had asked that Ms Weston not attend the meeting with him and the claimant, at the claimant's request

(f) Further, according to Mr Tatla's evidence to us, which we heard after Ms Weston's evidence had closed, he stated that Ms Weston had been relaying information to him, but, in her evidence to us, she made no reference to what he told us had

been happening. We found this most strange, and therefore it cast doubt over the reliability of Mr Tatla's evidence too.

(iii) **Mr Paul Tatla: Respondents' Director**

(a) The respondents' next witness was Mr Tatla. We heard his evidence on the afternoon of Wednesday, 6 February 2019. We had pre-read his witness statement, extending to 12 paragraphs, over 5 pages.

(b) He confirmed the terms of his witness statement, and he was cross-examined by the claimant. He gave his evidence referring, when appropriate, to relevant documents in the Joint Bundle.

(c) Aged 57 years, he is a Director of the Care Concern Group, and he has been involved in that Group since 2002, the Group operating Templeton House Care Home in Ayr, where the claimant was the Home Manager. He is a member of Templeton Care Limited Liability Partnership, and he explained how the Group has, since its foundation in 2002, been acquiring existing care homes from other providers and, since around 2008, developing new properties fit for purpose.

(d) He is based at the respondents' Head Office in Burnham in Buckinghamshire, and his work includes operational management as well as business development, site finding, and acquisitions. He described how he is involved with the Regional Managers and Care Home Managers, including Ms Weston and the claimant in the present case, and how he has HR support from Ms Sunny Dail.

(e) In considering Mr Tatla's evidence, we were conscious of the nature of the individual, and his Director role, where he told us that he required to take "***informal feedback"*** from others in the business, but it beggared belief that his evidence to us showed

no obvious knowledge of, or awareness of, how a reasonable employer should act towards an employee.

(f) It appeared that Mr Tatla believed that if an employee had less than two years' continuous service, then the employee could be dismissed at will, and with no formal process. In giving his evidence to us, he was flippant, detached, and abdicated all personal responsibility. Further, he was often unsure of material facts, and he appeared not to understand the concept of whistleblowing, as also not to understand the role and responsibilities of the Care Inspectorate.

(g) He frequently told us that he did not write things down, and that he did not give the claimant an opportunity to air her views. He acknowledged that the claimant had sent him an e-mail on 27 November 2017, and we, having considered the terms of that e-mail, can see that it was an invitation to him, and that she was raising concerns, and that seems to be the point from which he started to question the claimant's fitness to manage the Care Home going forward.

(h) Mr Tatla advised us that he received information from Jackie Weston, and he appears to have taken that at her word, and while he spoke of having concerns about the claimant's work as Care Home Manager, he did not give the claimant any meaningful opportunity to reply to whatever picture he had in his head from Ms Weston's updates to him.

(i) While he mentioned to us his contact with Mr Johal (another director, whom we heard from Mr Tatla was providing him with informal feedback on the claimant), again that was not documented, and his views of the claimant (whatever they might have been) were not put directly by Mr Tatla to the claimant.

(j) Indeed, we are compelled, in the circumstances of this case, as it emerged in evidence before us, to note the complete absence of a paper trail, about what he says were his concerns about the claimant as a Home Manager, in a regulated industry in the care sector, and we do not see how that does any credit whatsoever to the respondents.

(k) When Mr Tatla spoke to us about the "***without prejudice"*** form signed by the claimant, on 20 December 2017, at page 99 of the Joint Bundle, he advised us that it was a form he used for any meeting with any employee, and that he did so, notwithstanding he also told us that he did not understand its purpose or effect, and so he used it regardless of the circumstances of any particular case.

(l) Further, while Mr Tatla advised us that he had asked the claimant to tell him about her concerns, it is unfortunate to us that he regarded her comments as being negative, and it is equally unfortunate that he did not ask her how she could assist the business going forward, when he may well have regarded her response to that type of open questioning as being more positive.

(m) This was a classic case of confirmation bias, where having seen the e-mail of 27 November 2017 from the claimant, her "negative" responses, as he saw them, confirmed his view, about her and her fitness for the Manager role going forward, notwithstanding she had recently received a salary increase.

(n) His oral evidence to us was not consistent with his pre-prepared written witness statement, and we find it strange that if, as per his oral evidence, things happened as he told us in evidence that they happened, that he did not mention that narration of events in his pre-prepared written witness statement.

(o) In all the circumstances, and having regard to the claimant's evidence to us, we preferred her evidence, where it conflicted with his, as regards the meeting on 20 December 2017 in particular, and as such we placed little weight on his evidence, regarding it as generally incredible, and unreliable.

(p) We were particularly alert to the respondents' letter of 6 October 2017 to the claimant, from Ms Dail, awarding the claimant a salary increase from £50,000pa to £52, 500pa, as per page 93 of the Joint Bundle.

(q) Mr Tatla's views of the claimant, and the need to end her employment, did not stand muster when compared to that letter from the respondents' HR adviser, and its express terms, thanking the claimant for her "***ongoing commitment***", and appreciative of her "***dedication to the ongoing development and growth of the company."***

(iv) **Ms Sunny Dail: Respondents' HR Adviser**

(a) The respondents' final witness was Ms Dail. We heard her evidence on the late afternoon of Wednesday, 6 February 2019. We had pre-read her witness statement, extending to 10 paragraphs, over 4 pages. Aged 46 years, she is the respondents' HR Adviser.

(b) She confirmed that she has no official HR qualifications, but she has been engaged in HR work for approximately 15 years. Since March 2010 to date of this Final Hearing, she advised that she is the respondents' only HR Adviser, and she advises Home Managers, Regional Managers, and Company Directors, across the respondents' operations, on HR policy and procedures.

(c) As the respondents' business is to purchase existing Care Homes, and continue to operate them, but under new

management, she advised that she has to be familiar with existing Staff Handbooks varying from establishment to establishment.

(d) Having confirmed the terms of her witness statement, Ms Dail was then cross-examined by the claimant. She gave her evidence referring, when appropriate, to relevant documents in the Joint Bundle.

(e) While her witness statement did not detail much about 20 December 2017, other than Paul Tatla asking her to draw up an offer to the claimant (at pages 101 / 102 of the Joint Bundle), in cross-examination by the claimant, Ms Dail advised that Mr Tatla phoned her, maybe on 19 or 20 December 2017, but he did not tell her why he wanted to speak to the claimant, and she suggested to him that he should perhaps await the claimant's return to work, which tells us that Mr Tatla knew the claimant was off work, despite him saying he was unaware.

(f) In cross-examination, Ms Dail also confirmed that she was not aware, at that time, that Paul Tatla was having a "***difficult conversation"*** with the claimant about her performance, but she added that Mr Tatla had not sought any advice from her about performance management of the claimant.

(g) Advising us that the Care Concern Group runs about 40 establishments, Ms Dail spoke about the complexity of different Homes with different terms and conditions for staff. Generally, we found her to be a credible and reliable witness.

(h) In the lead up to the claimant's employment ending, Ms Dail had had a family bereavement, and she was only just back at work on 17 December 2017, so the Tribunal can well understand how, having suffered that bereavement, and as a sole HR resource available to the respondents, her attention to the

claimant's resignation acceptance, and reference requests, were not followed up in early course.

(i) The P45 lodged with the Tribunal, as additional document 28, shows the claimant's leaving date as 27 December 2017, but the P45 was not issued until 22 January 2018. While, within the Joint Bundle, at page 101, there was a resignation acceptance letter drafted to go to the claimant, as we have recorded in our findings in fact above, it is not clear to us that that letter was ever issued to the claimant, and, if it was, which we doubt, neither party produced a copy of it to us as a production for reference at this Tribunal. That too does not reflect well on the respondents as an employer, and their keeping of accurate personnel records.

(j) When we noted that the claimant's annual salary of £52,500 pa produced a gross monthly salary of £4,375 pm, nobody at the Final Hearing, including Ms Dail, as the respondents' HR witness, could explain why the claimant's salary dated 28 December 2017 (copy pay slip produced at page 133 of the Joint Bundle) paid her 3 months' notice at £4,791.67 pm. That too does not reflect well on the respondents as an employer, and their keeping of accurate pay records.

Agreed List of Issues

21. Following discussion with the claimant, and Mr McFarlane, at the start of the Final Hearing, the following revised version of his draft List of Issues was agreed with both parties, and accordingly it sets forth the matters before us for judicial determination, as follows: -

1. Whether the Claimant made a protected disclosure, as defined in Section 43B Employment Rights Act 1996 to the Respondent? The provisions of Section 43B set out below:

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

2. If the Claimant did make a protected disclosure, to whom and in what form did she make it?

3. If the Claimant did make a protected disclosure, did the Respondent subject the Claimant to any detriment (including dismissal) as a consequence? If so, what detriment(s) did the Claimant suffer?

4. Was the claimant dismissed, actually or constructively by the respondents, or was there a mutually agreed termination of her employment?

5. If the Claimant's employment did end as the result of a dismissal, was that dismissal automatically unfair under the provisions of Section 103A of the Employment Rights Act 1996? (set out below)

   "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."

6. If the claimant was automatically unfairly dismissed under Section 103A, to what compensation (if any) is she entitled from the respondents?

7 If the claimant is due any compensation, has she mitigated her losses, and / or is any compensation due to her subject to any reduction for contributory conduct, or other reason, or any uplift / downlift in compensation for unreasonable failure by either party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

Parties' Closing Submissions

22. At the Case Management Preliminary Hearing, the Employment Judge had ordered the respondents' representative to provide an outline written closing submission, with list of authorities for the respondents, to the claimant, by no later than 9.00am on Thursday 7 February 2019, being the last day of the listed Final Hearing, where that morning had been assigned for the Tribunal hearing closing submissions from both parties.

23. This was ordered, as per the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, to try and put parties on an equal footing, given the claimant is an unrepresented, party litigant, and it would enable her to have advance sight of, and to read, the respondents' submissions, prior to the claimant herself addressing the Tribunal on her own behalf, after we had heard from Mr McFarlane with his closing submissions for the respondents.

24. A Timetabling Order had been made by the Judge, at the Case Management Preliminary Hearing, in terms of the **Rule 45**, giving each party no more than one hour to deliver their closing submissions to the Tribunal. Mr McFarlane, for the respondents, and the claimant, each produced written closing submissions, and they each spoke to the terms of their respective closing submission, and replied to the other party's, when we head from them on the morning of Thursday, 7 February 2019.

List of Authorities for the Respondents

25. Having, on 27 January 2019, provided two case law authorities on which he intended to refer at the Final Hearing, the respondents' representative, Mr McFarlane, at the Hearing on Submissions on the morning of Thursday, 7 February 2019, provided an updated list of authorities for the respondents, in which items numbered 1 and 2 were as before, but with 4 further case law authorities, as follows: -

(1) Mr C. Sandhu v Jan De Rijk Transport Limited [2007] EWCA Civ 430

(2) Mr S. Ibrahim v H C A International Ltd [2018] UKEAT/0105/18

(3) Heaven v Whitbread Group [2010] UKEAT/0084/10

(4) Secretary of State for Justice v Hibbert [2013] UKEAT/0289/13

(5) Lund v St. Edmund's School, Canterbury [2013] UKEAT/0514/12

(6) Lawless v Print Plus (Debarred) [2010] UKEAT/03/33/09

Respondents' Outline Closing Submissions

26. Mr McFarlane, the respondents' representative, tendered, and spoke to, his written outline closing submissions which were in the following terms: -

Introduction: Addressing the italicised excerpts from the revised list of issues:

1. *Whether the Claimant made a protected disclosure, as defined in Section 43B Employment Rights Act 1996 to the Respondent?...* and
2. *If the Claimant did make a protected disclosure, to whom and in what form did she make it?*

The Claimant relies on 7 disclosures set out during her evidence in chief (pages 45F-45G): To be qualifying disclosures, the Claimant would have to have had a subjective belief in the public interest of the disclosures, with that belief being objectively reasonable. It is submitted that the Claimant's evidence does not point to the necessary belief being held by her for disclosures to be protected. Some of the disclosures are disputed, and only disclosure 4 comes close to being a protected disclosure, 1, 2 and 5 are simply expressions of opinion, 3 is disputed, 6 is wholly unsustainable as a disclosure, and 7 is vague.

3. *If the Claimant did make a protected disclosure, did the Respondent subject the Claimant to any detriment (including dismissal) as a consequence? If so, what detriment(s) did the Claimant suffer?*

The Claimant has not identified any detriment apart from the termination of her employment. The key issue is that there has to be (under 4. below) a causal link between her making a qualifying disclosure (if that is established) and any detriment. The Respondent maintains that no such link is established, even if the Claimant has made any qualifying disclosures.

4. *Was the Claimant dismissed, actually or constructively, by the respondents, or was here a mutually agreed termination?*

Mr Tatla's approach was not unlike a 'pre-termination negotiation'. The Claimant may not have been in a strong position, but she did make a deal. The Claimant's resignation was post-dated to 27th December 2017, the effective date of termination. The ACAS EC started on 26th March 2018 (the limitation day) to 10th May 2018 (page 27), with the Claim Form presented on the last day under the 'corresponding date rule'. The Claimant was clearly working to 27th December as her end date, chosen by her. The Respondent made the Claimant an offer, it had little by way of additional consideration, essentially a reference and three months pay in lieu, but it was an offer, which the Claimant accepted with a post-dated letter, a date of her choice. A P45 is not, strictly, determinative of the effective date of termination. If the Claimant was dismissed before 27th December 2017, there is a jurisdictional bar to her claims. The Respondent's conduct was not a fundamental breach entitling her to resign in response. The Respondent's action arose from a loss of confidence in the Claimant, this had been building over time. The Claimant stated at page 126 on 4th January 2018 '…*I knew I couldn't work with Jackie…'*. The Claimant said in cross-examination '*I don't have faith in the staff*'.

5. *If the Claimant's employment did end as the result of a dismissal, was that dismissal automatically unfair under the provisions of Section 103A of the Employment Rights Act 1996…*

If the Claimant had been dismissed, the *principal* reason would have to be that it was because she had made a protected disclosure. The issues with the Claimant's employment had been mounting, and a loss of confidence in her as a manager, of which Mr Tatla gave evidence, and the evident tension with Ms Weston, and the issues that the Claimant had with her staff, indicate that the reason, or even the principal reason, was not that the Claimant had made a protected disclosure, but that the Respondent had lost confidence in her as the Manager.

6. *If the claimant was automatically unfairly dismissed under Section 103A, to what compensation (if any) is she entitled from the respondents?*

The Claimant would be entitled to a basic and compensatory award, the former is calculated [subject to S122 (2) Employment Rights Act 1996] as 1.5 weeks' pay at £489 per week. The compensation for loss of earnings would be reduced (subject to 7 below) by the Claimant's mitigation of loss. The Claimant is now earning £57,000 pa, some £4,500 gross more than that she earned at the Respondent. The basis for calculation is net losses. Since 17th September 2018, the Claimant's losses have vanished, and she is now recovering any losses.

7. *If the claimant is due any compensation, has she mitigated her losses, and / or is any compensation due to her subject to any reduction for contributory conduct, or other reason, or any uplift / downlift in compensation for unreasonable failure by either party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?*

(a) Mitigation: As noted above in 6, the Claimant has now mitigated her losses and is on course to have fully mitigated loss of earnings at the rate of around £4,500 per annum.

(b) Contributory conduct: Section 122 (2) Employment Rights Act 1996 provides that where a tribunal considers that the Claimant's conduct contributed to the dismissal, it shall reduce a compensatory award accordingly. The Claimant's reaction to the evacuation and the management of the home with the staffing issues led to the Respondent's action.

(c) Uplift / Downlift re the ACAS code:

The Tribunal is required by Section 207 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 to take into account any provision of a code of practice that appears to be relevant in determining a question: The provisions of S207A (2) of the same Act effect that if it appears that,

'…(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%...". Similar provisions apply to an employee regarding a grievance, under Section 207A (3).

The focus here is on procedural compliance, but if the Respondent did not regard the procedure as engaged, (as is the case) it was not an *unreasonable* failure. Conversely, if a grievance applied to a resignation, the Claimant's view would have been that she had a grievance, so the Code was engaged. In any event, the uplift or downlift is discretionary.

Holiday Pay: The Claimant's case seems to be that phone calls from work impacted on her leave. The right to leave was honoured, the Claimant's apparent inability to 'let go' being the root cause. If compensation were due, on a just and equitable basis it would be nil or limited.

27. At the start of the Hearing on Submissions, we allowed, as an additional document 28, the copy produced of the claimant's P45 to be added to the Joint Bundle, confirming the claimant's leaving date as 27 December 2017.

28. Mr McFarlane then addressed us, with his oral submissions, speaking to the terms of his written outline closing submission, issue by issue, and cross-referring, as and when appropriate, to the case law authorities he had cited to us.

29. When he spoke about his position on the matter of any statutory uplift, or downlift, to any compensatory award, for any unreasonable failure by either party, to comply with the ACAS Code of Practice, Mr McFarlane did so, but without any reference to any case law authorities, and he stated that any failures by the respondents were "***inadvertent***", and that Mr Tatla did not consider himself engaged in a disciplinary hearing with the claimant, on 20 December 2017, but in an alternative "***protected conversation***", and in Mr Tatla's mind the termination of the claimant's employment was not a dismissal.

30. Further, Mr McFarlane added, Mr Tatla was seeking to give the claimant more than she was entitled to, because he could have simply given her her contractual notice. He added that the resources of the respondents were relatively minor, as regards an HR function, and he suggested that any uplift to the claimant should be at **12.5%,** so as not to punish the respondents, but reflect any failure to apply the appropriate procedure.

31. However, he argued, the claimant had chosen to resign, and she had chosen not to pursue a grievance, and the fact that she entered into post-termination communication with the respondents, for example her e-mail of 4 January 2018, shows that the claimant was not thinking of any grievance and, therefore, she did not regard herself as constructively dismissed at that time.

32. Further, Mr McFarlane added, the respondents thought that the claimant had spoken to her trade union but, if she was truly aggrieved, she totally failed to engage in the respondents' grievance procedure, although he recognised that she might say that she thought it would have been futile to do so. While, in his Counter Schedule, he had submitted that there should be a **25%** reduction to any compensation for the claimant, he advised us that he was now modifying that to **12.5%** reduction, as he had nothing to put to the claimant about her ignoring advice, or anything like that.

Claimant's Closing Submissions

33. Having heard Mr McFarlane's oral submissions for the respondents, which took about one hour, ten minutes to deliver, as we allowed him a short extension of time in order that he could fully address us, and answer our points of clarification, the Tribunal adjourned to allow the claimant to reflect on his oral submissions.

34. She advised us that the handwritten closing submission, which she had pre-prepared, had been written by her before getting the respondents' outline submissions, so that she wanted to add to that, before she addressed us in reply.

35. After that adjournment, the claimant provided to us a handwritten document, dated 7 February 2019, running to three pages, together with a further handwritten page, entitled "***Failing to follow ACAS Codes***", and a copy of her two page, handwritten protected disclosures, as we had already added to the Joint Bundle. She asked us to take her handwritten statement as read, and she then replied to Mr McFarlane's comments to us, and what he had been saying to us in his oral submissions to the Tribunal.

36. In her handwritten note about alleged failures by the respondents to follow the ACAS Code, the claimant had stated as follows: -

> "***Code 4.3 – paragraph 4***
>
> ***Code 4.4 - paragraphs 9, 10, 11, 12, 13, 14, 27 & 28***
>
> ***Code 4.5 - paragraphs 32, 34 & 46***
>
> ***Failing to act on whistleblowing in public's interest."***

37. We pause here to note and record that the claimant's references to the Code at 4.3, 4.4 and 4.5, refer back to the way that the **ACAS Code of Practice on Disciplinary and Grievance Procedures 2015** is reprinted in the Judge's bench copy of "**Butterworth's Employment Law Handbook,**" which had been provided to the claimant for her information. Where we refer to the ACAS Code of Practice later in these Reasons, we refer to the individual paragraph numbers of that Code of Practice.

38. A copy of the claimant's handwritten closing submission is held on the case file, and we have referred to it in coming to our Judgment, but it is not necessary to repeat its full terms *verbatim* here. Later, in these Reasons, we do, however, detail, from the claimant's oral submissions to us, her replies to Mr McFarlane's arguments for the respondents, about each of the issues before the Tribunal.

39. In delivering her closing submissions, which the claimant did with passion, and conviction, she referred to how the meeting with Mr Tatla on 20 December 2017 had not, in her recollection, been a "***negotiation***", and she felt that her voice was not being heard by the respondents, who had given her, to use the vernacular, "***a rubber ear".*** She described how Care Home providers get away with many things, when they should not, and that nursing and management is a hard job, without people not listening to you.

40. While Mr McFarlane had referred to some legal cases, in particular the **Lund** Judgment, where the claimant, a Mr Lund had not been happy with the computer equipment which he had used in teaching at school, the claimant stated that that was not related to her case at all, because in the Care Home situation, you deal with people, and not computers, and while Mr McFarlane felt that what she regarded as disclosures were not disclosures in law, the Tribunal needed to recognise that it was dealing with people, and not computers, or boxes.

41. Further, added the claimant, as Care Home Manager, she stated that she had a duty of care to the residents, as she was the responsible person for the Care Home. She felt both Ms Weston, and then Mr Tatla, simply did not listen to her, and while the ACAS Code says you can bring a grievance, she stated that had she done so, as it would simply have "***gone into the bin".*** She stated any grievance by her would have been totally futile, and that her employment termination was a constructive dismissal because she had "***no choice"***, and it was only after she had obtained new employment that she went forward to ACAS, and then to this Tribunal, bringing her complaint against the respondents.

42. The claimant stated that she was leaving the applicable law up to the Tribunal, and she was happy for us to do that. It had been explained to her, as an unrepresented party litigant, that Mr McFarlane had an obligation, as an employment consultant acting for the respondents, to advise the Tribunal of what he regarded as being the relevant law but, it was a matter for the Judge, and the lay members of the Tribunal, to apply the relevant law, as they identified it, to the facts of the case, and that is what they would do, for that is their role in this process.

43. The claimant further advised us that bringing this case was "***a matter of principle"*** for her as well, and she invited us to find in her favour, and make the respondents give her a written apology for the way she had been treated, and not listened to, that could have really affected her career at her age, and to have compensation reflecting the hurt suffered by her.

44. She further stated that it had "***knocked her",*** and that she was starting to get better, but after this Final Hearing was concluded, she would hopefully get back to normal, dependent on the Tribunal's findings.

45. Turning then to the agreed List of Issues, the claimant made some oral, bullet point style replies to issues (1) to (7) as follows: -

    (1) The claimant stated that she had made protected disclosures, as she was concerned for her residents.

    (2) She referred to pages 45F/G of the Joint Bundle for the seven disclosures relied upon by her.

    (3) The claimant stated that she believed she had ticked all the boxes in **Section 43B(1) of the Employment Rights Act 1996**. Further, she added, she felt there was a link between her disclosures, and her losing her job with the respondents.

    (4) The claimant stated that it was <u>not</u> a mutually agreed termination at all, as Mr Tatla had not given her any option, and she had not left for another job, although she had been successful in securing

new employment in February 2018. Whilst not sure of the legal difference between an actual, and constructive dismissal, the claimant stated that she believed she had been dismissed because she had blown the whistle.

(5) The claimant stated that she believed her dismissal had been automatically unfair, because of her whistleblowing, and that Mr Tatla had just listened to Ms Weston, and that he did not give her a chance to voice her concerns, nor did he even listen to her.

(6) The claimant stated that she sought compensation from the respondents, but she did not seek to be reinstated, nor re-engaged by them. She referred to her Schedule of Loss, and stated that she had no continuing losses after September 2018. Further, she added, as she did not get any protected time during her annual leave, she was looking for **£6,663** by way of holiday pay.

(7) On issue 7a, while the respondents had suggested that her compensation should be reduced, on the basis of contributory conduct, or a downlift for her failure to follow the ACAS Code, the claimant noted that there was no issue from the respondents that she had not mitigated her losses.

(8) On issue 7b, she denied that she had contributed to her employment ending, as there was nothing wrong done by her, as she is a Nurse, and a Manager, with a duty to protect her residents, and there had been no culpability, or blameworthy conduct on her part.

(9) On issue 7c, the claimant stated that, if she qualified for an uplift on compensation, then she sought that uplift. However, if she does not qualify, then she agreed it is not appropriate to make any uplift to her.

(10) While she had not submitted a written grievance, she stated that she had spoken verbally to both Ms Weston, and Mr Tatla, but they

were not interested in anything she had to say, and a formal grievance would have been futile.

(11) She added that compensation needs to be such that Mr Tatla "***learns a lesson that he cannot pick up Managers and drop them when he feels like it".***

(12) While Mr McFarlane had suggested that any injury to feelings award should not exceed £6,000, the claimant stated that it needed to be higher than that amount.

Reply for the Respondents, and Clarification from the Tribunal

46. Having heard the claimant's oral submissions, Mr McFarlane, the respondent's representative, was invited to reply. If any **Vento** damages were payable to the claimant, for injured feelings, he submitted that it should be no more than £6,000, as the claimant's termination of employment was a one off.

47. Further, he added, while the claimant says that Mr Tatla has to learn a lesson, that is aggravated damages, and not standard **Vento** damages, and as that is not applicable in Scotland, there should be no aggravated damages award in this case.

48. While McFarlane had addressed the Tribunal earlier on any ACAS uplift, but without reference to any case law authority, the Judge cited paragraphs 28 and 29 from Lady Smith's Judgment in **Allma Construction Ltd v Laing [2012] UKEATS/0041/11,** and the questions that an Employment Tribunal requires to ask itself: Did a relevant Code of Practice apply at the time of the relevant events?; Did the employer fail to comply with that Code in any respect? ; If so, in what respect? ; Do we consider that failure was unreasonable? ; If so, why? ; Do we consider it just and equitable, in all the circumstances, to increase the claimant's award?; Why is it just and equitable to do so? ; If we consider that the award ought to be increased, by how much ought it to be increased? ; Why do we consider that the increase is appropriate?

49. In reply, Mr McFarlane stated that it would not be just and equitable to increase any award to the claimant as, at the time, she seemed to have agreed to the situation, as per her e-mail of 4 January 2018. If there was to be any uplift award, it should be not more than **12.5%.**

50. In reply to that, the claimant responded stating that it was not an agreement mutually to terminate her employment, and that she was scared, and she did not want to cause a potential problem to her getting a good reference from the respondents. Basically, she explained, she totally refuted there was any agreement, and she submitted that it was a constructive dismissal due to the way that her employer had behaved towards her.

51. As neither party had raised the matter of the appropriate burden of proof, for a case such as this, being a **Section 103A** complaint, where the claimant has less than 2 years' qualifying continuous service, and so cannot complain of ordinary unfair dismissal, the Judge referred, in brief, headline terms, to the burden of proof being on the employee to establish that the reason for her dismissal was that she made a protected disclosure, referring to the Judgment of the Court of Appeal in **Smith v Hayle [1978] IRLR 413**, as applied by the Employment Appeal Tribunal in **Ross v Eddie Stobart Ltd [2013] UKEAT/0068/13.**

52. In reply to the Judge's comments, the claimant stated that she clearly believed that she was making disclosures to keep her residents safe, and that it why she was dismissed by Mr Tatla. She added that she thought that Mr Tatla and Ms Weston had had chats, and that they had discussed what they were going to do to get rid of her, and that Ms Weston was behind it, yet, while she had been awarded a pay rise, and she stated that she had been offered a big bonus, and she was doing a wonderful job, when Ms Weston appeared, things changed, and she added that if Ms Weston had not appeared, she thought she would still have been employed by the respondents.

53. In reply, Mr McFarlane said the facts as painted by the evidence did not fit Ms Weston wanting the claimant out, as Mrs Pauline Perrat had not been appointed as Care Home Manager at Templeton House until August 2018,

and the respondents could simply have given the claimant notice of termination before her 2 years' service was completed.

54. The Judge also referred to the terms of the ET3 response, Paper Apart, at paragraphs 10, 12 and 13 and asked Mr McFarlane to clarify the respondents' position. In reply, Mr McFarlane stated that the claimant's resignation had ended her employment, but it was not a constructive dismissal. He stated that the claimant's letter, produced at page 100 of the Joint Bundle, could not be described other than as a resignation, and the circumstances of it did not amount to a dismissal.

55. As per Mr Tatla's witness statement, at paragraph 12, Mr McFarlane submitted that the claimant left their employment "***on agreed terms after a difficult conversation about her performance",*** and there was nothing about whistleblowing or anything else behind the situation.

Reserved Judgment

56. When proceedings concluded on the afternoon of Thursday, 7 February 2019, the Judge advised both parties that Judgment was reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal.

57. With limited opportunity that afternoon, private deliberation took place at a Members' Meeting on Thursday, 30 May 2019. This unanimous Judgment represents the final product from our private deliberations, and reflects the unanimous views of us as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Relevant Law

58. Mr McFarlane, the respondents' representative, addressed us on some aspects of the relevant law, both by reference to some statutory provisions, and the cases he cited to us on behalf of the respondents. The presiding Employment Judge also advised both parties on some further matters,

including case law on the burden of proof, and on statutory uplift / downlift, to any compensatory award.

59. In addition, the Judge has also given us a self-direction on the relevant law. In particular, **Part IV A of the Employment Rights Act 1996** sets out the relevant legislation, as follows:

60. **Sections 43A,43B and 43C** state as follows:

"**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."

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.

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

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 – (a) to his employer, …"

Section 103A deals with protected disclosures and provides that:

"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."

Discussion and Deliberation

61. In considering this case, we have done so having regard to the structure of the agreed List of Issues, and in the following paragraphs of these Reasons, we set out to discuss our views on each of those issues, as follows:

62. **Issue 1: Whether the Claimant made a protected disclosure, as defined in Section 43B Employment Rights Act 1996 to the Respondent?**

63. In considering this issue, we have had to look at the constituent parts of the **Section 43B** test. The protected disclosure regime came under scrutiny from the Employment Appeal Tribunal in **Cavendish Munro Professional Risks Management Ltd-v-Geduld [2010] ICR 325**. Giving judgment, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts.

64. In **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, the Court of Appeal noted that an allegation can contain factual information and may be boosted by context or surrounding communications. Allegations are therefore to be subjected to evaluative judgment by the Tribunal in light of all the circumstances of a case.

65. The Court of Appeal in **Kilraine** endorsed observations made by Mr Justice Langstaff when that case was before the EAT that '***the dichotomy between "information" and "allegation" is not one that is made by the statute itself' and that "it would be a pity if tribunals were too easily seduced***

into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined."

66. Further, the Court of Appeal in **Kilraine** went on to stress that the word '***information'*** in **S.43B(1)** has to be read with the qualifying phrase '***tends to show'*** — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur.

67. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in **S.43B(1)(a)–(f).** It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures.

68. Furthermore, as explained by Lord Justice Underhill in the Court of Appeal's judgment in **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2017] EWCA Civ 979; [2018] ICR 731**, this has both a subjective and an objective element: -

a. ***The Tribunal must determine whether the worker subjectively believed at the time that the disclosure was in the public interest and, if so, whether the belief was objectively reasonable.***

b. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view.

c. The reasons why the worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to the Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

d. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief." which is not the same as "motivated by the belief…"

e. There are no "absolute rules" about what it is reasonable to view as being in the public interest. Parliament had chosen not to define what "the public interest" means in the context of a qualifying disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression".

69. Where a disclosure is made to an employer, it does not need to be true to qualify for protection but the employee must reasonably believe it to be true (**Darnton v University of Surrey [2003] IRLR 133** and **Babula v Waltham Forest College [2007] IRLR 346**).

70. The test of reasonable belief must take account of what a person with that employee's understanding and experience might reasonably believe (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**). Reasonableness depends not only on what is said in the disclosure but the basis for it and the circumstances in which it was made.

71. The EAT gave guidance on the findings a Tribunal should make in **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416,** at paragraph 98, per HHJ Serota QC, as follows:

"***It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.***

1. Each disclosure should be identified by reference to date and content.

2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an

individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

72. The Court of Appeal in **Chesterton Global Ltd v Nurmohamed [2017] IRLR 837** held that to be in the public interest, a disclosure had to serve more than a private or personal interest of the worker making the disclosure. As Underhill LJ put it, the question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but he held that counsel, Mr Laddie's fourfold classification of relevant factors which he reproduced at para 34 of the judgment might be a useful tool.

73. The factors referred to as a useful tool were:

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

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

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

(d) The identity of the alleged wrongdoer, as the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest – though this should not be taken too far.

74. In the present case, as a senior manager, and officer in charge of Templeton House, we consider that the claimant ought to have been aware of the respondents' whistleblowing policy, as provided to us at pages 76 to 77 of the Joint Bundle. There was, however, no evidence before us that this policy, and its procedures to be followed, had ever been used by her in a formal sense.

75. The fact that, in her closing submissions to the Tribunal, the claimant advised us that she had "***ticked all the boxes***" in **Section 43B(1)** , that she had made protected disclosures to the respondents, and she felt there was a link between those disclosures and her losing her job with the respondents, is noted, but it falls to us, as the fact-finding industrial jury, to decide whether or not we can be satisfied, on the balance of probability, from all of the evidence led before us at this Final Hearing, that the claimant has, or as the case maybe, has not met the relevant statutory case to prove her case against the respondents, and show that they are liable to her. Having carefully analysed the whole evidence led before us, we are not satisfied that the claimant has met the statutory test to establish that she made any qualifying, protected disclosures, as defined in **Section 43B**, to the respondents, albeit we do accept that all of what she regarded as disclosures were made to the respondents, as her employer, and not to anybody else.

76. **Issue 2: If the Claimant did make a protected disclosure, to whom and in what form did she make it?**

77. While we have found that the claimant did not make any qualifying protected disclosures to the respondents as alleged, or at all, in terms of **Section 43B of the Employment Rights Act 1996**, we record here why we have come to that conclusion.

78. As per the claimant's list of disclosures, which we received at pages 45 F/G of the Joint Bundle, and which we detailed earlier in our findings in fact, as paragraph 19 (lxii) of these Reasons above, of the 7 disclosures relied upon, 5 were verbal (or oral, as the claimant described them), and 2 were written, all stated to be made between 12 and 20 December 2017.

79. Looking at them in more detail, the claimant's handwritten note cross-referred to her written witness statement, so it is necessary to look at its terms, and not just what she wrote up in her note for the Tribunal.

80. ***(1) I made a protected disclosure to J. Weston about not silencing the buzzer on three separate occasions. (oral) to J. Weston (paragraph 2) statement (d)***

81. In her witness statement, the claimant stated that the Care Inspectorate had been in the home, and they had brought up about hearing the buzzer all the time, and they had felt that they were not being answered, and while Ms Weston suggested the buzzers might be silenced, and staff might use pagers that would vibrate in their pockets, the claimant stated she was unhappy with this and not comfortable doing that. The claimant further stated that: ***"Jackie was not happy with me from the off as I voiced opinion if I felt it was detriment to the residents."***

82. It was clear to us, from the evidence heard, that the claimant had a clear view about buzzers being preferable to pagers, but Ms Weston felt there was no serious danger to residents if pagers were to be used, rather than buzzers, and we note that the Care Inspectorate appear to have allowed a trial period for pagers.

83. While we accept that the claimant was concerned that there was a resident safety issue, we are equally satisfied from the evidence that Ms Weston did not share that view, and that is why they agreed that Ms Weston would speak with the Care Inspectorate.

84. In our view, that shows that this matter was no more than a difference of personal / professional opinion, and not an allegation that there was, in the reasonable belief of the claimant, any disclosure of information showing that it was in the public interest to disclose to the employer to show that resident health and safety had been, or was or was likely to be endangered.

85. (***2) The night of the fire 12th December I made a disclosure that I was not happy to have a nurse who we didn't think was acceptable for Templeton House as we had to let her go in probation but was now working for Crossgates. (oral) to J. Weston (paragraph 7) statement (d)***

86. In her witness statement, the claimant stated that she alerted Ms Weston that one of the Crossgates nurses who had arrived at Templeton late that night was "***one that we were concerned about as she had worked with us prior and the answer was its only one night and another nurse was there***".

87. While we accept that the claimant was concerned that there was this specific nurse from Crossgates there than night, following the emergency evacuation of 12 December 2017, it seems to us that this was the claimant's opinion of that other nurse, rather than an allegation, or disclosure of information, that, in some way, that nurse's presence constituted a danger to the safety and wellbeing of residents at Templeton that night. Given another nurse was on duty with the nurse that the claimant was concerned about, it did not seem to us that it was reasonable for the claimant to believe there was a resident safety concern.

88. In our view, this shows that this matter was no more than a difference of personal opinion, and not an allegation that there was, in the reasonable belief of the claimant, any disclosure of information showing that it was in the public interest to disclose to the employer to show that resident health and safety had been, or was or was likely to be endangered.

89. The Tribunal accepts, at face value, that while the claimant may well have let that particular nurse go, while on probation at Templeton, the respondents at Crossgates employed her at some future date, and there was no information led before us about what change in that nurses' circumstances might have caused the respondents to employ her at Crossgates, when previously she had been "***let go***" in her probation at Templeton.

90. As an employer, it is very much a matter for the respondents what due diligence, if any, over and above Disclosure Scotland checks for staff working in the regulated care sector, they do when hiring staff, and what checks, if any, they do with management at one establishment if an applicant for a job at a one establishment lists former employment at another, whether or not an establishment run and operated by the respondents.

91. ***(3) Residents sleeping in a wheelchair, I discussed with J. Weston that I was not happy with resident with pressure issues slept in a wheelchair all night (oral) 13th December (paragraph 9) statement (d)***

92. In her witness statement, the claimant stated that ***"residents had slept in their wheelchair and according to the night nurse they didn't want a mattress on the floor and one of the residents already had pressure issues and this could make them worse."***

93. We note, first of all, that the respondents were dealing with an emergency situation that night. In our view, this was not a disclosure of information, showing that it was in the public interest to disclose to the employer that resident health and safety had been, or was or was likely to be endangered.

94. At its highest, this matter was the claimant using this situation, where a Crossgates resident with pressure sores "***could"*** have them made worse, by being in a wheelchair all night, was being used by the claimant to establish that she felt there were issues about how the evacuation of Crossgates was managed on the night of the fire, and the impact of that on Templeton House.

95. It was very much a situation where there was a difference of opinion between the claimant and the respondents' senior management, about the

management of the emergency situation, and the level of care that she felt should have been provided to displaced residents from Crossgates evacuated to Templeton.

96. Further, given it relates to a one-off, emergency situation, even if we are wrong, and this could properly amount to a disclosure of information, as a Tribunal we do not see that this was a disclosure made in the public interest, as it was a consequence arising from an unforeseen, emergency evacuation following a fire at Crossgates.

97. ***(4) 20th December I sent J. Weston an email stating I was going home sick after the stress of the last few days and rumours currently going round the home. On this email I reported the four missing Tramadol (written). Statement (d) and (b).***

98. In her witness statement, at paragraph 14, the claimant stated that:" There ***was a drug error reported to me that morning by the agency nurse that Crossgates nurse had missing tramadol (this is classed as a controlled drug now). I again could not go and look into it as their staff had already made allegations against me so hence why I finally gave up and wrote an email to Jackie to go sick as to not open myself up to any further allegation. I reported the drug error to Jackie via email the morning I went off sick."***

99. It was clear to us, from the evidence that we heard, that the respondents conducted some sort of an investigation into the missing Tramadol, and that there appears to have been some "***miscounting***" by the nursing staff on duty, but unfortunately the results of that investigation, if committed to paper, were never produced to us at this Final Hearing by the respondents.

100. On the somewhat limited information available to us, we cannot say that there was any information showing or tending to show that a criminal offence had been committed, was being committed or was likely to be committed, and equally we cannot say whether or not there was any information showing that

it was in the public interest to disclose to the employer to show that resident health and safety had been, or was or was likely to be endangered.

101. It was equally clear to us, from the terms of the claimant's email of 20 December 2017 to Ms Weston, as produced to us at page 98A of the Joint Bundle, that the claimant emailed Ms Weston alleging that there had been no communication with her, and alluding to rumours being rife about her being sacked or suspended, and being off sick with stress. Her self-certified absence form of that date, produced to us at pages 104 and 105, clearly states that the claimant felt "***isolated, unsupported and very anxious."***

102. These are all matters relating to the claimant, and how she found the working environment at that time. They are a statement of her opinion about how she was then feeling, and not, in our view, a disclosure of any information showing that it was in the public interest to disclose to the employer that resident health and safety had been, or was or was likely to be endangered. For the avoidance of doubt, the claimant referred only to her own experience of stress and at no time indicated that there was any issue in relation to the health or safety of other employees.

103. ***(5) 12th Dec. Asked J. Weston to move residents straight from Crossgates to save them discomfort. A Fire Regulations evacuation not in place. (paragraph 6) statement (d) and (a)***

104. In her note to the Tribunal, the claimant did not state expressly whether this was an oral or written disclosure. We have taken it to be oral. In her witness statement, at paragraph 6, the claimant stated that: "I ***asked Jackie if residents could not go straight to wherever they were going to save two moves and also asked why there was not a hall or school used…. I was told she was coordinating it but everything was chaotic and my home became fuller and dangerous if we were to have a fire."***

105. As we did above, with alleged disclosure No.3, we note again, first of all, that the respondents were dealing with an emergency situation that night. In our view, this was not a disclosure of information, showing that it was in the public

interest to disclose to the employer that a criminal offence had been, was or was likely to be committed, nor that resident health and safety had been, or was or was likely to be endangered. Indeed, the claimant's witness statement makes it clear that her concerns at Templeton were "***if we were to have a fire***".

106. At its highest, this matter was again the claimant using this situation, where Crossgates residents were evacuated to Templeton, to show that she felt there were issues about how the evacuation of Crossgates was managed on the night of the fire, and the impact of that on Templeton House.

107. Further, given it relates to a one-off, emergency situation, even if we are wrong, and this could properly amount to a disclosure of information, as a Tribunal we do not see that this was a disclosure made in the public interest, as it was a consequence arising from an unforeseen, emergency evacuation following a fire at Crossgates.

108. (***6) Email to directors 29th Nov. I was stressed to P. Tatla in email, looking for respite & support (written) (paragraph 3) statement (d).***

109. In her witness statement, the claimant, at paragraph 3, stated that: "I ***had emailed the directors directly with the issues in the home as I was exhausted by it all by this time and getting no support, it was always promised but never given."***

110. On the information available to us, we cannot say that there was any information showing or tending to show that that it was in the public interest to disclose to the employer that resident health and safety had been, or was or was likely to be endangered. The claimant's identified issue is personal, in that she was alleging she was getting no support.

111. It was equally clear to us, from the terms of the claimant's email of 29 November 2017 to Mr Tatla, and Mr Johal, as produced to us at pages 94 and 95 of the Joint Bundle, that the claimant emailed Mr Tatla seeking a meeting. Given she spoke of "***banging my head against a brick wall***", we regarded it

very much as a personal cry for help from the respondents, given her statement that she ***"can't get any peace from the home."***

112. These are all matters relating to the claimant, and how she found the working environment at that time. They are a statement of her opinion about how she was then feeling, and not, in our view, a disclosure of any information showing that it was in the public interest to disclose to the employer that resident health and safety had been, or was or was likely to be endangered.

113. In her email of 29 November 2017, the claimant raises issues with staffing in the Home, and the Home's rating or classification, and the expectations of the local Council and the Care Inspectorate. Further, it refers to "***all Homes short of nurses***", but that is not a matter explored in evidence before us, nor was the other matter raised by her in her email of "***nurses not being disciplined***".

114. While understaffing impacting on resident health and safety might have been a disclosure that resident health and safety had been, or was or was likely to be endangered, the difficulty for the Tribunal was that we were not provided with any sufficient detail, and the claimant's emphasis in her email was on employee support , and so we viewed this matter as a personal issue affecting her, although we could recognise the potential for long-term stress and lack of support to a care home manager leading to the likelihood of resident safety being endangered.

115. ***(7) Disclosed to P. Tatla everything that was going on but he wasn't interested (oral) (paragraph 18) statement (d)."***

116. In her witness statement, at paragraph 18, the claimant stated that***: "I feel so strong about the whole thing and I do not think providers should get away with treating anyone in that manner, Paul should have at least listened to me before deciding to ask me to leave to get my side of the story and not be influenced in a new regional manager who has never managed a nursing home. …I was not sure who I could trust either to go to Sunny and I did not rock the boat as I needed a reference or references."***

117. This alleged disclosure relates to the claimant's meeting with Paul Tatla on 20 December 2017***.*** We have made our findings in fact about that meeting earlier in these Reasons.

118. Her evidence to us was that she was not allowed to put her case to Mr Tatla, whereas the wording of this alleged disclosure suggests that she put her case, but he was not interested in what she had to say.

119. Either way, we did not regard this as a qualifying protected disclosure, as it is far too vague and lacking in any meaningful specification.

120. **Issue 3: If the Claimant did make a protected disclosure, did the Respondent subject the Claimant to any detriment (including dismissal) as a consequence? If so, what detriment(s) did the Claimant suffer?**

121. The claimant's case before the Tribunal is only pled as automatically unfair dismissal for making a protected disclosure, contrary to **Section 103A**, and not as a detriment claim under **Section 47B.**

122. The difficulty for the Tribunal is that the claimant, as an unrepresented, party litigant, did not separately define in her written note the detriments that she alleges she suffered, and so we have had to try and determine the detriments from the contents of her ET1 claim form, and her own witness statement produced to the Tribunal.

123. In her ET1, the claimant stated, at section 8.1, that the ***"new regional manager who wanted me out as I would not conform to certain work practices that I felt was dangerous to do".*** She did not tick the box saying she was unfairly dismissed (including constructive dismissal), but she did tick the box at section 10.1 indicating that her claim included making a protected disclosure, and that she consented to her information being forwarded to the relevant regulator. It was registered at the Tribunal as a whistleblowing complaint and given the appropriate administrative jurisdictional code "***PID***".

124. She did not detail the background and details of her claim, at section 8.1, which gave her space to include the details of her claim, including the dates

when the events she was complaining about happened, but she did include some detail in the two page paper apart, as included at pages 13 and 14 of the Joint Bundle lodged for use at the Final Hearing. In particular, she complained: "I ***never got any support from management and was on call 24/7 from day one…"***

125. In that paper apart, and in her submissions to us, it was clear that she is complaining about what she regards as an unfair dismissal for whistleblowing, and at the Case Management Preliminary Hearing, it was identified as a **Section 103A** complaint, on the basis that she alleged that she had been dismissed for making a protected disclosure.

126. In particular, when speaking of her meeting with Mr Tatla, on 20 December 2017, albeit she did not give the date of that meeting in that paper apart, the claimant there stated: "***He said to me that we needed to get on and its best if we part company. I couldn't believe what I was hearing and felt backed into a corner…. I felt I was forced into leaving when he asked me to resign…"***

127. **Issue 4: Was the claimant dismissed, actually or constructively by the respondents, or was here a mutually agreed termination of her employment?**

128. In considering this matter, there was a dispute to resolve, where the claimant asserted that she had been forced into resigning, and the respondents, who disputed that they had dismissed her, asserted that she had resigned, and there was a mutual termination of her employment.

129. Further, as per their ET3 response, at paragraph 2 of the "***Rider to Response Form"***, lodged on 13 July 2018, the respondents had there asserted that "***her resignation was a "pure resignation", not a "dismissal" in law, that it was not "forced", and that there was no "automatically unfair" reason in operation in respect of the claimant's resignation."***

130. In her ET1 claim form, at section 8.1, the claimant had stated: "***New regional manager who wanted me out as I would not conform to certain work practices that I felt was dangerous to do.*** "(Joint Bundle, at page 6.)

131. In the attached paper apart to her ET1, at pages 13 and 14 of the Joint Bundle, before us, the claimant further stated that : " ***I got home and received a call from Paul Tatla to see if would go in and see him for a chat which I did but he was not interested in me whistleblowing and said he felt Jackie was doing a wonderful job. He said to me that we needed to get on and its best if we part company. I couldn't believe what I was hearing and felt backed into a corner. I told him I had worked very hard and did what he had asked me to which was to get the home opened as it had a moratorium placed on it when I took the post on. He said yes, I had got it to this stage, but it was someone else's turn meaning Jackie and a manager she brought with her who now has my job…I felt forced into leaving when he asked me to resign…...I have been informed that this is what he does with managers, so I want to do this, so he can't keep doing it. I have witnesses about what my last days were like in the home. This was the week before Christmas. I was unwell and depressed after this and I was treated appallingly with Jackie. She ignored me and spoke to my deputy and made me feel like a spare part …"***

132. In particular, at page 14, it states: "… ***I was never told they were not happy with my work in all my time there until a new regional came."*** In context, that was Jackie Weston as the new Regional Manager from 4 December 2017.

133. In considering this part of the case before the Tribunal, we are conscious, from the evidence that we heard, that Paul Tatla sowed the seed for the claimant to part company with the respondents, and that it was him that invited her in for the meeting on 20 December 2017.

134. However, from the evidence before us, we are satisfied that Mr Tatla did not dismiss the claimant, but she negotiated her exit on agreed terms. It was clear to us that the claimant knew she could not work with Jackie Weston, and the

claimant's exit was mooted then as it suited both parties. Indeed, in the ET1, the claimant specifically refers to Mr Tatla saying "***it's best if we part company***".

135. From the terms then mutually agreed, the claimant secured an extra week's pay to 27 December 2017, as she was off that week, on self-certificated absence from work, and she post dated her resignation to that later date, rather than effective from the day she submitted it to Mr Tatla. While, in evidence to us, the claimant stated that she had to resign to get a reference, the fact of the matter is that it is not clear, on the evidence produced to us, if and / or when any reference was ever provided to her future employer.

136. Further, while we can accept that the claimant may well have felt pressurised into attending the meeting with Mr Tatla, albeit her ET1 refers to her being called to go in for "***a chat",*** the fact that she attended, and that she drafted the letter of resignation, rather than signing something he had drafted beforehand and simply given to her to sign, saying resign, or be dismissed, shows us that she was in a position to make an informed decision at that time, and to conclude agreed terms for her exit on a basis acceptable to her.

137. At that meeting, the claimant was negotiating her exit from the respondents' employment on the best possible terms she could achieve. As those terms were mutually agreed with Mr Tatla, the termination of her employment is best categorised as a mutually agreed termination, and it is certainly not a dismissal by the respondents.

138. **Issue 5: If the Claimant's employment did end as the result of a dismissal, was that dismissal automatically unfair under the provisions of Section 103A of the Employment Rights Act 1996?**

139. **Section 103A** provides that: "***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."***

140. As the claimant in the present case does not have 2 year's qualifying continuous service with the respondents, the burden of proof lies on her to show that the reason, or principal reason, for any dismissal of her from the respondents' employment, is that she made a protected disclosure.

141. **Section 103A** therefore creates two questions: (1) Was the making of a disclosure the reason (or principal reason) for the dismissal? and (2) Was the disclosure in question a protected disclosure within the meaning of the Act? If the answer to both questions is yes, the employee will have been unfairly dismissed: **Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401.**

142. Here, an important issue for the Tribunal to determine is whether or not the claimant was dismissed by the respondents? **Section 95(1)(c) of the Employment Rights Act 1996** provides that an employee is taken to be dismissed by his employer if "***the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."***

143. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

144. As is well within our judicial experience, in most alleged unfair constructive dismissal complaints brought before this Tribunal, most such claims are based on alleged breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer.

145. Both limbs of that test are important; conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. It is the impact of the employer's behaviour (assessed objectively) on the

employee that is significant - not the intention of the employer: **Malik v BCCI [1997] IRLR 462**.

146. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/,** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-14):

> "***12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being: "… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."***
>
> ***13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.***
>
> ***14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP &***

> ***Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."***

147. In the present case, the claimant resigned on 20 December 2017, handing in her resignation letter, effective from 27 December 2017. It is her case that the circumstances of her resignation were such that she should be taken to have been constructively dismissed by the respondents. She speaks of having been "***forced"*** to resign and having no choice.

148. In his closing submissions, Mr McFarlane, for the respondents, referred us to the cited Court of Appeal judgment in **Sandhu**. In particular, it discusses the proper test to be applied by a Tribunal in determining whether an employee has resigned or been dismissed. That is very much an underlying issue in the present case.

149. Lord Justice Wall, in giving the judgment of the Court, held, at paragraph 51, that it simply could not be argued that Mr Sandhu was negotiating freely, as he had no warning of the purpose of the meeting was to dismiss him, he had had no advice, and no time to reflect, and he was simply doing his best to salvage what he could from the inevitable fact that he was going to be dismissed. He described that as "***the very antithesis of free, unpressurised negotiation".***

150. At paragraph 52, Lord Justice Wall noted how the terms Mr Sandhu was able to obtain could not be said to be particularly favourable to him, being "***pretty small beer"***, as Lord Justice Pill had put it during the course of argument at the Court hearing.

151. The facts and circumstances of the **Sandhu** case are, of course, different from the facts and circumstances of the present case.

152. We find that the claimant was not dismissed, actually or constructively, but that she resigned in a mutually agreed termination of her employment. Accordingly, as there was no dismissal, we do not require to make an enquiry into what facts and beliefs caused the respondents' decision-maker to decide to dismiss the claimant. We are satisfied that it was a mutual termination of employment, where she resigned in return for 3 months' notice, and a reference, as agreed with Mr Tatla on 20 December 2017.

153. In our view, support for the fact that it was a mutually agreed termination, albeit the claimant wrote a resignation letter, post-dated, is that in that resignation letter the claimant makes no reference whatsoever to having made disclosures to the respondents, and that being the reason for her dismissal.

154. She does not use the word "***dismissal"***, or "***dismissed***", again reinforcing the fact that she made a conscious choice to resign in return for the agreed 3 months' notice, and a reference. In answer to the simple question, who really terminated the employment contract here, we are satisfied that quite clearly it was the claimant, but on terms mutually agreed between the parties, including her post-dating her resignation.

155. **Issue 6: If the claimant was automatically unfairly dismissed under Section 103A, to what compensation (if any) is she entitled from the respondents?**

156. On this matter, given our findings that there was no dismissal, and so no unfair dismissal, as it was a mutually agreed termination of employment, but even if there was, it was not dismissal for having made a protected disclosure, the matter of remedy does not strictly speaking arise for our further consideration, but we address a few matters arising, when looking at Issue 7 below.

157. **Issue 7: If the claimant is due any compensation, has she mitigated her losses, and / or is any compensation due to her subject to any reduction for contributory conduct, or other reason, or any uplift / downlift in**

compensation for unreasonable failure by either party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

158. There is no dispute by the respondents that argues that the claimant has failed to mitigate her losses. Of course, the duty to mitigate does not arise unless and until the employee has actually been dismissed, and here we have found there was no dismissal. That said, the claimant successfully obtained new employment, post termination of her employment with the respondents, and as she is now earning more than she was when employed by the respondents, her Schedule of Loss clarifies that there is no loss post start of her current employment in September 2018. As such, we are satisfied that there is no failure by the claimant to mitigate her losses.

159. Looking at the issues identified by Lady Smith, in the EAT judgment of **Allma Construction Ltd v Laing [2012] UKEATS/0041/11**, cited by the Judge, and referred to above earlier in these Reasons, at paragraph 48 above, the first issue for us to address is whether or not a relevant Code of Practice applied at the time of the relevant events, being the termination of the claimant's employment effective on 27 December 2017.

160. On that matter, the Tribunal finds that this is a case where, there being a mutually agreed termination, there was no application of the ACAS Code of Practice, and so, even if the claim of automatically unfair dismissal under Section **103A** had been upheld, no scope for any uplift in compensation payable to the claimant.

161. Further, even if we had upheld the claim, we do not consider that this is a case where we would have made any reduction in compensation otherwise payable to the claimant for contributory conduct, or other reason.

162. We reject, as not well-founded, Mr McFarlane's suggestion, at paragraph 7(b) of his written outline closing submission, that under **Section 122(2),** we should find "***the claimant's reaction to the evacuation and management of the home with the staffing issues"*** led to her dismissal. While he referred

to that as allowing a reduction in her compensatory award, that statutory provision relates to basic award.

163. **Section 122(2) of the Employment Rights Act 1996** provides:

"***Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".***

164. In this case, we find that, even if we had found for the claimant, and that she had been unfairly dismissed by the respondents, there is no proper basis for us to reduce any basic award of compensation.

165. **Section 123(1)** provides that:

"The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

166. Again, in this case, we find that, even if we had found for the claimant, and that she had been unfairly dismissed by the respondents, there is no proper basis for us to reduce any compensatory award of compensation

167. **Section 123(6)** provides:

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensation award by such proportion as it considers just and equitable having regard to that finding".

168. Similarly, we find that, even if we had found for the claimant, and that she had been unfairly dismissed by the respondents, there is no proper basis for us to reduce any compensatory award of compensation on the basis of her contributory conduct.

169. Put simply, there was no evidence led before us of any culpable or blameworthy conduct on the part of the claimant, which would have allowed us to identify specific misconduct on her part, and then decide whether it is just and equitable to reduce any compensation to any extent.

170. We did feel that she was very entrenched in her views and was not willing to consider suggestions from Ms Weston. Having said this, we don't consider that this was specific misconduct which would have made us consider reducing compensation.

Holiday Pay claim

171. In her closing submissions, the claimant sought **£6,663** by way of holiday pay. Within her Schedule of Loss, she stated that: "***Holiday pay I felt I never had any holiday time although I was off, it was like working at home answering calls every day and on some days being phoned in."***

172. In his closing submissions for the respondents, Mr McFarlane stated that:

> "***Holiday Pay**: The Claimant's case seems to be that phone calls from work impacted on her leave. The right to leave was honoured, the Claimant's apparent inability to 'let go' being the root cause. If compensation were due, on a just and equitable basis it would be nil or limited*."

173. In considering the claimant's request, we have to be satisfied that there is a competent claim for holiday pay before the Tribunal. Her claim, on presentation, was registered by the Tribunal administration as for a whistleblowing complaint only. It was not registered as a holiday pay claim, as she did not tick the form at section 8.1 to state she was owed holiday pay, although in the paper apart to her ET1 claim form, presented on 10 June 2018, the claimant did state: ***" I never got any support from management and was on call 24/7 from day one and I never got a holiday that was not interrupted in all the time I managed the home."***

174. In her PH agenda, for the Case Management Preliminary Hearing, heard on 9 October 2018, a holiday pay claim was not expressly mentioned, and the respondents' ET3 response does not address any holiday pay claim. At paragraph 11 of the paper apart to the ET3 response, it was submitted that: "***The Respondent had calculated the Claimant's holiday entitlement up to the effective date of termination and had paid it accordingly."***

175. Quite simply, such a holiday pay claim was not foreshadowed in the ET1 claim form, which did not state that the claimant was suing the respondents because she was owed any unpaid holiday pay.

176. Being a creature of statute, an Employment Tribunal can only competently deal with a claim that is before it, either in the claim form, as presented, or added at a later date, by way of an amendment to the ET1 claim form allowed by the Tribunal. In these circumstances and having regard to the judicial guidance binding upon us, from the Court of Appeal's judgment in **Chapman v Simon [1994] IRLR 124**, this Tribunal cannot adjudicate upon a complaint that is not pleaded.

177. A party's case should be set out in its original pleading – his ET1. In **Chandhok v Tirkey [2015] ICR 527**, in which an issue as to the scope of the claim arose, the EAT said:

> "***The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."***

178. The fact that the claimant has mentioned it does not make it part of her pleaded case. She did not seek leave of the Tribunal to amend her claim. Had she done so, we would have had to consider any amendment application, and heard from the respondents, before making a ruling. That did not happen, as the claimant made no such application.

179. Her submission, in closing submission, that she did not get "***protected time***", during earlier annual leave granted by the respondents, seems to have arisen due to her sense of duty that, even while off on holiday, and a deputy was on duty in her absence, she still took calls from the home.

180. On the limited evidence before us, there was no challenge that she had received her annual leave entitlement, and that she had been paid holiday pay. As such, even if such a claim had formed a proper part of her claim before this Tribunal, there was no explanation from her as to how she had calculated the sum sought at **£6,663**.

Employment Judge: I McPherson
Date of Judgment: 26 August 2019
Date sent to parties: 28 August 2019