Case Number: 1600749/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Peiu**

Respondent: **Leonard Cheshire Disability**

Heard at: **Cardiff** 5, 6, 9, 10, 11, 12, and 13 September 2019.
7, 8, 9 and 10 January 2020.

Tribunal panel only in Chambers on 17 June 2020.

Before: **Employment Judge Harfield**
Members **Mrs W Morgan**
Mr M Pearson

Representation:
Claimant: In person
Respondent: Mr Islam-Choudhary (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that the claimant's complaint of "ordinary" unfair dismissal succeeds. The claimant's complaints of detriment and dismissal on grounds of having made a protected disclosure and of direct race discrimination and victimisation do not succeed and are dismissed.

The unfair dismissal claim will proceed to a remedy hearing.

REASONS

Introduction and procedural history

1. The claimant is a Nurse. The respondent is a charity supporting people with physical and learning disabilities. The claimant worked at Ty Cwm care home which is a 20 bed nursing home for adults with disabilities, On 6 September 2017 the claimant presented an ET1 claim form complaining of race discrimination and victimisation. In box 8.2 of her claim form she made four specific complaints against the respondent relating to the conduct of a Nursing and Midwifery Council (NMC) hearing in June 2017. On 19 October 2017 the respondent filed their ET3 response form denying the claims.

2. On 8 November 2017 the claimant emailed the Tribunal stating she had just received a letter saying she had been summarily dismissed and she would like to add an unfair dismissal claim "on top of continuous discrimination (from my initial claim)". On 22 November 2017 the claimant sent a further email [29a – 29c] providing more comments about the claim she was seeking to bring. At a case management preliminary hearing on 6 December 2017 no directions were made as the claimant was appealing her dismissal and waiting for some advice from the CAB. It was anticipated the claimant would then either bring a new Tribunal claim or apply to amend the existing one.

3. On 10 April 2018 the CAB filed an application to amend on the claimant's behalf together with further and better particulars. The CAB explained the delay in providing these lay with resourcing issues within the CAB. That ceased their involvement and the claimant has since continued as a litigant in person. At a case management preliminary hearing on 24 September 2018 the case was listed for a public preliminary hearing.

4. The matter came before Employment Judge Cadney on 1 February 2019. His case management order is at [50 – 58]. Employment Judge Cadney permitted the claimant to amend her claim to bring those covered by her email of 22 November 2017 (whistleblowing detriment and dismissal, victimisation and "ordinary" unfair dismissal.) He refused permission for the claimant to amend her claim to bring other complaints relating to matters such as training, a lack of supervision meetings, and salary issues.

5. The case initially came before the Tribunal on 5, 6, 9, 10, 11, 12, and 13 September 2019. A decision was made to limit the hearing to liability issues only (i.e. whether the claimant's claim or any part of it succeeds). The first day became a reading day and the claimant gave evidence over

parts of day 2, 3 and 4. On day 5 the Tribunal dealt with an application by the claimant for specific disclosure and for additional documents to be included in the bundle (held over from day 4 so that the claimant could finish her evidence under oath). The application was not granted save that the Tribunal indicated it had already reached the view itself it would helpful to see one particular document (the daily narrative for a service user that features in the case, known as SU2). No formal order was made as the respondent agreed to make enquiries.

6. The Tribunal heard evidence from the respondent's first witness. On the morning of day 6 the daily narrative was produced and it appeared to contain relevant entries that had not formed part of the disciplinary case against the claimant or disclosure in these proceedings. The disciplinary investigating officer, SJ was not a witness in the case. The Tribunal indicated that it was considering issuing a witness order for SJ to explore what had happened with the document in question. However, we indicated that we wished first to hear evidence from Ms Wilkinson, the respondent's service manager who was already a witness in the case and who, it seemed to the Tribunal may have relevant evidence to give.

7. Ms Wilkinson started her evidence. On the morning of day 7 the respondent's counsel made an application for an adjournment. In short he said new information had come to light that was likely to lead to further disclosure and potentially a further witness for the respondent. He said more time was needed to resolve those issues and if the case continued without a postponement, on the advice of the Bar Council, he would be unable to continue to represent the respondent.

8. Having heard from the parties the Tribunal considered the application and granted it. There were difficulties with finding mutual availability dates to relist the hearing it was agreed a telephone case management hearing would be listed before Employment Judge Harfield to address listing and the likely applications relating to disclosure and the addition of new witnesses. The Tribunal also ordered that the respondent's solicitor review the files and records in the case, including those relating to SU2 to determine whether there were any additional documents to disclose. That process was separate to the new disclosure anticipated by the respondent's counsel. The Tribunal also decided, on its own volition, to issue a witness order for the investigating officer, SJ.

9. The telephone case management hearing proceeded on 18 October 2019 before Employment Judge Harfield. A further 4 days were listed for 7, 8, 9 and 10 January 2020. By the time of the hearing the respondent had not produced their additional disclosure or proposed additional witness statement. A further case management hearing had to be listed. At the telephone hearing on 18 October 2019 the claimant applied to amend her

claim and made a disclosure application but the applications were not in a form the Tribunal could sensibly deal with.

10. At a subsequent telephone case management hearing on 5 November 2019 Employment Judge Harfield granted permission for the respondent to rely on an additional witness, Ms Young. The claimant did not oppose that application. Employment Judge Harfield also admitted additional documents relating to SU2 and the disciplinary investigation. The latter were to be placed within an additional file for the hearing as they were voluminous. The claimant also made an application to rely on additional documents. Some were permitted and some were refused. The claimant also made a further application for additional disclosure of documents by the respondent. They were not granted but Employment Judge Harfield made some case management orders as to matters about which the respondent should confirm their position, including whether there were additional documents relating to SU2 displaying challenging behaviour or refusing treatment. The respondent provided further documents relating to SU2 on 26 November 2019 and answered the additional points they had been required to confirm.

11. The claimant made a further application to amend her claim that was addressed by Employment Judge Harfield in a telephone case management hearing of 18 December 2019. The application was refused. The Tribunal panel decided to maintain the witness order for SJ. However, on receipt of medical evidence as to SJ's fitness to attend the witness order was rescinded.

12. The liability hearing completed between 7 and 10 January 2020. Judgement was reserved. There were difficulties in finding a date when the Tribunal panel were all available for chambers deliberations and it could not be listed until 31 March 2020. Unfortunately those chambers deliberations did not take place due to restrictions in place relating to the Covid 19 pandemic. It then took some time to make arrangements, including suitable document security arrangements, so that the Tribunal could undertake their chambers deliberations remotely. The Tribunal did so on 17 June 2020 completing their deliberations. Employment Judge Harfield apologises to the parties for the delay thereafter providing this Reserved Judgment which was related, in part, to the consequences of the Covid 19 lockdown.

13. The Tribunal heard witness evidence from the claimant and from Ms Gulliver, Ms Wilkinson, Ms Young, Ms Browning, and Mr Clubb for the respondent. We had before us two lever arch files of documents (as updated) forming the main bundle. Page numbers in this decision, unless otherwise indicated are a reference to that main bundle. The additional disclosure relating to the disciplinary investigation process were placed

within a separate "Investigation File." References to documents within that file in this decision are prefixed by the letter "I"). We also had before us the respondent's chronology, draft list of issues and written closing argument. Both parties gave oral closing submissions. Whilst we have not repeated them all here, we took all submissions into account.

The issues to be decided

14. At the start of the full hearing the respondent produced a draft list of issues. Before starting to hear witness evidence we spent some time discussing its content. Some adjustments were made by the Tribunal to reflect what Employment Judge Cadney had decided at the case management hearing referred to above. The claimant accepted the respondent's draft was a fair summary of the main issues to be decided in her case. The updated version is below (limited to liability issues only).

Direct Race Discrimination – section 13 Equality Act 2010

(a) the claimant is of Romanian national origin.

(b) Was the claimant treated less favourably than either a hypothetical comparator would be treated or how an actual comparator has been treated because of race?

(c) The claimant relies on the following alleged less favourable treatment:

(i) During the NMC hearing in June 2017 the respondent "submitted an antagonistic statement compared to LCD disciplinary hearing (24/02/16)" (claimant's ET1 at [8])

(ii) During the same NMC hearing the respondent "failed to produce original medical documents requested by the NMC, answering they "cannot be located" against the legislation of 10 years archives for medical documentation" (claimant's ET1 at [8])

(iii) During the same NMC hearing the respondent "refused to provide representation/ support (the staff association)" (claimant's ET1 at [8])

(iv) During the same NMC hearing the respondent "disclosed confidential information towards the NMC witnesses, who have disclosed this in the hearing against me" (claimant's ET1 at [8])

(v) The allegations made against her by the service manager in September 2016 (case management order of Judge Cadney paragraphs

9, 11, 13, 14 and 15 [52 -53] and the claimant's email of 22 November 2017 [29b][1]

(vi) The claimant's suspension from 30 September 2016 (case management order of Judge Cadney paragraphs 9, 11, 13, 14 and 15 [52-53] and the claimant's email of 22 November 2017 [29b]

(vii) The claimant's dismissal on 7 November 2017 (case management order of Judge Cadney paragraphs 9, 11, 13, 14 and 15 [52-53] and the claimant's email of 22 November 2017 [29b].

Victimisation – section 27 Equality Act 2010

(a) Has the claimant done protected acts within the meaning of section 27(2) Equality Act?

The claimant relies on the following alleged protected acts:

(i) First grievance dated 18 February 2016;
(ii) Second grievance dated 7 November 2016;
(iii) third grievance dated 3 July 2017

(b) Was the claimant subjected to detriment because the claimant had done a Protected Act (section 27(1)(a))

The claimant relies on the following detriments:

(i) During the NMC hearing in June 2017 the respondent "submitted an antagonistic statement compared to LCD disciplinary hearing (24/02/16)" (claimant's ET1 at [8] and Judge Cadney's case management order at paragraph 16(a) [53])

(ii) During the same NMC hearing the respondent "failed to produce original medical documents requested by the NMC, answering they "cannot be located" against the legislation of 10 years archives for medical documentation" (claimant's ET1 at [8] and Judge Cadney's case management order at paragraph 16(a) [53])

(iii) During the same NMC hearing the respondent "refused to provide representation/ support (the staff association)" (claimant's ET1 at [8] and Judge Cadney's case management order at paragraph 16(a) [53])

[1] On a closer reading of EJ Cadney's order it is not entirely clear that he granted permission for this allegation (and the two below) to be brought as a direct race discrimination complaint as opposed to being complaints of whistleblowing detriment and victimisation (which were clearly permitted to proceed). It is, however, in the claimant's email of 22 November 2017 , the respondent's draft list of issues and the parties dealt with it. The Tribunal has therefore addressed the complaints in this Judgment.

(iv) During the same NMC hearing the respondent "disclosed confidential information towards the NMC witnesses, who have disclosed this in the hearing against me" (claimant's ET1 at [8] and Judge Cadney's case management order at paragraph 16(a) [53])

(v) The allegations made against her by the service manager in September 2016 (case management order of Judge Cadney paragraphs 9, 11, 13, 14, 15 and 16(c) [52 -54] and the claimant's email of 22 November 2017 [29b]

(vi) The claimant's suspension from 30 September 2016 (case management order of Judge Cadney paragraphs 9, 11, 13, 14, 15 and 16(c) [52-54] and the claimant's email of 22 November 2017 [29b]

(c) Was the claimant dismissed because the claimant had done a Protected Act? (case management order of Judge Cadney paragraphs 9, 11, 13, 14, 15 and 16(c) [52-54] and the claimant's email of 22 November 2017 [29b]

Protected Disclosure – section 43A Employment Rights Act 1996

(a) Did the claimant make any disclosure of information and, if so, what was that disclosure and to whom was it made?

(b) Did the claimant believe that the information disclosed tended to show that:

(i) the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject (section 43B(1)(b) ERA); and/or

(ii) the health and safety of any individual has been, was being or was likely to be endangered (section 43B(1)(d) ERA)

(c) If so, did the claimant reasonably believe that the disclosures were made in the public interest?

(d) If the disclosure was made to persons other than the respondent, did the claimant reasonably believe that the relevant failure related solely or mainly to any other matter for which a person other than her employer has legal responsibility to that other person? (section 43C(1)(b))

The claimant alleges that the protected disclosure was made to an "external agency about an issue raised by a service user. The claimant believed she was acting in the best interests of the service user and was therefore making a protected disclosure when contacting the social

worker" (paragraph 22 Further and Better Particulars [44 – 45] and paragraph 16(b) of Judge Cadney's case management order at [54])

Detriment for making protected disclosure – section 47B ERA

(a) Did the respondent subject the claimant to any detriment on the ground that she had made protected disclosures above (section 47B)

(b) Are all the alleged detriment claims within time and, if not, was it reasonably practicable to lodge in time? If it was not reasonably practicable to lodge in time, did the claimant lodge the claim within a reasonable period thereafter? (section 48(3) ERA)

(c) The claimant relies on the following detriments:

(i) During the NMC hearing in June 2017 the respondent "submitted an antagonistic statement compared to LCD disciplinary hearing (24/02/16)" (Judge Cadney's case management order at paragraph 9 [51 - 52])

(ii) During the same NMC hearing the respondent "failed to produce original medical documents requested by the NMC, answering they "cannot be located" against the legislation of 10 years archives for medical documentation" (Judge Cadney's case management order at paragraph 9 [51 - 52])

(iii) During the same NMC hearing the respondent "refused to provide representation/ support (the staff association)" (Judge Cadney's case management order at paragraph 9 [51 - 52])

(iv) During the same NMC hearing the respondent "disclosed confidential information towards the NMC witnesses, who have disclosed this in the hearing against me" (Judge Cadney's case management order at paragraph 9 [51 - 52])

(v) The allegations made against her by the service manager in September 2016 (case management order of Judge Cadney paragraphs 9, 11, 13, 14, 15 and 16(b) [52 -54] and the claimant's email of 22 November 2017 [29b]

(vi) The claimant's suspension from 30 September 2016 (case management order of Judge Cadney paragraphs 9, 11, 13, 14, 15 and 16(b) [52-54] and the claimant's email of 22 November 2017 [29b]

Unfair dismissal – protected disclosure – section 103A ERA

(a) Was the sole or principal reason for the claimant's dismissal on 7 November 2017 that she made a protected disclosure as above? (case management order of Judge Cadney at paragraph 16(b) [54]

"Ordinary" unfair dismissal -section 94 ERA

(a) What was the sole or principal reason for the claimant's dismissal on 7 November 2017 and was it a potentially fair one in accordance with section 98(1) and (2) ERA?

The respondent asserts that the claimant's dismissal was for a reason relating to the claimant's conduct.

(b) If so, was the dismissal fair or unfair in accordance with section 98(4) and in particular, did the respondent in all respects act within the so called "band of reasonable responses"?

Relevant legal principles

Protected Disclosures

15. Under section 43A Employment Rights Act 1996 ("ERA"), a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. A qualifying disclosure must fall within section 43B ERA and also must be made in accordance with any of sections 43C to 43H. Section 43B says:

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

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

16. Section 43C provides:

"Disclosure to employer or other responsible person

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

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person…"

17. There are therefore a number of requirements before a disclosure is a qualifying disclosure.

18. First the disclosure must be of information tending to show one or more of the types of wrongdoing set out at Section 43B. In order to be such a disclosure "*It has to have sufficient factual content and specificity such that it is capable of tending to show one of the matters in subsection (1)"* (Kilraine v London Borough of Wandsworth [2018] ICR 185). Determining that is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case.

19. Second, the worker must believe the disclosure tends to show one of more of the listed wrongdoings. Third, if the worker does hold such a belief if must be reasonably held. Here, the worker does not have to show that the information did in fact disclose wrongdoing of the particular kind relied upon. It is enough if the worker reasonably believes that the information tends to show this to be the case. A belief may be reasonable even if it is ultimately wrong. It was said in Kilraine that this assessment is closely aligned with the first condition and that: "*if the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable to tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

20. Fourth the worker must believe that the disclosure is made in the public interest. Fifth, if the worker does hold such a belief, it must be reasonably held. The focus is on whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant

motive for making disclosures: Chesterton Global Ltd v Nuromhammed [2018 ICR 731.

21. In Chesterton it was also said that there was no value in seeking to provide a general gloss on the phrase "in the public interest" but that the legislative history behind the introduction of the condition establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. The question is to be answered by the Tribunal on a consideration of all the circumstances of the particular case but relevant factors may include:

    (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;
    (c) the nature of the wrongdoing disclosed;
    (d) the identity of the alleged wrongdoer.

22. Sixth, the disclosure has to be made to an appropriate person.

Whistleblowing/ Protected Disclosure detriment

23. Under Section 47B(1) a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under section 47B(2) the section does not apply where the detriment in question amounts to a dismissal within the meaning of Part X (because dismissals are governed by Section 103A within Part X ERA).

24. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment (see Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 713 applying Derbyshire v St Helens MBC [2007] UKHL 16 and Shamoon v Chief Constable of Ulster Constabulary [2003] ICR 33.)

25. There must be a link between the protected disclosure or disclosures and the act (or failure to act) which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. In Manchester NHS Trust v Fecitt [2011] EWCA 1190 it was said that "section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower." This is a "reason why" test. The Tribunal has to look at why (consciously or unconsciously) the decision maker acted as he or she did. It was said in Jesudason that:

"Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under Section 47B."

26. Section 48 governs the time limits for whistleblowing detriment claims and says:

"(3) An employment tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

27. Section 48(4) provides that where an act extends over a period, the "date of the act" means the last day of that period, and a deliberate failure to act shall be treated as done when it was decided on. In the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act, or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Protected Disclosure/ "Whistleblowing" dismissal

28. Section 103A ERA provides:

"*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."*

"Ordinary" Unfair Dismissal

29. Section 94 ERA gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--
…(b) relates to the conduct of the employee..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

30. Under section 98(1)(a) of ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At that stage, the burden of showing the reason is on the respondent. If discharged, the burden of proof when assess fairness under section 98(4) is neutral.

31. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

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

32. In cases involved alleged misconduct the tribunal must have regard to the test set out in British Home Stores v Burchell [1980] ICR 303 (often referred to as the "Burchell test.") In particular, the employer must show that the employer genuinely believed that the employee was guilty of the conduct. Further, the tribunal must assess whether the respondent had reasonable grounds on which to sustain that belief, and whether, at the

stage when the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

33. The Tribunal must also have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

34. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.) Such an approach also applies to the assessment of any other procedure or substantive aspects of the decision to dismiss an employee for misconduct reason.

35. As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness: (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399). We also remind ourselves of the decision in South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular that:

"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

36. We have reminded ourselves of the decisions in A v B [2003] IRLR 405, Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457 and Turner v East Midlands Trains Limited [2012] EWCA Civ 1470 that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee.

37. In A v B [2003] IRLR 405 the Employment Appeal Tribunal (a case involving 2 1/2 year delay of which a police investigation took up one year), it was also said

"In our opinion, in this case, the delays were so lengthy and the justification for them was so limited that we consider that the Tribunal did err in concluding that they did not render the dismissal unfair. That is particularly so when these delays are combined with other factors to which we return"

38. The other factors were a failure by the employers to serve witness statements and a further failure to interview some other relevant witnesses. The EAT held that the question whether an employer has carried out such investigations as is reasonable in all the circumstances necessarily involves a consideration of any delays. In certain circumstances a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. Where the consequence of the delay is that the employee is or may be prejudiced (for example because it led to a failure to take statements that might otherwise have been taken, or because of the effect of delay on fading memories) this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process.

39. In Secretary of State for Justice v Mansfield UKEAT/0539/09/RN the Employment Appeal Tribunal similarly held that there is a need to look at the length of the delay and the reasons for it and that while prejudice to the employee from the delay may be an additional ground of challenge it is not essential that prejudice should be shown. Delay may still render the dismissal unfair if it is substantial and there is no good reason for it.

40. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary

process may be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage. The appeal should be treated as part and parcel of the dismissal process: Taylor v OCS Group Ltd [2006] EWCA Civ 702.

41. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration. However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. The tribunal should again not substitute its own views for that of the employer (London Borough of Harrow v Cunningham [1998] IRLR 256 and Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA).

42. If the Burchell test is answered in the affirmative the Tribunal must still determine whether the decision of the employer to dismiss rather than impose a different disability sanction (or no sanction at all) was a reasonable one. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the Tribunal to consider:

    (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

    (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is the employee's attitude towards their conduct.

Acas Code of Practice

43. The Acas Code of Practice on Disciplinary and Grievance Procedures is a statutory code issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992. A failure to follow the Code does not, in itself, make an organisation liable to proceedings. However, under section 207 any provision of the Code which appears to the tribunal to be

relevant to any question arising in the proceedings shall be taken into account in determining that question.

44. At the time of the claimant's disciplinary hearing the Code included the following:

"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing…

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action…

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case...

46 Where an employee raises a grievance during a disciplinary process the disciplinary process can be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

Direct Race Discrimination

45. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

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

46. Race is a protected characteristic and includes, colour, nationality, ethnic or national origins (section 9(1)).

47. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 *"there must be no material difference between the circumstances related to each case.*"

48. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves

consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 and the authorities discussed there at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

Victimisation

49. Section 27 of the Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act. Section 27(2) defines a protected act as:

(a) bringing proceedings under the Equality Act;
(b) giving evidence or information in connection with proceedings under the Equality Act;
(c) doing any other thing for the purposes of or in connection with the Equality Act;
(d) making an allegation (whether or not express) that the respondent or another person has contravened the Equality Act.

Equality Act - Burden of Proof

50. Section 136 provides that:

" …(2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provisions."

51. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the

balance of probabilities, the respondent had committed an act of discrimination.

52. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

Relevant background and findings of fact

53. The Tribunal does not need to make findings of fact about every point of dispute between the parties or points raised by a party. We need only make findings of fact about points that are relevant to the issues we need to decide in this case, as set out above. Where we make findings of fact we do so applying the balance of probabilities.

The complaint by the family of SU1 and safeguarding investigation

54. The claimant initially started working for the respondent on 42 March 2014 [152A]. In October 2014 the claimant left to take up a position at Morriston Hospital. She returned to work for the respondent again on 15 December 2014 [193].

55. During the claimant's first week back at work, on 21 December 2014, a service user, known in these proceedings as Service User 1/ SU1 was admitted to hospital whilst the claimant was working the morning shift. On 6 January 2015 SU1 returned to the home.

56. On 7 January 2015 the wife of SU1 made a complaint about the care of SU1 [153-156], including alleging the claimant had failed to take his temperature or vital signs, had delayed in calling an ambulance and had made inappropriate comments. The Tribunal finds the focus of this complaint was against the claimant as opposed to other members of staff.

57. On 16 January 2015 the claimant was suspended by SRM (the then service manager) [157-158]. On 19 January 2015 the claimant was referred to the NMC by PJ at the time the senior nurse at Ty Cwm [159-164]. The claimant's perspective is that if there were any errors in respect of the care of SU1 it was not by her and that SM, an agency nurse, had failed to take action in respect of a suspected stroke the night before the claimant came on shift. Further, that when SU1's medication was not located in his bag in his return to the home from hospital, responsibility for that lay with ME, another nurse and not the claimant. The claimant's view is that she took action to correct the mistakes of SM and ME but ended up being the one being unfairly blamed and singled out.

58. The matter was also referred to the Council's safeguarding team. The chair of the safeguarding meeting considering the referral was CW. A safeguarding meeting took place on 27 January 2015 [166-177]. A decision was made that safeguarding would undertake their own investigation.

59. On 5 June 2015 the adult protection investigation report was produced [207 – 214]. The report concluded that the weight of the evidence supported an allegation that the claimant had failed to take SU1's temperature on the day in question. In relation to a complaint that the claimant had ignored obvious signs of a stroke the report said that it was not able to confirm the second allegation was proven as the available medical records were unable to confirm obvious signs of a stroke but that given the weight of concerns raised by the family and the nursing documentation, further investigation was required by the NMC as to the claimant's fitness to practice. The report also recommended that the respondent complete their own disciplinary investigation. The investigation found that SU1 had in fact been given his medication but said that there should be an internal investigation as to why the medication was left unattended in his bag. The report also said "It may also be questioned by the agency nurse, SM, also failed during her night shift to act on the concerns raised by [SU1's wife] regarding signs of a stroke."

60. The report was discussed at a meeting on 14 July 2014 [215-222]. The meeting minutes repeated a recommendation that there be an investigation by the NMC into the claimant's fitness to practice and for the respondent to complete a disciplinary investigation. It raised the question regarding the actions of SM on the night shift with an action point for the respondent "to speak with DNS Agency regarding [SM]," and recommended the respondent consider an internal investigation as to why the medication was left unattended in SU1's bag.

61. The NMC fitness to practice investigation was held in abeyance pending the internal investigation by the respondent [223].

The respondent's investigation regarding SU1

62. The respondent's investigation commenced on 30 September 2015 [229]. The investigation was delayed as the respondent decided to wait for Ms Wilkinson to start as the new Service Manager and she then broke her leg on 9 October 2015. The investigation was eventually passed over to SD another Service Manager. SD produced his report on 23 December 2015 [228-233]. In relation to the allegation of the claimant not taking SU1's temperature, SD concluded that there was evidence that SU1 had not

presented with symptoms of raised temperature and that the claimant had made a clinical judgment that taking his temperature was not a priority at the time. But he also concluded that there were conflicting versions of what had happened in the course of the incident such that overall he considered there should be a referral to a disciplinary hearing. However, he downgraded the allegation to less than gross misconduct and said the claimant's suspension should be lifted. In relation to the allegation that the claimant had ignored signs of a stroke he recommended no further action be taken. In relation to the allegation about the missing medication on SU1's return to the home he said that it should not form part of the disciplinary hearing as the error was not made by the claimant. He said that staff error needed to be separately addressed by the Service Manager.

Lifting of the claimant's suspension and return to work

63. The claimant had been suspended since 16 January 2015 and returned to work nearly a year later on 14 January 2016. She attended a return to work meeting with Ms Young, HR Business Partner, and Ms Wilkinson. The claimant said that when she attended work one of the first things she saw on the staff board was that ME had been promoted to care supervisor and SM was still working there. This has left the claimant with a deeply ingrained sense of injustice about everything she had been through and was continuing to face, particularly with ongoing NMC fitness to practice proceedings when as far as she could see, from her perspective, nothing had happened to ME and SM.

64. The claimant handed over a grievance which is the first protected act relied upon in the victimisation claim [234]. Ms Young told the claimant that the individuals the claimant was complaining about no longer worked for the respondent and it was agreed that the claimant would have a think about whether she wanted to proceed with her grievance [480]. Ms Young later followed this up in writing [482].

65. On 26 January 2016 the claimant was given a letter inviting her to a disciplinary hearing [236 – 237]. On 27 January 2016 the claimant was signed off work by her GP [239].

66. On 8 February 2016 Ms Young wrote to the claimant saying that she would request (in relation to SU1) the admissions form, handover notes, scan result and discharge letter from hospital but that she believed they were absent from the service and they would have to contact safeguarding [481].

67. The disciplinary hearing took place on 24 February 2016 [240 -243, 244, 494 -497]. Ms Gulliver, Operations Manager for Wales, concluded the

claimant had acted reasonably in the circumstances in not taking SU1's temperature and therefore no disciplinary action was taken against the claimant. In the hearing notes Ms Gulliver noted an issue with the wife of SU1 refusing access to some documents. The claimant's trade union representative also commented that safeguarding had said they had never had the handover notes. Following the hearing Ms Gulliver updated the NMC [243a] and sent them a copy of the documentation on 26 February 2016 [489].

68. It was agreed that when her original GP certificate ran out the claimant would take a period of about 8 weeks annual leave that she had accrued and had not used during her period of suspension. The claimant therefore returned to work again in April 2016.

April to June 2016

69. Following the claimant's return to work she raised numerous concerns. The claimant's view is that they were all legitimate and that she was the victim of bullying at the hands of various members of staff and also that she had legitimate concerns about the management and practices at the home and of some of the carers and other nurses. She complains, for example, that she was not given training or supervision, her professional decisions were questioned, her medication rounds were interrupted, carers were messing her around and recording false documents, she was down on the rota without days off and that Ms Wilkinson and ME were bullying her.

70. The respondent's contrary view is that the claimant, in part because of her experiences relating to SU1, was over sensitive to any criticism or feedback and would say she was being bullied by managers, colleagues, service users and their families if there was any disagreement or something said the claimant did not agree with. The respondent says the claimant struggled to get on with colleagues and would make frequent complaints about them and colleagues would make frequent complaints about the claimant being rude to them or about them in written records. Ms Wilkinson says she spent significant periods of time gatekeeping between the claimant and colleagues and dealing with the claimant's concerns. It is not for this Tribunal to adjudicate upon all of these points and events as it is not necessary to decide the issues in the case we are tasked with deciding. We briefly mention some of them, not to adjudicate on the rights or wrongs of those involved, but because they form some of the backdrop to what then happened.

71. On 20 April 2016 Ms Wilkinson expressed concerns to Ms Young that the claimant had potentially spoken inappropriately to an external professional about the support care staff provide to service users if they are having a

seizure. On 23 April 2016 the claimant emailed Ms Wilkinson saying she wanted to complain about the wife and daughter of SU1 about matters such as bullying staff and that they should not have a power of attorney over SU1 [251 – 256].

72. At some stage the claimant said she did wish to pursue her grievance. A grievance meeting took place on 26 April 2016 [251–256] with Ms Wilkinson. Part of the complaint was that ME had been promoted to senior nurse despite the medication error and that the claimant had previously asked HR to report ME and SM to their professional bodies but it had been refused.

73. On 27 April 2016 the claimant emailed Ms Wilkinson [257] about various concerns from her perspective including training about epilepsy and choking, that she felt a colleague was bullying service users and her viewpoint that various carers should be suspended as they were not safe. On 11 May 2016 the claimant emailed Ms Wilkinson [258] making an allegation that a colleague [J] was bulling her and again saying that carers were not doing their jobs properly. On 19 May 2016 the claimant emailed Ms Wilkinson about what she saw as a lack of staff training [261]. On 16 June 2016 the claimant emailed Ms Wilkinson with a complaint about a dispute with a carer relating to the application of a cream to a service user [262].

74. On 17 June 2016 Ms Gulliver provided a witness statement to the NMC [263 – 265]. It is this witness statement that forms the basis of the claimant's first allegation of discriminatory treatment for her direct race discrimination claim, victimisation and whistleblowing detriment.

75. In her statement Ms Gulliver said:

"*Given that the family had raised concerns that they were concerned that the patient may have suffered a stroke, I would have expected the registrant to have taken the resident's vital signs, if time allowed. Vital signs would include checking the residents blood pressure, pulse, respiration rate and also check the patients arm and facial movements for sign of a stroke. In respect of the registrant not taking the residents temperature, it was acceptable for the registrant to use her clinical judgment as she had no reason to believe that the resident had a temperature. The registrant was of the clinical view that the resident had not suffered a stroke and felt that the most essential thing to do at this point as to telephone for an ambulance given that the family were so insistent that the resident had suffered a stroke. The registrant has maintained that there was no physical manifestation of the patient having a temperature and she therefore did not see this as urgent...*

The outcome of the disciplinary hearing on 24 February 2016 … found that the allegations were not substantiated and that the registrant had acted reasonably under the circumstances …there have been no concerns raised regarding the registrants practice."

76. The Tribunal accepts the evidence of Ms Gulliver that this witness statement was drafted by an NMC caseworker following a telephone interview in which Ms Gulliver was answering the questions put to her by the caseworker. The Tribunal accepts that Ms Gulliver was asked whether she personally would have taken SU1's temperature and she responded along the lines that although it would be hard to say for definite she would like to think that she would have as it was a specific request from SU1's relative.

77. On 24 June 2016 the claimant emailed Ms Wilkinson [266] seeking an update on her grievance. She made various complaints about the carers including allegedly putting false narratives in written records, bullying, and complained about rota allocations. On 30 June 2016 Ms Wilkinson contacted Ms Young expressing concerns that the claimant had refused to have a service user back from A&E and questioned the consultant about his decision. She said that safeguarding and the CCSIW had asked for the claimant to be given feedback that her action could have resulted in a referral to safeguarding. Ms Young advised Ms Wilkinson to keep on tackling each issue with the claimant as it arose and that at some point they would have to sit down with the claimant, go through the log, and explain that her manner had to change.

July and August 2016

78. On 6 July 2016 the claimant emailed Ms Wilkinson [268] complaining about an alleged lack of manual handling and peg training and chasing her grievance outcome again. On 15 July 2016 the claimant emailed Ms Wilkinson [272] alleging that [J] had tried to ride his bicycle into her, that she would not come to work whilst he was there, that she would not get her GP to sign her off and seeking to take 2 weeks' annual leave. Ms Wilkinson responded to say that he would not be on the same shift as the claimant for at least 10 days and she could not grant the leave. The claimant said she would come into work [271]. Ms Young subsequently offered to hold a mediation meeting.

79. On 19 July 2016 the outcome was provided to the first grievance [272-277]. Ms Wilkinson concluded that the claimant had been suspended in line with policy and whilst it was difficult to comment about why other individuals were not involved in the disciplinary process earlier as the decisions were made by prior members of staff, the allegations made by SU1's family were directed at the claimant alone. The grievance outcome

denied that the claimant had been discriminated against compared to ME and SM. The grievance was, in part, upheld relating to the length of the suspension and investigation and on the basis it may have been against policy to refer the claimant to the NMC at the point in time it was originally done (albeit it would have happened later on). The claimant was given the right of appeal to GM (Director of Operations for Wales).

80. On 25 July 2016 the mediation meeting was held by Ms Young between the claimant and [J]. It was unsuccessful. The police investigation into the claimant's allegation was ongoing.

81. On 28 July 2016 the claimant commenced a period of annual leave. There is a dispute between the parties as to whether the third week had been authorised by Ms Wilkinson or ME. Ms Wilkinson telephoned the claimant. The claimant says this disturbed her holiday, that the leave was all properly approved and that Ms Wilkinson was aggressive with her saying she was on unauthorised leave. Ms Wilkinson says felt the claimant had deliberately circumvented her authority to secure the extra week and that she had to phone the claimant to see when she would be returning and what shifts she could cover. On 19 August 2016 the claimant emailed Ms Young and GM complaining that Ms Wilkinson and ME had telephoned her and shouted at her when she was on holiday [280]. GM forwarded the email on to Ms Gulliver as he was unable at the time to deal with it.

82. On 19 August 2016 the NMC wrote to the respondent saying they considered there was a case to answer as to whether the claimant (as alleged by the family of SU1) had taken no action on being informed he may have had a stroke and had to be persuaded to call an ambulance. The case examiners noted that the respondent had decided to take no disciplinary sanction, that the claimant had continued to work since her suspension was lifted and that the respondent had reported no fitness to practice concerns. But they nonetheless decided to proceed [284 - 286]. They advised that the next step was for the case to be reviewed by the legal team.

83. On 22 August 2016 the claimant and Ms Gulliver exchanged emails about the annual leave dispute [287– 288]. The claimant made other complaints to Ms Gulliver alleging she was being bullied by Ms Wilkinson and ME. Ms Gulliver responded on 24 August 2016 [297] offering the claimant an informal discussion or alternatively informing her she could proceed to make a formal grievance.

84. The claimant was then on certified sick leave from 22 August 2016 until 11 September 2016 with certificates for work related stress.

85. On 30 August 2016 the claimant attended a grievance appeal meeting relating to her first grievance with GM. Amongst other things the claimant raised with GM that ME was still working for LCD on promotion with no action having been taken against her or SM relating to SU1. The claimant says he told her that SM had been given stroke training and ME had struggled during the particular shift in question and had been subject to a private investigation. The claimant was not satisfied as she felt they should receive the same treatment that she had. The claimant says that GM told her that he would speak with AG about giving a positive statement to the NMC. The Tribunal did not hear from GM but consider it unlikely he would make an express promise on Ms Gulliver's behalf that she would change her statement, as opposed to committing to discussing the statement with her.

The events with SU2 – 12th to 25th September 2016.

86. At 11:53am on 12 September 2016 a member of staff, PD, emailed Ms Wilkinson [310] stating that SU2 "*came to me first thing this morning wanting to have a chat in my office. He didn't think it was right that [the Claimant] was talking to him about being bullied by staff in Ty Cwm. He was quite stressed about this and that it was nothing to do with him and he didn't want to be involved in this*." At 12:09 another member of staff, MK, emailed Ms Wilkinson [311] saying: "*When I arrived this morning [SU2] came to see me. He was concerned that [the Claimant] was telling him she was being bullied by members of staff, he feels he shouldn't be told things like this."* MK said reported that a further colleague, CK had said SU2 had also approached her too saying similar things.

87. SU2 also came to speak to Ms Wilkinson, albeit she did not prepare a record of their interaction until she prepared a brief for the investigating officer some time in October [359]. She says he told her that for about a week when the claimant had come into his room to give him his medication she was "always going on about staff bullying her" and that it was nothing to do with him and he did not want to hear or worry about these things. In fact it could not have been going on for about a week as the 12 September was the claimant's first day back in work. Ms Wilkinson said in evidence she was aware of that and that SU2 could say inaccurate things.

88. Ms Wilkinson decided to look into what had happened. On 14 September Ms Young advised her to speak to the claimant about SU2's complaint and then decide if she wanted to take it down a formal route or not [527]. Ms Wilkinson asked GS, a worker at the home who had struck up a friendship with SU2 and who also worked for the respondent's staff association, to support SU2 with preparing a statement [360].

89. This statement alleged that at 7:55am the claimant had come into SU2's bedroom and said she was fed up. SU2 said he asked why and the claimant said the staff had been bullying her and she would not say what she meant or who it was. He said "*I think she was trying to get me on her side."*

90. SU2's daily record has an entry at 7:50 that includes "had medication, good mood" that appears to have been completed by the claimant. .

91. The claimant denies having said such things to SU2. She says that it was SU2 that initiated a conversation with her. She wrote a subsequent email on 17 September 2016 [316] where she says (she misquotes the date as 19 September and not 12 September) SU2 "*has reassured me that he will protected me against bullying, that bullying is a criminal act, that I am a good nurse and I am doing my job and he will stand up for me against bullying. I didn't pay attention, I thought it was just a conversation."*

92. The claimant said in oral evidence she was not saying that PD, MK or CK were lying about the events of 12 September but she says that SU2 as a vulnerable individual with various health challenges had a tendency to make false allegations and that he either made it up or got things twisted in his mind.

93. The Tribunal's judgment is that it is likely there was a two-way conversation between the claimant and SU2 that morning. Ms Wilkinson said she had also been trying to deal with complaints about the claimant made by other members of staff. The claimant herself said in evidence that people were told she had complained about them and that she was then being challenged by colleagues. Given the claimant had been absent from work for a period on annual leave and sick leave the Tribunal considers it likely that other staff were talking about the claimant in her absence in unkind terms and that SU2 is likely to have overheard some of it.

94. Despite the claimant's evidence that she did not and would not do so, the Tribunal considers it likely that on the claimant's return to work that morning there was a conversation between the claimant and SU2 about other staff not liking the claimant and the claimant saying that she felt she was being bullied. The claimant was faced with a lot of stressors at that time and was feeling that she was being bullied by various individuals. The Tribunal considers this was fertile ground for the claimant's guard to slip and express a sentiment to SU2, who was in a good mood, that she was feeling fed up and staff were bullying her. That it was likely to have been a two way conversation, potentially involving the notion of SU2 standing up for the claimant in some way also fits with SU2's expressed unease thereafter that he was involved in something he would rather not

be in. It also fits with the claimant's expression in her witness statement that SU2 was "reassuring" her.

95. Having taken advice from Ms Young, on 15 September 2016 Ms Wilkinson spoke with the claimant. There is no contemporaneous record prepared by Ms Wilkinson. Ms Wilkinson asked the claimant why she had complained to SU2 about being bullied. The claimant told Ms Wilkinson that SU2 had initiated the conversation about bullying and that she had ignored it as she would not initiate such a conversation with a service user [316] (the Tribunal has made findings about this above). The claimant felt that Ms Wilkinson was bullying her because she had asked the claimant "why" which presupposed the claimant had done what she was being asked about. The claimant says that she told Ms Wilkinson that the claimant had a history of making racist and challenging remarks to her and a previous manager, CP, had made him apologise in 2014.

96. On 16 September 2016 the claimant says that SU2 approached her saying that it was not right for the staff to call the claimant names, to stab her in the back and saying that she needed to leave Ty Cwm, that they would do their best for her to leave, and that the staff had called the claimant a bitch. She says he said he liked her and did not want her to leave. The claimant says that she reassured SU2 that she would speak to Ms Wilkinson and that he did not need to worry. The Tribunal accepts that it is likely that SU2 did tell the claimant in conversation with her that the staff were stabbing the claimant in the back (in the sense of talking about her behind her back), that the claimant had been called a bitch and that they wanted her to leave the home. The claimant told SU2 that she would report it to Ms Wilkinson who would sort things out.

97. The claimant went straight away to speak with Ms Wilkinson. SU2 entered the room very shortly thereafter. Ms Wilkinson's account subsequently prepared by Ms Young on 27 September 2016 [336] suggests Ms Wilkinson recounting that SU2 appeared uncomfortable in being brought in by the claimant with the claimant touching SU2's arm but that the claimant had carried on stating her opinion. The claimant says she said to Ms Wilkinson words to the effect that she "had solved the mystery", that SU2 had been acting as the claimant's protector and she was rubbing his arm for reassurance. Both the claimant and Ms Wilkinson sought to reassure SU2.

98. The claimant wrote an entry in the daily narrative saying "[*SU2] has reassured me that he will stand up for me against the staff who are bullying me and call me names from behind, saying that they will do their best for me to leave this place. I went to the manager and reported it, SU2 has come from behind, me and Jacquie we have reassured him that*

he doesn't need to worry about me and that Jacquie will sort it out." [398CW].

99. The Tribunal notes about this particular event that whilst after the event it was recorded that the claimant was seeming to have acted inappropriately, it was not something documented by Ms Wilkinson at the time and nor did she take action at the time which she would have done if she had thought the claimant's conduct in relation to SU2 was really that intimidatory. Ms Wilkinson was unable to explain why she took no note. The Tribunal, however, also accepts that it is likely the claimant may have asked SU2 questions about what he had been hearing.

100. On 17 September 2016 the claimant emailed Ms Wilkinson, Ms Young, Ms Gulliver and GM [316]. The email was headed "complaint against bullying" and the claimant set out her version of what had happened that week saying that she was particularly upset that Ms Wilkinson had initially called her in blaming her as if she was guilty when it was the opposite. She commented that it was "pathetic and distressing that a service user has to protect me from bullying." She referred to a meeting the following week with Ms Young about [J] and that she was still waiting for an answer to her grievance.

101. On 19 September 2016 CK prepared a discussion note [317]. She reported that on 15 September SU2 "*spoke to me when I was in his room administering his medication. He said "that Michaela…said to me that all the staff are bullying her… and I said to her why are you getting me involved?" "I don't understand why she's involving me in all of this it's fucking stupid."* She reports that on 17 September 2016 SU2 "*again was saying to me that Michaela… had told him that she was being bullied by all the staff. I advised him on both occasions to speak to Service Manager Jacquie Wilkinson or any of the nurses if manager was unavailable. He said to me "it's not right to be involving me… I'm seriously pissed off with this."* CK did not refer to any earlier conversation with SU2 on 12 September.

102. On 20 September 2016 GM visited the home for a regulatory visit. That day he sent the claimant a grievance appeal response [318 – 322]. In relation to ME he said "*I can confirm there was an investigation in relation to medication being left in the bag and this was shared in the safeguarding meeting, and there were further actions and recommendations as a result. I am not able to share the outcomes with you as it is personal to staff involved…"* He denied that there had been discrimination against the claimant compared to the treatment of ME stating that the claimant's suspension had been based on the concerns raised by SU1's family members. He did not uphold the claimant's request that ME be investigated and dismissed and be referred to the NMC. In relation to the

claimant's own referral to the NMC he observed that NMC guidance was that in very serious cases it would be appropriate to refer a nurse to the NMC at an early stage, even before internal investigations. He, however, upheld the claimant's concern in part as he accepted that the respondent's own policy was not clear on that point. He also addressed the claimant's complaints about references, and pay. The claimant was invited to submit a further grievance about her other ongoing concerns. He also referred to having spoken to Ms Gulliver about the NMC hearing who had stated that a date was being planned for November or December. He also stated:

"A further point that was discussed in the meeting with you was your concern as to why Anne Gulliver advised the NMC that she would have taken the residents temperature relating to the allegation against you. I can confirm having spoken to Anne Gulliver that the NMC asked Anne specifically, in this situation would you have taken the residents temperature as a nurse given the family were asking for this to be done which Anne advised she would as the family were requesting this. This was sent back to Anne as a statement but she was responding to a direction question being asked of her. I hope this clarifies the point you raised and explains why this comment was in the report you were sent from the NMC."

103. That same day GM also went to see SU2. He prepared a letter that on 23 September he asked Ms Wilkinson to ask SU2 to sign [323]. It says:

"You asked to speak to me today on 20/09/16 to raise a complaint relating to Michaela the nurse at Ty Cwm. You feel that when she comes to see you on each shift she is working she is telling you that all the staff are bullying her. You feel this is not appropriate and it is stressing you out and you are a vulnerable adult and should not be informed of staff bullying. You have advised you have told Michaela to speak to the manager Jacquie if she has any concerns. You have informed me that you would like to raise this as a formal complaint…"

104. That same day the claimant also met with Ms Young [529–530]. Ms Young also told the claimant that it was the NMC who contacted Ms Gulliver and asked her the specific question as a nurse as to what she would have done in relating to taking SU1's temperature. She suggests to the claimant that they have a meeting with Ms Wilkinson to go through the various concerns the claimant had raised. She also offered the claimant the opportunity raise a further formal grievance.

105. On 21 September Ms Young sent the claimant a follow up email [529–530] confirming again that Ms Gulliver had been contacted by the NMC "*and specifically asked in her opinion, as a nurse, would she have taken the residents temperature. She had to be honest and respond accordingly."*

Ms Young confirmed a meeting would be arranged so that they could go through every concern that the claimant had raised and that it was imperative the meeting happen as soon as possible. In response to the claimant's concerns about being questioned by Ms Wilkinson and in response to the email of 17 September, Ms Young explained that Ms Wilkinson had spoken to the claimant on her advice about SU2 as Ms Wilkinson had a duty to find out what had happened. Ms Young noted that the claimant had said she did not wish to raise a grievance but that if this changed the claimant could submit a form.

106. On or around 22 September 2016 the claimant made a complaint to the Care and Social Services Inspectorate Wales [325-328]. The particular detail of the complaint is not known to the Tribunal. The Tribunal accepts that the respondent did not know that the claimant had made such a referral at the time.

107. On the evening of either 23 or 24 September Ms Wilkinson took the letter drafted by GM to SU2 to sign. She alleges the claimant saw her take it in. The claimant disputes this saying she was not on shift. The Tribunal notes that HE subsequently records SU2 saying that the request to sign the letter had been on the Saturday night (ie the 24 September). The Tribunal did not find it established that the claimant had seen Ms Wilkinson take the letter in.

25 September 2016

108. On 25 September 2016 there was a further interaction between the claimant and SU2. The claimant went to see SU2 about 8am to check his glucose levels and give him his medication. He was complaining of belly pain and she was not happy with his glucose level. The claimant gave the claimant medication and painkillers but not his insulin and called the GP out of hours facility for advice. The claimant spoke to the GP surgery about 8:30am who told her to refrain from giving SU2 insulin until the GP had visited [398DC]. The claimant went into see SU2 to update him. The claimant says that SU2 then disclosed to her that he was upset as Ms Wilkinson had forced him to sign a document that was against the claimant and he was going to be evicted unless he signed it.

109. The Tribunal is satisfied, on the balance of probabilities, that SU2 expressed some upset to the claimant that Ms Wilkinson had asked him to sign a letter which referenced a complaint about the claimant and bullying and that he did not want to sign it. (In fact SU2 had signed the GM letter and the earlier statement prepared with the assistance of GS). It probably involved the claimant asking SU2 some questions. The Tribunal found it unlikely that SU2 told the claimant that Ms Wilkinson had forced him to sign it (as opposed to being asked) or that Ms Wilkinson had threatened

him with eviction. Not least because that is not what the claimant subsequently wrote in her entry on the daily narrative at 398DC.

110. The claimant went to get two colleagues, SB and HE, to witness what SU2 was saying. The Tribunal considers that in doing so the claimant was seeking protection for herself by having a third party present, particularly bearing in mind her experiences with the family of SU1.

111. SB and HE's accounts differ in some respects. SB, in her subsequent record made on 27 September 2016 [333] says that SU2 had said that Ms Wilkinson had requested SU2 to witness and sign a letter which said that the staff had made a complaint that the claimant was bullying them. She records SU2 being a little distressed and agitated that it had been asked to sign it and made it clear that he did not want to. She says he repeated this statement several times. She records them all telling him he did not have to sign anything if he did not want to. HE recorded in her note [334] that it was the claimant (not SU2) who said that Ms Wilkinson had asked him to sign a letter. She also recorded the letter was about the staff bullying the claimant and not the other way around. Both say that the claimant had asked them to sit on SU2's bed. The claimant says that it was SU2 who spoke and repeated that Ms Wilkinson had forced him to sign the document but he did not repeat the threat of eviction.

112. The Tribunal finds it is likely that SU2 did state to the carers in the presence of the claimant that he had been asked (not forced) to sign a letter about the claimant by Ms Wilkinson and that he did not want to. The claimant wrote in the daily narrative that SU2 was "*very distressed about the fact that the manager had asked him to sign a paper against me. He said he had refused. Sue B and Hilary present. I consider this deterioration to the fact that he is stressed by the manager."* It is likely this is the entry that the carers refused to endorse.

113. The claimant told SB and HE that she had called the GP and that she was going to call safeguarding. The claimant tried to call safeguarding but, as it was a Sunday, there was no answer. She tried to call them multiple times.

114. The claimant went to see SU2 again and told him that she had called the GP and asked him if he wanted her to call anyone else for him. SU2 said that he would contact his advocate, RL, himself the next day. The claimant asked him for RL's number and SU2 told her that she would not be contactable as it was a Sunday. The claimant looked at SU2's care plan to find RL's number. As it was the weekend her call was redirected and she left a message with a receptionist for a call back. The claimant needed to attend to other service users so she asked HE and SB to continue trying to call safeguarding.

115. The GP then visited. The GP completed an entry in the daily narrative at 9:35am. It records SU2 was complaining of generalised abdominal pain, and following examination there was no obvious cause for the symptoms. It says "*Note ongoing stress and concern re issues in care home. Advised to speak to external advocate Ruth Lewis re this. NB morning BM lower than usual – reduce morning insulin to 20 units" [*398DD].

116. Either HE or SB then called Ms Wilkinson. At 9:49am [532] Ms Wilkinson emailed GM, Ms Young and Ms Gulliver saying that staff had called her a little concerned as the claimant had called them into SU2's room to witness what he was saying. She says the staff told her SU2 had said that Ms Wilkinson had asked the claimant to sign a letter saying that staff had complained about the claimant. The email recorded that the claimant had called in the GP as she said the claimant's bloods had changed due to the stress of the letter and the claimant was ringing safeguarding. Ms Wilkinson wrote that the claimant had asked a member of staff to call safeguarding but the staff had refused. Ms Wilkinson also recorded being told that the claimant had asked the staff to sign something but they had refused as it was not exactly what SU2 had said. Ms Wilkinson was engaged elsewhere that day and the email recorded that she asked the staff to ring the duty manager "in case she does call safeguarding or there are further issues. " There is a similar entry in a timeline later prepared by Ms Wilkinson at [366] where she says the staff told her the claimant had asked them to call safeguarding as SU2 was being abused. Ms Wilkinson also told HE and SB that they should only sign or write something they thought was the truth.

117. At about 12:10pm the claimant spoke with SA, the standby officer for the Carmarthenshire County Council Emergency Out of Hours Social Work Service. The claimant stated, which the Tribunal accepts, that SA called her, in response to the message the claimant had left when trying to contact the advocate. The claimant did not record a contemporaneous account of their conversation other than a brief mention in the daily narrative. The Tribunal therefore accepts the account as recorded by SA in her report at [331 to 332] is a summary of their exchange albeit it is a summary account. In that regard SA wrote that "*This was a difficult conversation to follow as [the claimant] was stumbling and talking very quickly. I had to summarise and get her to repeat what she was saying on quite a few occasions. This is an overview of what is being alleged and referred onto the department."*

118. SA then recorded:

- *"[SU2] is being bullied into signing papers (unclear what maybe a statement as there could be an investigation taking place into Ilinka*

bullying other residents) He has told her and the two other staff members on today, she does not know their names except one is called Sue B that he does not want to sign it because she is a good nurse.

- *[SU2] Iiinka has says has been told by the manager Jackie Wilkinson that he will be evicted if he does sign the statement.*[2]
- *[SU2] has had in low mood and deteriorated in terms of his presentation. I asked how this has shown. She stated that this is in his blood sugars as he was waking low and they are normally high. I asked if he was having hyopos and what they were. She said 5.5 I pointed out this is in normal ranges. She said it was low for him. This has been going on for 7 – 10 days.*
- *Ilinka said that he is being bulled when it is her that is being accused of bullying others.*
- *She stated that she has also rung the GP today to express her concerns but was not able to tell me which GP this was."*

119. Under "action taken" SA recorded:

- "*I asked for clarification as to why she was phoning today. As I was unclear if she was ringing to complain about how she was being treated or how [SU2] was being treated. She stated that he was bullying bullied* [3] *and needs an advocate/social services to be told what is going on. I advised that he records that SSD and the GP conversation are recorded in their log.*
- *Care first check."*

120. SA recorded that the referral could have waited until office hours and asked the department to follow it up the next day. She added at the *end "The conversation was a bit of a muddle. It sounds like Ilinka is under investigation for bullying other clients. She thinks Leonard Cheshire want to get rid of her but in doing so are forcing [SU2] into signing something that he does not want to sign against her."*

121. In her account of events SB added that towards the end of the shift she went to see SU2 and that he had said again "*that the staff are telling him that Michaela is bullying them and that they would like to get rid of her."* She recorded SU2 saying he wished that the staff "*wouldn't tell him these things, as he said he liked Michaela."*

122. By 1pm one of the carers recorded that SU2 was "*feeling ok. He had concerns earlier that there was a letter he was asked to sign to witness but explained that he didn't have to sign anything if he didn't want to and now feels better."*

[2] It is likely the word "not" is missing here
[3] Presumably this should read "being bullied"

123. The claimant finished her shift at 2pm.

26 and 27 September 2016

124. The next day, 26 September, Ms Wilkinson was contacted and asked to call safeguarding about an emergency issue. Ms Wilkinson spoke with CW in safeguarding who told her that the claimant had called the duty social worker alleging that Ms Wilkinson had forced SU2 to sign a document about the claimant and that if he did not he would have to leave the home. It was discussed that the advocate would come to see SU2 and that CW would be passing the matter to AS the safeguarding case handler. Ms Wilkinson says that CW commented that the event was not long after the incident with SU1 and mentioned other issues about the claimant not related to the respondent which Ms Wilkinson said she was not privy to. Ms Wilkinson said that CW then questioned the claimant's fitness to practice and Ms Wilkinson said she would speak to her managers about it. She spoke to Ms Gulliver and GM in a phone call and agreed she was going to meet with the claimant.

125. That same day the claimant also telephoned safeguarding again seeking to make a safeguarding referral (as she had not got through the day before). She was told there was already a referral in place with her name on it. The claimant says she spoke to a male and again told him that SU2 had been forced to sign a document and had been threatened with eviction. She agreed in evidence that she also told him that she was suing the respondent for race discrimination. She says it was part of the relevant background in that, in her view, the respondent was forcing SU2 to sign the document as part of an aim to secure the claimant's exit from the home as they were in conflict with the claimant. She states she was asked if she wished to make a second referral in her own name and that she said it was not necessary as she was taking action against the home herself and could handle it herself. The claimant also tried to ring SU2's advocate but she was not available. The claimant also made a report to the Community Team of Learning Disability (CTLD).

126. On 27 September Ms Wilkinson spoke with SB and HE and asked them to write down what had happened. SB told Ms Wilkinson that she felt it was all blown out of nowhere and did not need to have gone this far. Ms Wilkinson said it was best just to record what happened and they could take it from there [367]. SB and HE also told Ms Wilkinson that they were unhappy that the claimant had involved them and had asked them to refer the situation to safeguarding and that they did not want to be involved with that [361]. SB and HE also told Ms Wilkinson that the claimant had asked them to sign something that they were not happy with and they felt uncomfortable.

127. Ms Wilkinson also spoke with AS in the safeguarding team who said that the advocate, RL, would visit SU2. He told Ms Wilkinson that he had spoken with the claimant and that the claimant had been talking about suing the respondent for racial discrimination and mentioned the figure of £350,000. He also questioned the claimant's fitness to practice [348]. Ms Wilkinson also became aware of the claimant's referral to CTLD [367]. That day AS also emailed Ms Wilkinson saying "can you let me know if your organisation decide to suspend the member of staff we discussed" [I331]. Whether that conversation with AS happened before or after Ms Wilkinson and Ms Young's meeting that day with the claimant is unclear.

128. On 27 September Ms Wilkinson and Ms Young also met with the claimant. They pre-wrote a plan for the meeting [335 -336]. In short form, the plan was to discuss various concerns that the claimant had been raising and the difficulties that she was causing from Ms Wilkinson's perspective. The plan was to try to bring some of these matters to a conclusion and draw a line in the sand. The plan was then to move on to the events involving SU2 why she had involved SB, HE and safeguarding (including that safeguarding were questioning the claimant's fitness to practice). The intention was to ask for the claimant's account, and to ask her why she was behaving that way and whether she considered herself safe to practice.

129. At the meeting Ms Wilkinson asked the claimant to go through her main outstanding concerns. The claimant made a complaint of bullying by the care supervisor, that staff were taking extra breaks, and other complaints about the carers not doing their jobs properly. The claimant also asked Ms Wilkinson to provide a statement for the NMC proceedings about the more recent incident with the family of SU1 where the claimant felt the family had not been honest about the length of time a call bell was ringing. The claimant also raised the fact that SU1's wife was refusing access to the handover notes. There was also discussion about [J] and incident forms, other issues with SU1's family, the claimant asking colleagues for statements and the annual leave incident.

130. Ms Wilkinson then raised the incident with SU2 and her concerns about the claimant's actions. According to Ms Young's notes the claimant said that she called the witnesses in because what SU2 was saying needed witnessing. She said that she had written an opinion for SB but that she told her she was free to write her own version. She said that SU2 told the GP that he was stressed because Ms Wilkinson had asked him to sign a statement and that the GP had told her to speak to the social worker. When asked why she had phoned safeguarding and not the advocate or the duty manager, the notes record the claimant saying that she checked a list which did not say who she should contact in the circumstances and that she phoned the number that was on the cupboard. She said the

number on the cupboard referred her to SA and that SA had passed it to safeguarding. She said she did not phone the duty manager as it was not life threatening and did not fit the criteria and that it was on the wall to phone safeguarding if you have concerns. The claimant was told that safeguarding had questioned her fitness to practice due to the referral as it was said the claimant was annoyed on the phone, became irate when questioned and the information she gave did not make sense. At the end of the meeting the claimant was told they may need a follow up [337–343].

131. The claimant said that the minutes are not accurate but could not give the Tribunal an account of the detail of what was discussed other than that she had been dragged into the meeting against her wishes and interrupted a medication round. She says she told them that there should be an appointment for a meeting where she could have a trade union representative. She says that Ms Wilkinson and Ms Young were shouting at her about things like what she said to safeguarding, what was the name of the doctor and "why don't you leave Ty Cwm?" She says that she was crying and when she left the meeting they shouted "Why don't you leave, why don't you just go?" Ms Wilkinson and Ms Young deny behaving in this way. They state that any comment about the claimant "leaving" was in a later meeting of 30 September when the claimant at one point was asked to temporarily leave Ms Wilkinson's office (so that they could take advice) not to leave the premises.

132. The Tribunal finds that the meeting was likely to have been upsetting for the claimant as she was being challenged about numerous things, including why she had called safeguarding, what she had said and for her views on their comments about her fitness to practice. The Tribunal accepts that the claimant personally perceived being challenged in that way as bullying. But the Tribunal looking at it objectively does not find it likely that Ms Wilkinson and Ms Young acted inappropriately or shouted at the claimant either at this meeting or subsequently on 30 September or told her that she should leave (in the sense of stopping working for) Ty Cwm.

133. The subsequent briefing note to the disciplinary investigation officer prepared by Ms Wilkinson refers to the claimant sending an email to the LCD campaign inbox on 27 September outlining that she wished to make a complaint about Ms Wilkinson and Ms Young bullying her. The briefing note says it was considered necessary to investigate the claimant's concerns alongside the disciplinary investigation. The actual email sent by the claimant does not appear to be available although there is an email from GM to the claimant dated 30 September 2016 [355] acknowledging an employee concern sent through the campaigns email and that he had

asked SJ, a service manager from another care home to look into the concern. He asked the claimant to complete an employee concern form.

29 & 30 September 2016

134. On 29 September 2016 safeguarding closed the case but asked Ms Wilkinson to inform them of how the situation with the claimant was being managed due to their concerns about the claimant's fitness to practice [361].

135. Following the meeting on 27 September 2016 it was decided that the follow up meeting with the claimant was required. It was planned in advance to happen on 30 September 2016 with a nurse, AC, being asked to come in to cover the lunchtime medication round so that the claimant could attend the meeting without being concerned about that. The claimant did not know of the arrangements before the day in question.

136. On 30 September 2016, SU2 refused the claimant access to his room [346]. Ms Wilkinson emailed GM and Ms Gulliver about this and the arrangements she had put in place for other staff to deliver medication that day and over the weekend when the claimant was due to be in work. Ms Wilkinson also met with SU2 and asked him if he would permit the claimant to give him care if there was a chaperone in the room and he agreed to have a think about that [381].

137. Ms Wilkinson and Ms Young pre-planned a format for the meeting [347-349]. The plan was split into two parts. First to try to close down various matters such as the submission of inappropriate incident forms, the need for the claimant to continue to work with [J], the power of attorney for SU1, and annual leave incident. The intention was to tell the claimant that if she did not adhere to standards going forward then she faced the risk of formal disciplinary proceedings. The second part was intended to discuss SU2 and to tell the claimant that this aspect would be considered under formal disciplinary procedures conducted by another manager. A decision had therefore been made by Ms Wilkinson that the claimant would face disciplinary proceedings in respect of what happened in relation to SU2. The intention was to tell her the disciplinary allegations were:

1. Inappropriate elevation of an issue;
2. potentially placing staff in a difficult position;
3. Potentially placing a service user in a vulnerable position;
4. Not acting professionally by making a referral personal to yourself when representing our client group;
5. Potentially bringing the organisation into disrepute.

138. The meeting plan includes no mention of a plan to suspend the claimant. The Tribunal is satisfied that the original plan, before the events of that day unfolded, did *not* include the suspension of the claimant whilst the disciplinary investigations took place. This is supported by the fact Ms Wilkinson was putting in place arrangements for the weekend so that SU2's medications could be administered by another member of staff when the claimant was in work.

139. Events did not, however, unfold as planned. AC attended work at 12:00 to cover for the claimant and told her so on arrival. The claimant therefore anticipated that she was going to be called into another meeting. She admits she told AC that she was not going anywhere.

140. Ms Wilkinson told the claimant that she wanted to meet with her at 12:30. The claimant said she wanted to have the discussion there and then in the reception area which Ms Wilkinson declined. The claimant asked the care supervisor, MK, to take over her shift and the medication round so that AC could accompany her. She intended to tell Ms Wilkinson and Ms Young that she was not going to attend the meeting. The claimant says they were made to wait outside the office before Ms Wilkinson and Ms Young would let them in.

141. At about 12:20 they did go into the office and the claimant told them she would not be attending. Ms Young told the claimant that it was imperative she attend as Ms Wilkinson needed to discuss current issues including SU2 and to close off discussions from Tuesday. The claimant declined to attend stating that Ms Wilkinson and Ms Young were bullying her. Ms Young told the claimant that she must attend and that it was a reasonable management request as Ms Wilkinson needed to close off issues and tell the claimant about current activity involving her. The claimant again declined to attend. She said Ms Wilkinson should send her a formal invite that the claimant could attend with a trade union representative. Ms Young told the claimant it was vital that Ms Wilkinson speak to her that day as there were situations in the home that needed to be discussed for the claimant to be in the workplace. The claimant was told she was not entitled to formal accompaniment, that she could have someone with her for support but that they could not wait for trade union availability. The claimant continued to refuse to attend. She said in evidence that she should have been given advance warning to come in with a representative, that she had previously asked not to be taken off shift to attend a meeting, and that account should have been taken that she was not well.

142. The situation had reached an impasse so Ms Wilkinson and Ms Young decided to take a break to seek advice from DE, Ms Young's manager, in HR. The claimant says that Ms Young and Ms Wilkinson said they did not

understand why the claimant did not just leave Ty Cwm. AC's subsequent evidence in the grievance investigation was that this was not said. As above, I accept that the request was actually to temporarily leave the office so that they could decide what was to happen next and not an instruction to leave the home.

143. DE's advice was to consider suspending the claimant. A suspension script was prepared [351]. It referred to the claimant's refusal to attend the meeting and said:

"I need to make you aware of the following

- *A Service User has refused care from you – this has not been influenced by LCD*
- *2 safeguarding representatives have questioned your fitness for work – again this has not been influenced by LCD*
- *You have flatly refused to attend the meeting that we would be discussing, resolving and closing the issues we raised on Tuesday, and informing you of next steps to current cases that are ongoing – this is refusing a reasonable management request*
- *We wanted to discuss with you [SU2]'s complaint and refusal to have you provide care to try to put steps in place and inform you of how things will be moved forward. Your refusal to attend the meeting has meant that we cannot resolve matters and consequently could be putting a service user at risk.*
- *We have heard your employee concern and employee concern appeal, and have for the last 9 months tried to get the working relationship back on track, but it feels as though your behaviours and actions, and inappropriate elevation of issues to external bodies are in retaliation to the organisation.*
- *It is unworkable and making local governing authorities question your fitness to practice as well as placing people using our service in a vulnerable position, to the extent they are refusing care from you.*

You will not allow us to meet with you to discuss this and resolve and we cannot have you in the workplace without these discussions.

We have done everything we can to try to resolve matters reasonably and informally, but you are flatly refusing. This could be insubordination or refusal to follow a reasonable management request.

Your actions and behaviour could potentially amount to gross misconduct, and so you have left me with no choice but to suspend you pending investigation."

144. At about 1:15 pm Ms Wilkinson asked the claimant if she would meet with her briefly to tell the claimant some important information before the claimant left. The plan was to deliver the suspension script. The claimant said she would attend once she had finishing writing up a report. The claimant did not attend and Ms Wilkinson went to look for her. Ms Wilkinson discovered the claimant had signed out at 1:30pm with her shift due to finish at 2pm.

145. Ms Wilkinson tried to telephone the claimant but there was no answer. She therefore delivered the suspension script by email [352 – 354]. The claimant said that she was really scared and left the building as she was feeling really sick and unwell. She says she thought she would be shouted at again. She says she spoke with MK and told her that she was being dragged into a meeting against her wishes, was feeling unwell with chest pain and asked to go home. The claimant says that Ms Wilkinson had also agreed the claimant could go home early [442]. Ms Wilkinson said the claimant left without notifying her and denies telling the claimant to leave work. The Tribunal accepts that the claimant discussed leaving early with MK, the care supervisor. But does not find that the claimant sought or had authority to do so from Ms Wilkinson who was expecting the claimant to come and see her.

146. Ms Wilkinson then sent the claimant a letter [357–358] confirming the suspension from duty to allow investigations to take place. The allegations by then were said to be:

1. Inappropriate and unprofessional discussion with a Service User, potentially placing the Service User in a vulnerable position and resulting in a Service User complaint
2. Inappropriate elevation of an issue to external bodies

a. Involvement of staff in the situation, potentially placing staff in a difficult position

b. Involvement of a Service User in the situation, potentially placing a Service User in a vulnerable position.

3. Not acting professionally by making a safeguarding referral personal to yourself when representing our client group
4. Potentially bringing the organisation into disrepute
5. Refusing a reasonable management request, which could potentially lead to Service users being placed at risk
6. Leaving shift early potentially placing Service Users at risk.

147. The letter also said: "*The overriding objective of the investigation is to establish the facts. This should ensure that, as far as possible, where concerns are raised these are investigated promptly and thoroughly and that matters are resolved as speedily as possible.*"

Disciplinary and grievance investigations by SJ

148. SJ, a manager in another home was appointed as investigating officer, both for the claimant's grievance and the disciplinary investigation. Ms Wilkinson was tasked with preparing his brief [359–362]. Proposed witnesses for interview and an anticipated timetable was set with the report to be completed the week commencing 24 October 2016 [362]. It was sent to SJ on 8 October 2016 together with arrangements for him to interview SB and HE [I351].

149. SJ met with Ms Wilkinson on 7 October [I3]. A statement was produced [i8 – 11] but that appears to be largely made up of a documents Ms Wilkinson had already written.

150. SJ interviewed SB and HE on 7 October 2016 [372]. This comprised reading out the statements they had previously provided and they declined to add any more.

151. On 10 October SJ wrote to the claimant seeking to arrange a meeting [374].

152. On 14 October 2016 the NMC wrote to the respondence stating that after a review of the case by the legal team a panel had decided that the case would be considered at a hearing [375].

153. On 21 October 2016 SJ interviewed Ms Young [379 – 388].

154. SJ met with Ms Wilkinson on 24 October 2016. Again no notes are available other that the statement referred to above. He also met with SU2 that day, supported by GS. There are, however, no notes or records available of that interview either.

155. SJ met with the claimant on 7 November 2016 [393–395]. The notes of that interview were not provided to the claimant at that time despite it being said to her by SJ that she would be asked to make a statement and sign it [393]. During that interview the claimant gave SJ a further employee concern / grievance form. This is said to be the second protected act in this case [396–398]. The claimant complained of continuous discrimination, continuous wrongful payment, continuous bullying, intimidation and harassment, continuous neglectful management and management misrepresentative and continuous promotion of bad, unsafe practices in Ty Cwm.

156. On 27 January 2017 Ms Wilkinson emailed SO at the NMC [399] saying:

"Please find attached the daily narratives as requested.

As discussed the originals are unable to be located, the copy I have was sent to me via safeguarding who original had a copy sent in January 2015.

These documents have both been requested by NMC previously and I have said I am unable to provided the originals. I was requested by NMC in October to highlight Michaela Ilinca's entries so you will see yellow highlighted sections.

I have also said to Michaela Ilinca and her union representative that the originals are unable to be located, there has also been an issue from Patient A family refusing permission for the hospital admission form to be released to Michaela Ilinca and her union representative. The hospital admission form is a document that would have been completed at the hospital not here at Ty Cwm."

157. On 15 February 2017 SJ sent HR his draft investigation report in respect of the disciplinary investigation. It is not clear why this took from October to prepare [i37]. The initial reaction from AS in HR was that the report was comprehensive and with appendices attached it was ready to be passed to a disciplinary hearing manager. SJ suggested someone and on 1 March 2017 DE advised that AS in HR had left and CS in HR had taken over responsibility. What exactly was happening and why it was taking so long is not clear from the evidence before the Tribunal or indeed what, if anything, was communicated to the claimant whilst she was suspended.

158. On 29 March 2017 MW in HR said that SJ should meet with the claimant by 5 April 2017 to go over her grievance and also meet with Ms Wilkinson. She said that the disciplinary and the grievance should be investigated at the same time but that the grievance should be wrapped up before the disciplinary investigation is wrapped up and there needed to be two reports [404]. Why nothing had happened with the claimant's grievance until then is unclear, particularly bearing in mind it had always been GM's intention that SJ would deal with it alongside the disciplinary investigation.

159. On 29 March 2017 SJ sent HR his draft investigation report but the section for "findings" was blank. The Tribunal does not understand how that marries with HR having said in February that the report was comprehensive. MW in HR sent various comments back to SJ essentially suggesting that far more detail needed to be inserted and that he needed to confirm if statements had been checked by the individuals interviewed [i39 – 71].

160. On 31 March 2017 SJ stated that the claimant could not make a meeting the following week as her union representative was unavailable but that he

would take steps to meet Ms Wilkinson. The claimant then proposed to meet on 24 April 2017.

161. On 4 April SJ and MW exchanged emails about the latest draft of his investigation report [I74 – 118]. On 19 April 2017 the claimant emailed the staff association seeking representation for her NMC hearing on 28 to 30 June 2017 saying that her union had just withdrawn [417]. MD responded to state that she would support the claimant and would contact her on the Monday [416].

162. SJ in fact met with Ms Wilkinson about the claimant's grievance on 20 April 2017 [411 – 414]. During the course of that interview Ms Wilkinson said: "*I think the biggest thing for us as an [organisation] was that we had to react when Safeguarding questioned if she was fit to practice."*

163. Due to a dispute about venue the grievance meeting with the claimant was moved to 3 May 2017 [422 – 425]. The claimant's union representative asked whether there was any feedback from the previous disciplinary investigation meeting and SJ told him that after the latest meeting was typed up he would send it all over to them. The note records him also saying "*I have done the report and we can resolve this first and then look at.."* The claimant then sent an email [427] complaining, amongst other things that she had not received a copy of her interview with SJ which he had recorded.

164. On 5 May 2017 SJ interviewed Ms Young about the claimant's grievance [428 to 430].

165. On 21 June 2017 the claimant emailed MD at the staff association with the hearing details. MD then replied to say: "*I am very sorry but due to unforeseen circumstances I cannot make the 28th. I have taken advice from HR, could you confirm you are an employee of Leonard Cheshire."* The claimant responded to say that she was and MD replied to say the claimant should try her union again for support as MD was not able to make it as she was on the Isle of Wight [431].

166. On 26 June 2017 SJ interviewed AC who accompanied the claimant on 30 September [434]. AC could not remember the detail of what was said that day but denied that either Ms Wilkinson or Ms Young had shouted at the claimant and said they were behaving perfectly reasonably in their request. He was also clear that neither Ms Young or Ms Wilkinson had asked the claimant to leave the premises.

167. On 28 June 2017 the grievance report was finalised. For reasons unknown as part of that report SJ commented that "AC states that GY or JW asked MI to leave" on 30 September. In fact the note of the interview

says that AC said they did not ask the claimant to leave the premises. The grievance report found that there was no evidence that bullying and harassment of the claimant had taken place or a hostile environment, that whilst the claimant had raised many concerns about issues and practices in the home Ms Wilkinson had attempted to resolve these and there was no evidence of neglectful management and management interpretation. A complaint about continuous wrongful payment in respect of the week's disputed annual leave was also rejected.

NMC Hearing

168. On 28 to 30 June 2017 the claimant attended her NMC hearing. During the course of the hearing the claimant said to the NMC that she had requested the original daily narratives for SU1 and not the copies because she considered that the copies had been "counterfeited" and had removed the claimant's entries where she recorded that she did not do observations on the day in question and did not give paracetamol. She alleged that where she recorded in the notes she had complained about bullying, that part was also missing. She also appears to have said that the handover notes from the night shift to the morning shift were not there [435]. What the NMC's conclusions on these things were is unknown to the Tribunal.

169. In the course of the hearing the wife of SU1 gave evidence and alleged that the claimant had "*been suspended three times now that I'm aware of."* The chair of the panel said that was not evidence for them and that it should be struck from the record. The wife for SU1 said "*Well, its checkable."*

Progression of grievances

170. On 3 July 2017 the claimant submitted a third grievance [578 – 581]. This is the third protected act relied upon for the victimisation claim. In her covering email she said that she still had not received copies of her interviews with SJ, or responses to her employee concerns/grievances, complaints raised with the respondent.

171. On 20 July 2017 the claimant was sent the outcome letter for her second grievance [582 – 585] from SJ which said it also enclosed the investigation report [436-577]. As already stated the claimant's grievance was not upheld and mediation was offered between the claimant and Ms Wilkinson. The claimant was also given the right of appeal. The letter said that the "*this report will be forwarded to a separate commissioning officer who will consider the allegations of the suspension under the disciplinary policy."* On the evidence before the Tribunal nothing in fact happened in that regard.

172. On 25 July 2017 GM wrote to the claimant in response to her third grievance of 3 July 2017. He addressed issues raised by the claimant in relation to a pay rise and training. The claimant had complained that original documents requested by the NMC had not been given to the NMC. GM stated that the respondent had provided "ALL documents requested by the NMC." The claimant had also raised the refusal of staff association representation for the NMC hearing and GM asked the claimant for more details of this. The claimant also complained: "*Anne Gulliver has not presented objectively to the NMC despite GM's strong promises on 30 August 2016. Anne Gulliver continues to defamate with her bullying statements to the NMC."* GM told the claimant that the NMC had made contact by telephone with Ms Gulliver to ask for her professional opinion as to whether she would have taken the temperature or not and that: "*Anne felt she had to respond with her opinion as she had been asked for this. However Anne balanced this by explaining that she did not think that you had acted inappropriately."* The claimant had also alleged that as a result of breach of confidentiality the family of SU1 had defamed her at the NMC hearing saying that the claimant was a bad nurse and the respondent had suspended her again. GM stated that the respondent had not informed staff, service users or service users families that the claimant had been suspended and that they could not control what service users families said at the NMC. He sought to address the claimant's concerns informally but offered the opportunity to make the grievance formal [587 – 587].

173. On 29 July 2017 the claimant lodged an appeal against the outcome of the second grievance process [588]. She said she had not received the records of her interviews with SJ or the investigation report that was supposed to accompany the outcome letter. Amongst other things, she complained that her second suspension was discriminatory revenge because she had called safeguarding. The grievance appeal was allocated to PS, Operations Manager in Northern Ireland.

174. That same day the claimant also wrote back to GM about her third grievance [589 – 590]. The claimant continued to complain that the respondent had not provided original documents to the NMC with the respondent saying that the family had refused or that they cannot be located. She continued to complain about the lack of representation from the staff association, that Ms Gulliver had continued with her statement against the claimant to the NMC despite the claimant saying that a temperature check is not part of stroke guidelines. She said that when she had asked GM to ask Ms Gulliver to change her statement he said he would have a word with Ms Gulliver but that at the hearing the NMC was presented with the same "defamatory" statement from Ms Gulliver. She alleged that Ms Wilkinson and Ms Young had deliberately disclosed the

fact of suspension to SU1's family. She said her grievance was a formal one.

175. On 14 August 2017 PS made contact with the claimant about her grievance appeal for the second grievance. The claimant said that she needed first her interview records and the investigation report [594]. The investigation report was posted to the claimant on 18 August 2017 [598].

176. Again exactly what was happening has not been set out clearly to the Tribunal but it appears that at some point GM realised that the disciplinary process had not progressed. On 21 August 2017 GM sent a version of the disciplinary investigation report to Ms Browning saying he believed it was finalised [231]. The draft report appears to have reverted to the original version discussed between SJ and AS.

NMC Outcome

177. On 31 August 2017 the claimant received her NMC outcome. She was cleared of all charges [604] with a finding that there was insufficient evidence that the claimant had been asked to take SU1's temperature, or that the appropriate action was for the claimant to take the claimant's vital signs (as opposed to calling an ambulance) when concerns were raised he may have had a stroke. The panel commented that Ms Gulliver's evidence put forward by the NMC was not as an expert witness and there was no suggestion she had any particular expertise in the matter. They found there was no evidence that the claimant had not called an ambulance in a timely fashion. The claimant was also cleared of having allegedly spoken inappropriately to the family of SU1. The panel found that it was inherently unlikely given the positive references from colleagues and professionals in the home that the claimant would have displayed such an attitude.

Further preparation of the disciplinary investigation report

178. On 6 September 2017 GM sent a version of the investigation report and appendices to BB to be sent to the claimant. He stated that the claimant would not have been aware that "this has progressed to a disciplinary hearing so will need to be included in the letter to advise her." BB was also asked to check the appendices were in order. The hearing was to take place on 12 September [i233]. On 6 September GM advised that the report was in fact not ready and another date would need to be offered to the claimant [i270].

179. On 6 September 2017 the claimant presented her original Employment Tribunal claim form [2-13]. At that stage the claimant's race discrimination

and victimisation complaints were specifically about the NMC proceedings alone.

180. It is not a matter for this Tribunal, but it appears by then all was not well in the relationship between the respondent and SJ. It appears he was, in effect, removed from the remainder of the work in completing the report. GM asked Ms Young to look over the draft report. She advised on 10 September that she thought further investigations were required [i275]. Ms Young identified that SJ had interviewed SU2 on 24 October 2016 but there were no notes or records available of that interview. Ms Young raised other matters such as missing interview records for Ms Wilkinson, the absence of signed interview records, various missing appendices and various points she considered could be followed up with various witnesses. She was then tasked with trying to sort and link up the appendices to go with the report [i328]. Ms Wilkinson sent Ms Young some documents she held regarding safeguarding and other missing appendices [I331 –351].

181. On 21 September 2017 SJ was suspended from work.

182. On 21 September 2017 GM said that as the claimant's second and third grievances overlapped he would ask PS to review the claimant's most recent grievance as to whether there were any further areas to be looked into [607]. *He said to the claimant: "There has been a delay in writing to you relating to your disciplinary process and I will look into getting this concluded shortly* [607]."

183. On 26 September the claimant met PS for her grievance appeal [637–654].

184. On 3 October 2017 Ms Young sent her latest version of the report to DE and GM ([i356] and [i376]) identifying that she had added parts and taken other unevidenced parts out of the report to ensure that it only covered fact. She identified that SU1 and Ms Wilkinson's investigation meeting notes remained missing, that she thought the recordings would be on SJ's phone and she had left an answerphone message asking him to call her. On 4 October she confirmed she had been unable to get hold of SJ and suggested that the hearing proceeded in the absence of the missing notes [i377].

185. On 5 October 2017, in the context of a dispute about references for a job the claimant was seeking to secure elsewhere, the claimant emailed GM complaining, amongst other things, about her prolonged suspension and that after a year she still had not received notes of interviews or the suspension investigation report [655- 656].

186. On 5 October 2017 Ms Young forwarded the report and appendices to BB and AB [I398]. For reasons unknown the claimant's statement as produced by SJ only had its first page when asserted as an appendix [i477]. On 6 October 2017 GM forwarded on another version of the investigation report to AB [I489].

187. On 12 October 2017 GM emailed the claimant to say that the disciplinary investigation was now complete and the claimant would be invited to a disciplinary hearing on 20 October. He said the claimant would be sent the investigation report and appendices in advance [748]. The claimant protested that she had not received her interview notes which should have been countersigned by her [748]. GM asked BB to email the notes to the claimant in advance [748]. It does not appear this was done.

Appeal outcome for second grievance

188. On 13 October 2017 PS responded to the claimant's grievance appeal [770 – 774]. The appeal was largely rejected. PS said she could find no evidence to support the claimant's allegation that Ms Wilkinson and Ms Young had said to her "why don't you just leave?" PS did uphold the claimant's complaint about not being paid for the third week of annual leave that Ms Wilkinson had said was unauthorised on the basis that there was conflicting accounts as to what had happened and it was not possible to obtain evidence from ME. In relation to the claimant's third grievance PS found that there was a breakdown in communication with the staff association about attendance at the NMC hearing which was not "entirely satisfactory." She otherwise commented that the claimant's concerns about Ms Gulliver's statement and the alleged breach of confidentiality had been covered already by GM. She noted her recommendation that the current disciplinary process be expedited as soon as possible so that the claimant could receive the disciplinary investigation report and associated documents.

Disciplinary Hearing

189. On 13 October 2017 Ms Browning wrote to the claimant inviting her to the disciplinary hearing on 20 October 2017 [776- 777]. The allegations to be considered were:

"1. That on 12 September 2016, you engaged in an inappropriate and unprofessional discussion with a Service User, potentially placing the Service User in a vulnerable position.

2. That on Sunday 25 September 2016, you inappropriate elevated an issue to external bodies.

3. That on Sunday 25 September 2016, you unnecessarily involved other staff members in the situation referred to above, potentially placing staff in a difficult position.

4. That on Sunday 25 September 2016 you involved a Service User in this situation, potentially placing a Service User in a vulnerable position.

5. That, on or around 25 September 2016 you acted unprofessionally by making a Safeguarding referral personal to yourself when representing LCD client group. Potentially bringing the organization into disrepute.

6. That on Friday 30 September 2016 you refused a reasonable management request, which could potentially lead to Service Users being placed at risk,

7. That on Friday 30 September 2016 you left your shift early potentially placing Service Users at risk."

190. The claimant was told that the allegations were serious and if proven may constitute gross misconduct which could result in summary dismissal. A copy of the investigation report and appendices was said to be enclosed.

191. The disciplinary hearing went ahead. The notes are at [810 – 816]. The claimant complained that the notes prepare by SJ of her interview were one page long for a 2 hour interview. She said that there were additional documents she wanted to produce. BB told the claimant that Ms Browning could only deal with the hearing on the basis of the paperwork she had and Ms Browning told the claimant that she had the opportunity to put her position forward.

192. The claimant did so giving her account that it was SU2 who had told her on 12 September he would support her if she was being bullied and would stand by her. She said that SU2 may have overheard conversations in the lounge. The claimant gave her account of Ms Wilkinson calling her into the office and that she had denied to Ms Wilkinson making the comment and that she sensed SU2 was looking to defend her having previously been made to apologise in 2014 for racist comments. The claimant pointed out that the record of this conversation and meeting was not in the disciplinary paperwork which she considered was discriminatory. Ms Browning said she would seek clarification on missing notes.

193. The claimant gave her account of what SU2 had said on 15 September 2017. She also gave her account, on the 25 September, of having tried to call the advocate but being redirected to social work as it was out of hours. She said that she had called the GP because SU2's BM was lower than 5 and that the GP and SU2 had asked her to call the advocate. The record

says that claimant sought to include an email she had sent about being bullied but was told by BB it was a separate issue. The email the claimant was seeking to rely on is [316] which does, in part, set out the claimant's perspective of what had happened between 12 and 19 September.

194. The claimant said that SU2 had told her he did not want to sign the statement and that he was told he would be removed from the home if he did not. She also gave her version of what had happened on 27 and 30 September. She said she asked MK, in the presence of AC, that she be allowed to go home early. She said that when she got home she took medication and lay down, in accordance with medical advice, and so had not answered the telephone calls. The hearing concluded with Ms Browning telling the claimant that she had some further information to obtain so the outcome would be given in writing. The claimant accepted in evidence that Ms Browning had given her a full opportunity to put her case.

Further enquiries

195. Ms Browning telephoned Ms Wilkinson after the disciplinary hearing about supervision records. She also spoke with AC about whether the claimant had been shouted at. There are no records available of those exchanges. Ms Browning also had sight of the full notes of the interview of the claimant by SJ before reaching her decision to dismiss.

Decision to Dismiss

196. On 6 November 2017 Ms Browning sent the dismissal letter [820 – 821]. The letter says that Ms Browning had requested copies of supervision notes but had been told there were no notes but that she understood the claimant met with Ms Wilkinson almost weekly to discuss issues. She said she was satisfied on the balance of probabilities that gross misconduct had occurred in relation to each of the offences. She said:

"Your account of incidents differs from the weight of evidence presented by all other people interviewed as part of the process. The interview notes from staff and SU2 state that you told SU2 that you were being bullied, rather than your account, where you stated that SU2 said he would support you if you were bullied by staff, not the other way round.

During the Hearing, you frequently alleged that staff discriminated against you or were racist in their attitude towards you. However, when questioned, you were unable to provide any evidence to support either of these allegations.

I felt that your interpretation and understanding of your roles and responsibilities was not correct. If seemed as if you were happy to pass on decision making to Social Work or the manager, rather than dealing with situations yourself, at least initially.

Due to the allegations listed above, I have found that dismissal is the appropriate penalty. Having taken into account the mitigation circumstances including the lack of notes available in the initial pack of information and length of time you were suspended, the offences are so serious that a final warning is inappropriate and not commensurate with the gravity of the misconduct."

197. Ms Browning's evidence was that she considered it unlikely that on the claimant's return to work on 12 September 2016, after around 6 weeks' absence, that SU2 would have suddenly said to the claimant that he would stand by her if staff were bullying her. She said she considered it more likely that the claimant had told SU2 that staff were bullying her. In doing so she said she also took into account that other staff reported a consistency in SU2's account by PD, MK, CK and GM (as well as the two statements taken from SU2 by GS and GM). She said that the staff reported that SU2 was upset by the claimant speaking to him about this and that, in her view, it was not something that a member of staff, however they were feeling, should discuss with any service user and, here, a vulnerable adult. She said she considered that the service user, as a vulnerable adult had been pulled into a situation not of his making or of interest which caused upset to him.

198. The claimant said that Ms Browning failed to take account of or look at documents (such as the care plan) relating to the claimant's condition and his learning disabilities, challenging behaviour and difficulties controlling his temper. Her view was that this would show she was unlikely to have confided in SU2 given his historic behaviour, and also that he would say things and then later retract it. Ms Browning said it was for the investigating officer to give her the relevant evidence but she accepted that SU2 had challenging behaviour and a learning disability but it did not mean he was to be disbelieved. She considered there was an internal consistency in the accounts he gave to the other members of staff.

199. In relation to 25 September 2016, Ms Browning said it was her view that it was inappropriate for the claimant to have called the two carers into SU2's room in order to speak about events that the claimant was saying was causing distress to SU2 (i.e. being asked or forced to sign a statement). Her assessment was that if SU2 was already a little distressed and agitated, doing that would only add to his distress and anxiety. Her view was that if the claimant needed support from other staff she could have spoken to them outside of the room so that the conversation did not add to

SU2's stress levels. She explained in oral evidence that staff hold a position of power when caring for vulnerable adults, and that having 3 members of staff in SU2's personal space in that way was, in her opinion, an abuse of that power and not something she expected to see happening in the respondent's services. She said it also caused stress to the other staff members as well.

200. In her written witness statement Ms Browning said she did not have enough information to reach a conclusion on whether the claimant should have called the GP albeit she felt there was little evidence of the claimant intervening to calm the situation down first. In her oral evidence she said she would accept it was appropriate to call the GP for a second opinion about SU2's health. But she did not consider it appropriate for the claimant to call outside agencies. Her evidence was that if the GP had advised SU2's advocate be contacted then this suggested the GP was confident that SU2 did not have a health issue requiring medical attention. Ms Browning's evidence was that she considered that what the claimant did was "use" SU2 to enable the claimant to voice her own complaints about practices in the home as opposed to acting in furtherance of SU2's best interests or for his benefit. She referred to the fact that what the claimant did was to call safeguarding and not just the claimant's advocate and that in looking at the content of the discussion with SA she considered that the claimant spoke more about staff practice and what they did or did not do rather than the effect she felt it was having on the service user or being about SU2 himself. She considered that the claimant was pursuing her own personal agenda in furthering her own individual grievances with the respondent's staff.

201. Ms Browning's evidence was that she considers the claimant had not followed the correct protocols and had escalated a situation that could have been handled in house instead to outside agencies that caused additional and unnecessary distress to SU2. Her point in that regard was that SU2 then became involved in even more discussions about the situation and ultimately led to him deciding to refuse care from the claimant. Ms Browning's evidence was she considered the use of a vulnerable service user in such a way to be an abusive situation. She said she considered that the claimant's actions put the respondent's reputation at risk in being described as in coherent and irate when challenged. Ms Browning said that her concern was not that the claimant made the call to the out of hours service per se but that she did not consider the claimant had acted genuinely in making the call and was more concerned with furthering her own agenda than making a genuine safeguarding call in the best interests of SU2.

202. Ms Browning's evidence was that she considered that on 30 September 2016 the claimant had refused a reasonable management request by Ms

Wilkinson to attend the meeting. As an informal meeting, Ms Browning considered it was acceptable to ask the claimant to attend with support but without waiting for union representation. Whilst accepting that the claimant said she felt unwell, Ms Browning's view was that the claimant should have spoken to a senior member of staff before leaving. She stated that the claimant could otherwise have left service users in a more vulnerable position with one staff member down on shift. The claimant put it to Ms Browning in oral evidence that she had obtained permission from a line manager, MK because she was unwell. Ms Browning said that if that was the case then she would accept that but that she did not think the claimant had made that clear at the disciplinary hearing and it would still have been better practice to speak to Ms Wilkinson.

203. Ms Browning said the combination of events and the claimant's lack of insight into what should have been properly done also raised the seriousness of the claimant's conduct overall. She said that the combination of all the factors together with the way the claimant spoke about service users and staff during the hearing led her to decide that dismissal was the correct outcome. She stated she considered the claimant was dismissive of SU2 as a disabled person in saying his recollections could not be credible and that she felt uneasy in general about how the claimant spoke about people with disabilities. She stated she did not consider the claimant had the right values or attitude for the job. In said in making her decision to dismiss she ultimately looked at the safety and benefit of service users.

204. Ms Browning commented that even if the claimant's version of her interactions with SU2 were correct and that SU2 was defending the claimant then what happened in the sequence of events between 12 and 25 September was still inappropriate as service users should never be involved in staffing disputes. When asked for her views on the disciplinary allegations individually, Ms Browning said in oral evidence that this treatment of SU2 by the claimant was, in her opinion, the most serious part of the allegations against the claimant and that whilst it was part of an ongoing course of events from 12 to 25 September, what happened on the 25 September was, in her view, the most serious. She also viewed the claimant's actions in relation to the out of hours service as serious. She said she was less concerns about the issue of organisational disrepute, the failure to follow a management request and leaving the shift early, albeit the organisation did not want staff just walking off shift.

Appeal against dismissal

205. The claimant was offered the right of appeal and lodged her appeal by email on 9 November 2017 [822 – 823]. She said the allegations were false and manufactured by Ms Wilkinson, that the investigation was

improper and unreasonably long, she had not been sent notes of interviews or the opportunity to amend notes, and had not been given copies of the safeguarding report and SU2's daily narrative and care plan.

206. Mr Clubb, Operations Support Director, was the appeal officer. In a letter to the claimant of 29 November 2017 he asked the claimant to provide him with the exact details of the information she felt should have been considered and it would then endeavour to ensure it was available at the appeal hearing [828, 830]. On 7 December 2017 the claimant said again that she had not been sent the records of her interview with SJ. She asked for 9 witnesses to be called and various other documents set out at [841 – 842] including SU2's records and those of other service users. MS in HR contacted Ms Young observing that the statement taken in November 2016 did seem incredibly short for such a meeting and asking if the claimant had been sent her witness statement for checking. It appears it then came to light the claimant did not have a full copy of SJ's interview notes.

207. On 8 December 2017 Mr Clubb emailed the claimant saying "*I would also add that additional information regarding the service user who was involved is not relevant as the incident is very specific and the service user's version of events is corroborated by other members of staff. Therefore unless you can explain the relevance of providing additional information on the service user involved in the case, I will be unable to provide this to you.*" He said that even then copies would not be given but it could potentially be made available for viewing on the day. He sent the claimant the full 3 pages of her interview notes prepared by SJ. He said the claimant's training file and personal file would be available on the day of the hearing or she could make arrangements to go into the home to view them. He asked the claimant to identify other relevant correspondence she thought she did not have. In relation to witnesses he noted that only 3 were still employed, that AC had already been interviewed and the other two were not referred to in the investigation. He said that they would not be called at the hearing but the claimant could explain their relevance and he would then consider arranging for the individuals to be interviewed [846 – 847].

208. On 8 December 2017 the claimant applied to amend her employment tribunal claim [29a].

209. On 9 December 2017 the claimant lodged a further grievance complaining of, amongst other things, continuous discrimination and victimisation [849 –851, 861] including complaints that she was suspended for an unreasonably long time, procedural failures in the disciplinary and discrimination against manager's abuse. Mr Clubb acknowledged it on 12 December saying that he had passed it on to HR. It was agreed that

he would deal with it whilst dealing with the claimant's appeal against dismissal.

210. The appeal went ahead on 14 December [854 -859]. The claimant again asserted that SU2 had told her he had been forced to sign a document by Ms Wilkinson and that her judgment in referring that on was correct. She said again that SU2 could sometimes make false allegations about her and other staff and that she had told Ms Wilkinson this. She denied telling SU2 that she was being bullied. She raised the absence of the email in which she had complained about being bullied by Ms Wilkinson and said it had not been replied to. Ms Browning was present at the hearing by telephone and commented that she felt this email was related to the claimant's grievance as opposed to the dismissal. There was also a discussion about the claimant's outstanding grievances.

211. The claimant said in evidence she did not ask on the day of the appeal if any documents were there for her to view. Mr Clubb said the claimant's personnel file was available for the claimant on the day and that the claimant had not set out why she considered other documents were relevant or why she wanted AC there as a witness. Mr Clubb's evidence was that he asked the claimant whether there was anything else that she wanted to add and she said that there was not. He stated that he spent some time mulling the case over for himself and discussing it with MS as "sounding board."

212. On 18 January 2018 Mr Clubb issued his appeal outcome [870 – 873]. He noted that Ms Browning had explained that in deciding which version of events seemed most likely she took into account that the evidence presented by other witnesses was corroborated whereas the claimant was the only person presenting her version of events. He stated that he did not feel there was any obvious error in Ms Browning's decision and that her explanations for her findings were reasonable and supported by the evidence. He stated the clamant had offered no reasonable explanation as to her actions during the call to safeguarding and that the claimant did not appear to understand the processes or her own responsibilities. He stated that the claimant could not explain the relevance of the wide range of documents that she had requested or why the witnesses she had requested were relevant to the appeal. He upheld the decision to dismiss. In relation to the claimant's grievance of 9 December 2017 he noted that much of it had already been dealt with by PS and GM.

213. Mr Clubb's evidence to the Tribunal was that he concluded that Ms Browning's findings were appropriate. Mr Clubb said that a key consideration for him was that he considered the claimant had behaved in a way to get SU2 to speak on her behalf and it was an abuse of her position to do so and which increased SU2's anxiety. He considered the

heart of what SU2 was saying was that the claimant was manipulating him and he did not want to be involved or put in that position. Mr Clubb also stated that he was concerned about the nature of the claimant's call to social services, that it was inappropriate and confusing, and was also concerned about the feedback then received questioning the claimant's fitness to practice.

214. Mr Clubb stated that the claimant's actions on 30 September smacked of insubordination in refusing to attend the meeting and then leaving early without telling Ms Wilkinson. He accepted that the claimant may have got permission from someone else and that with hindsight that could perhaps have been explored further. He said that the claimant's actions that day were also a risk to SU2 as the allegation had been made and there needed to be a discussion about how to respond to it. The claimant put it to Mr Clubb that in leaving she did not leave the home understaffed as she would, if present, have been in a meeting and AC was there as additional cover. Mr Clubb's view was that staff should not just assume that a ward is sufficiently staffed and that Ms Wilkinson was expecting to meet and the claimant just did not attend. He said he did consider whether to reduce the sanction but came back to fact at midst of it all was a vulnerable adult.

215. On 1 January 2018 the claimant submitted a further grievance which the respondent declined to deal with [874].

Discussion and conclusions

216. At the heart of this case are questions about the reason why certain decision makers made the decisions they did in relation to the claimant. What was operating in the minds of the decision makers? Part of this assessment includes considering whether, and to what extent, there was any causal link (in a "reason why" sense) between what the claimant says was a protected disclosure and protected acts (her grievances) and the detriments/dismissal that she complains about.

217. It is therefore helpful to start with the question of whether the claimant made qualifying protected acts within the meaning of the victimisation provision in the Equality Act and whether she made a protected disclosure in the sense of the whistleblowing/public interest disclosure legislation.

Protected Acts

218. The respondent concedes that the claimant's first grievance of 18 January 2016 [234], second grievance of 7 November 2016 [396 -398] and third grievance of 3 July 2017 [580 -581] were protected acts for the purposes of a victimisation claim.

Protected Disclosure

219. The record prepared by SA is at [331 – 332]. The respondent accepts the account it contains of what was said by the claimant to SA is capable of amounting to the "disclosure of information" within the meaning of section 43A ERA. We have already made a finding of fact that the record does summarise what the claimant said to SA.

220. The respondent also concedes that in making the disclosure to a person other than the respondent, the claimant reasonably believed that the relevant failure related solely or mainly to a matter for which the Council's Out of Hours Safeguarding team (rather than the respondent) had legal responsibility. In discussion with the Tribunal the respondent's counsel accepted here that he was not seeking to make fine distinctions between the Council's safeguarding team and the social work team. They are clearly interlinked given, as we have found as a matter of fact, the claimant's attempts to call SU2's advocate resulted in her ultimately speaking to a social worker via the out of hours service who in turn referred it on to safeguarding.

221. The respondent, however, disputes that the claimant's disclosure qualified for protection on the basis that:

- The claimant did not have a reasonable belief that the information tended to show that (a) the respondent had failed, was failing, or was likely to fail to comply with any legal obligation to which it was subject and/or (b) that the health and safety of any individual had been, was being or was likely to be endangered (sections 43B(1)(b) and (d) ERA);

- The claimant did not reasonably believe that the disclosure was made in the public interest.

<u>Reasonable belief that information tended to show failure to comply with legal obligation/ health and safety of SU2 was endangered</u>

222. The test is both subjective and objective. We have to consider whether the claimant, taking account of her personality and individual circumstances, held a belief that the information disclosed tended to show such a wrongdoing. But there is also an objective element– was any such a belief a reasonably held one?

223. It is important to assess this from the perspective of the Tribunal's findings of fact as to what the claimant knew and said as at the point she spoke with SA. The claimant told SA that SU2 had been bullied or forced into signing something that he did not want to that was against the claimant. The Tribunal has found that SU2 did say to the claimant words to the

effect that he had been asked by Ms Wilkinson to sign a document that was about a complaint against the claimant about staff bullying and that did not want to sign it. We also find as a matter of fact that the claimant was genuinely concerned about SU2's health as he was complaining of stomach pain and that he seemed distressed and agitated to degree. The claimant contacted the GP for genuine reasons.

224. The Tribunal's judgment is that it is likely that the claimant did genuinely believe that SU2 may have been treated inappropriately by Ms Wilkinson in that regard in that he was saying that he did not want to sign the document and was exhibiting some signs of distress. SB recorded that SU2 had said several times that he did not want to sign it. SU2 was of course a vulnerable adult in a regulated care home that was his home. He was interacting with Ms Wilkinson, the service manager, who inevitably had a position of power over him or certainly SU2 would see it that way. The Tribunal has found it unlikely that SU2 actually used the words that he was "forced" or that Ms Wilkinson had "bullied" him into signing it. However, he was saying he did not want to sign it. The claimant made efforts to make contact with SU2's advocate the Tribunal considered that was because she genuinely thought SU2 needed that independent support.

225. In that context the Tribunal is satisfied that the claimant genuinely believed that interaction between SU2 and Ms Wilkinson was inappropriate in the sense that there was pressure in some way on SU2 as a vulnerable individual to sign it. The Tribunal is satisfied that the claimant also genuinely believed that conduct was jeopardising the health of SU2. He was a vulnerable adult with multiple medical conditions exhibiting a degree of distress. The claimant also genuinely believed that this was a failure to comply with the respondent's legal obligations towards SU2 as an individual within their care. Overall, the claimant did genuinely believe that the information she gave to SA did tend to show a qualifying wrongdoing had happened. That the claimant may have exaggerated what SU2 had said in terms of being "forced" or "threatened with eviction" did not, in the Tribunal's judgment mean that the claimant genuinely held this fundamental belief.

226. The Tribunal is also satisfied that belief was reasonably held. The Tribunal is satisfied that the claimant did not know the background in that GM had been to see SU2 on 20 September or that SU2 had told GM he wanted to make a formal complaint about the claimant or that GM had asked Ms Wilkinson to take the document to SU2 for signing. Ms Wilkinson did not tell the claimant about this until 27 September [341]. The claimant therefore thought Ms Wilkinson had seen the claimant about signing a document relating to a complaint without anyone else there to support him. The Tribunal did not consider it established on the balance

of probabilities that the claimant had seen Ms Wilkinson take the document in for signature the night before, but even if she had the Tribunal is satisfied the claimant would not have known the detail of what it was about.

227. The claimant did know she herself had come under attention for allegedly telling SU2 that staff were bullying her because Ms Wilkinson had asked her about it in the office. The claimant did also know, because we have made findings of fact about this, that the claimant had had two way discussions with SU2 about staff bullying her. The claimant did not give Ms Wilkinson the complete picture about that but she did tell Ms Wilkinson that SU2 was saying she was the victim of staff bullying and that SU2 was supporting her. Whilst it may well have been objectively reasonable for the claimant to have supposed she herself may potentially face some consequences for her own interactions with SU2 the Tribunal does not consider that this means the claimant did not have good reason also to suppose that SU2 himself was being subject to some improper conduct in his own interaction with Ms Wilkinson and the signing of the document. The Tribunal does not agree with the respondent's assertion that it was all a deliberate ploy by the claimant to coerce him to say things that the claimant could use to de-rail an anticipated disciplinary investigation.

Reasonable belief that the disclosure was made in the public interest

228. The Tribunal's judgment is that the claimant made the disclosures that she did to SA for mixed reasons or motivations.

229. In particular, we consider that the claimant was genuinely concerned for SU2's welfare. As set out in our findings of fact whilst the claimant was trying to contact safeguarding too, the call that she thought her conversation with SA was in response to was her effort to speak to SU2's advocate. SA records the claimant saying that SU2 was "being bullied and needs an advocate/ social services to be told what is going on." The Tribunal's judgment is the claimant believed her disclosure was in the public interest. It related to the interests of SU2 as a vulnerable adult for whom she believed the recipient owed public welfare responsibilities. She thought that an advocate or a social worker would come out to see SU2 and look after his interests and that was an element of why the claimant made the disclosure that she did.

230. We consider that this belief it was in the public interest was reasonably held. This is for the reasons we have set out already above. In essence, whatever the claimant's own situation may have been, that it was still reasonable for her to consider on what she then knew that SU2 may have been subject to some improper conduct by Ms Wilkinson in some way. We took into account here that SU2 told the claimant that could wait until

the Monday to speak to his advocate but we did not consider that meant it was not objectively reasonable for the claimant to still seek to have someone to protect SU2's interests.

231. The Tribunal accepts that the disclosure was also likely to have been motived by the claimant's own private interests. She thought that she was being bullied by Ms Wilkinson and others and she thought she was the victim of a long campaign of discrimination and mistreatment. She had complained about this, including in her email of 17 September 2016. She thought she was not being listened to. She told SA that she thought the respondent wanted to get rid of her but in doing so were forcing SU2 into signing something that he does not want to sign against her. We accept the claimant was seeking to shine a light on how she saw herself as a personal victim of mistreatment to an external body that she knew, in turn, had a position of authority over the respondent. She said herself that if her complaints had been dealt with then she would not have needed to take it externally.

232. However, the Tribunal does not consider this prevents the claimant meeting the overall test of holding a reasonable belief that the disclosure was made in the public interest. As was said in Chesterton it does not have to be the individual's predominant motive for making disclosures. Indeed in Chesterton it was said:

"I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

233. The Tribunal finds that the claimant's belief her disclosure was in the public interest formed some part of her mixed motivation for making it. We therefore find that the claimant did make a qualifying protected disclosure.

During the NMC hearing in June 2017 the respondent "submitted an antagonistic statement compared to LCD disciplinary hearing (24/02/16)"

234. The claimant alleges that this happened and amounted to less favourable treatment because of race, victimisation and/or subjection to a detriment on the ground of making a protected disclosure.

235. The heart of the claimant's complaint is that she considered that Ms Gulliver produced a witness statement for the NMC that deliberately drove the NMC proceedings forward, by saying that she would have expected

the claimant to have taken SU1's vital signs if time allowed.. The claimant says Ms Gulliver should simply have said that the claimant had been found not guilty, and provided the relevant documents. She says Ms Gulliver was also speaking outside of her own expertise and stroke guidelines (which the claimant says shows it was done deliberately to harm her). The claimant says that despite her efforts to get Ms Gulliver's statement changed it was not changed and ended up being put before the NMC hearing in June 2017 in the case presented against the claimant (albeit Ms Gulliver was not actually called to give evidence).

236. The claimant considers that this was less favourable treatment because of race because the same thing did not happen to SM and ME. She considers that it was victimisation because she considers the adverse statement was produced by Ms Gulliver and maintained by Ms Gulliver in response to the claimant making and pursuing her first grievance and in particular the claimant pressing for SM and ME to themselves be referred to the NMC. Alternatively, she says Ms Gulliver was motivated by the claimant making her protected disclosure.

237. The Tribunal has made a finding of fact that Ms Gulliver's written statement was initially drafted by an NMC caseworker based on specific questions that had been asked of Ms Gulliver and answered by her in a telephone interview. Her interview exchange with the case worker was in relation to the NMC charges which were wider than those that ended up before Ms Gulliver at the internal disciplinary hearing. She was asked for her opinion as to whether she would personally have taken the patient's vitals and she considered that she had to provide an honest answer which was that she would like to think she would have done so, if time allowed, all predicated on their having been a request from a relative. In doing so, her statement set out that this was only if time allowed (something indeed the claimant herself had said). The statement also set out Ms Gulliver's view that it was acceptable for the claimant to have used her clinical judgment in not taking the claimant's temperature and that it was the claimant's clinical view that the most essential thing was to phone for an ambulance. The statement also set out that the outcome of the disciplinary hearing was that the allegations were unsubstantiated and the claimant had acted reasonably dealing with SU1. It does not, when read in the round, present as a statement intended to harm the claimant's interests.

238. The Tribunal is satisfied that the reason why Ms Gulliver's witness statement contained that opinion about taking vital signs is because it was her honest opinion in answer to the questions asked of her by the NMC as a regulator. The Tribunal has not found that GM promised the claimant that Ms Gulliver would change her statement. Instead, Ms Gulliver's position was explained to the claimant by GM and Ms Young. Thereafter

the decision to present Ms Gulliver's witness statement to the NMC hearing or to rely upon it lay with the NMC not with Ms Gulliver. The claimant accepted in oral evidence that if an employer decides there is no case to answer the NMC can still proceed with their own proceedings. The claimant also accepted that the respondent (and by implication Ms Gulliver) needed to cooperate with the NMC.

Direct race discrimination

239. In relation to the claimant's direct race discrimination complaint, the Tribunal does not consider that the claimant was treated less favourably than SM and/or ME. The Tribunal does not find that either SM or ME are appropriate comparators as there were material differences between the claimant's circumstances and that of SM and ME. In particular, the claimant's complaint is a very specific one relating to the content of Ms Gulliver's witness statement for NMC proceedings and that Ms Gulliver did not withdraw or amend that witness statement. SM and ME were not in similar circumstances to the claimant because they were not subject to NMC proceedings. The claimant feels very much aggrieved that SM and ME were not referred to the NMC about the events relating to SU1 but that is not the allegation of less favourable treatment that she has pursued in these proceedings. Furthermore, SM and ME's circumstances were different as the complaint by SU1's family was against the claimant individually and not SM or ME. The safeguarding report and panel meeting conclusions also stated that the claimant should be subject to an internal disciplinary investigation and NMC investigation. They did not say the same about ME or SM.

240. If the claimant's situation is alternatively compared with a hypothetical comparator of a difference race who is in not materially different circumstances to the claimant, the Tribunal can see no basis on which it could conclude or infer that Ms Gulliver would have conducted herself any differently to how she dealt with the claimant's situation. The Tribunal has found a non discriminatory reason for the treatment complained about but in any event the Tribunal could see no primary facts that would have shifted the burden of proof to the respondent.

241. This complaint of direct race discrimination is not well founded and is dismissed.

<u>Victimisation</u>

242. The Tribunal likewise considers that Ms Gulliver did not authorise her NMC witness statement or fail to withdraw it or amend it because the claimant brought her first grievance or her second grievance. The Tribunal is satisfied that the reason why Ms Gulliver acted as she did was

for the non discriminatory reasons set out above. That Ms Gulliver did not victimise the claimant for bringing a grievance is also supported by the fact Ms Gulliver acquitted the clamant of the internal disciplinary charges on 24 February 2016 and did so *after* the claimant presented her first grievance on 18 January 2016.

243. This complaint of victimisation is not well founded and is dismissed.

Whistleblowing detriment

244. The actual making of Ms Gulliver's witness statement cannot have been in response to the claimant's protected disclosure because the witness statement was provided (17 June 2016) *before* the protected disclosure took place (25 September 2016). The continued reliance by Ms Gulliver on that NMC witness statement was, in the Tribunal's view for the non discriminatory reason already set out above. The Tribunal is satisfied that it was not on the ground that the claimant made a protected disclosure. The protected disclosure was not a material influence or indeed any influence on Ms Gulliver's witness statement being before the NMC hearing.

245. This protected disclosure detriment complaint is not well founded and is dismissed.

During the same NMC hearing the respondent failed to produce original medical documents requested by the NMC, answering they "cannot be located" against the legislation of 10 years archives for medical documentation

246. In February 2016 Ms Young told the claimant she believed there were some documents absent from the service and may have to be requested from safeguarding. On 27 January 2017 Ms Wilkinson told the NMC that the originals of the daily narratives for SU1 could not be located and that the copy she had, which she was sending on, had been provided by safeguarding who had originally received a copy in January 2015. She explained that the documents had been requested previously by the NMC and that she had also told them previously she was unable to provide the originals. Ms Wilkinson also told the NMC that SU1's family had been refusing permission for the hospital admission form to be released to the claimant and that this was a hospital form not a Ty Cwm form. The claimant said that she was seeking the original documents for the NMC hearing as she believed the copies had been doctored to change or remove entries. The Tribunal does not have the copies that are alleged to have been doctored. There was no positive documentary evidence before us of what it was that was said to have been changed other than an extract of it being discussed before the NMC.

Direct race discrimination

247. It is not clear to the Tribunal what is said the respondent actually did during the NMC hearing in June 2017 given they had told the NMC some 6 months prior that they could not find the originals of the daily narratives and indeed that they had told the NMC this before. It would appear the claimant's complaint is that they did not remedy that situation.

248. The claimant seeks to compare herself with ME and SM but for the reasons already given the Tribunal does not consider them appropriate comparators. They were not the subject of NMC proceedings and so their circumstances were not materially similar to the claimant's.

249. Whatever the respondent's document retention requirements may be, the evidence before the Tribunal is that the respondent was unable to find the originals and that had been the situation for some time. The Tribunal is satisfied that a hypothetical comparator of a different race to the claimant but in materially the same circumstances would have faced that same situation. They would have likewise faced the NMC being told by the respondent that because the original documents could not be located, they could not be given to the NMC and they were only able to provide copies obtained from safeguarding. Likewise the respondent would have said they were unable to provide documents that were generated in the hospital and not at the home and that they could not themselves override a refusal of consent by an individual to release medical documents. The tribunal could see no primary facts in that regard that would have shifted the burden of proof to the respondent.

250. This complaint of direct race discrimination is not well founded and is dismissed.

Victimisation

251. The Tribunal likewise finds that the respondent did not fail to provide documents at the NMC hearing in June 2017 because the claimant brought her first or her second grievance. The documents were not available for the NMC for the reasons already set out. Further, Ms Young had identified before the second grievance was even lodged that there were missing documents and copies may have to be obtained from safeguarding.

252. This complaint of victimisation is not well founded and is dismissed.

Whistleblowing detriment

253. Likewise the Tribunal is satisfied that the non production of the documents was not done on the ground that the claimant made a protected disclosure. The protected disclosure was not a material influence or indeed any influence on Ms Gulliver's witness statement being before the NMC hearing.

254. This protected disclosure detriment complaint is not well founded and is dismissed.

During the same NMC hearing the respondent refused to provide representation/ support (the staff association)

255. The Tribunal accepts Ms Gulliver's evidence that the staff association is a body of volunteers made up of LCD staff. Its work can include accompanying staff to internal and external hearings but it would depend on individual willingness and availability. A representative can refuse to attend but it is not something within LCD's control and it is not LCD's duty to provide a representative. MD initially told the claimant that she would support the claimant at the NMC hearing but later pulled out saying she could not do it due to unforeseen circumstances and that she could not make it as she was on the Isle of Wight. The Tribunal did not hear from MD so had no other information available as to why she had to go to the Isle of Wight, although it appears that the claimant's argument was more that someone had influenced MD so that she withdrew representation. Ms Gulliver's evidence, which the Tribunal accepts, was that she did not influence any lack of representation and did not know the claimant had gone without representation at the NMC hearing. Ms Wilkinson likewise denied in evidence, which the Tribunal accepts, that she did not speak with the staff association to encourage it to not represent the claimant. The Tribunal is left with no positive evidence of who it is said to be that exerted the influence.

Direct race discrimination

256. Again the Tribunal does not consider that SM and ME are appropriate comparators as they did not have to attend an NMC hearing and therefore were not a similar situation to the claimant. Likewise the Tribunal has no evidence before it on which to conclude that a hypothetical comparator in materially the same circumstances but of a different race to the claimant would not have similarly been told by MD that she could no longer offer support as she had to go to the Isle of Wight instead. The Tribunal also does not have the evidence before it to support a conclusion that an unidentified individual with the respondent influenced the staff association to withdraw support because of the claimant's race. The Tribunal did not consider sufficient facts were established to show a primary case that would shift the burden of proof to the respondent.

257. This direct race discrimination complaint is not well founded and is dismissed.

Victimisation

258. The Tribunal also does not have sufficient evidence before it on which it can conclude or infer that MD withdrew support, or that an unknown individual within the respondent influenced her to withdraw the support because the claimant brought either her first or her second grievance.

259. This victimisation complaint is not well founded and is dismissed.

Whistleblowing detriment

260. The Tribunal also does not have sufficient evidence before it on which to conclude that the claimant's protected disclosure had in some way a material influence on the decision by MD to withdraw staff association support at the NMC hearing.

261. This protected disclosure detriment complaint is not well founded and is dismissed.

During the same NMC hearing the respondent disclosed confidential information towards the NMC witnesses, who have disclosed this in the hearing against me

262. The claimant alleges that the respondent told SU1's family that that the claimant had been suspended again which SU1's wife revealed in her oral evidence at the NMC in an attempt to discredit the claimant. In fact SU1's wife had it wrong. She said the claimant had been suspended three times, when in fact it was twice. The claimant had no evidence as to who she says informed SU1's wife and in oral evidence she could not rule out that SU1's wife was basing her assertions on gossip, even potentially from service users. Ms Wilkinson denied telling SU1's wife and said she had kept the claimant's suspension confidential. GM also told the claimant in the grievance appeal that confidentiality had been maintained.

Direct race discrimination

263. For the reasons already given the Tribunal does not accept that ME or SM are appropriate comparators. The Tribunal has no evidence before it on which it can conclude that a hypothetical comparator of a different race in materially similar circumstances to the claimant would have been treated differently by the respondent. The Tribunal did not consider sufficient facts were established to show a primary case that would shift the burden of proof to the respondent.

264. This direct race discrimination complaint is not well founded and is dismissed.

Victimisation

265. The Tribunal also does not have sufficient evidence before it on which to conclude or to establish a primary case that the respondent breached confidentiality and told SU1's wife that the claimant had been suspended or that that happened because the claimant had brought her first or her second grievance.

266. This victimisation complaint is not well founded and is dismissed.

Whistleblowing detriment

267. The Tribunal also does not have sufficient evidence before it on which to conclude that the claimant's protected disclosure materially influenced an unknown person in the respondent to tell SU1's wife that the claimant had been suspended, or indeed that the respondent did tell her that.

268. This protected disclosure detriment complaint is not well founded and is dismissed

The allegations made against the claimant by Ms Wilkinson in September 2016

The reason for the disciplinary proceedings

269. Here the Tribunal has to answer the question why Ms Wilkinson decided to invoke formal disciplinary proceedings against the claimant on 30 September 2016. As set out above the Tribunal finds that initially Ms Wilkinson decided to place the claimant under disciplinary proceedings without suspending her. The position on suspension changed as the events of 30 September 2016 unfolded.

270. Having heard from the witnesses, including Ms Wilkinson, and considered the documents the Tribunal finds as a matter of fact that there were several factors operating in Ms Wilkinson's mind.

271. First, Ms Wilkinson, with Ms Young advising from a HR perspective, was engaged in a longer term plan, from their perspective, to try to get the working relationship with the claimant under control. In particular, to try to build some stability into the relationship and find a way to close down some of the issues that the claimant was raising and try to find a pathway forward that was smoother, with the claimant, to take one example, raising less incident reports. But against that on reflection Ms Wilkinson, with Ms Young, had from their perspective serious concerns about the conduct of the claimant in relation to SU2. In particular, that the claimant had been behaving inappropriately in the content of discussions that she was having with SU2 about bullying. This culminated in the incident on the 25th when the claimant involved two other members of staff, who said they felt uncomfortable, and with SU2 on several occasions having exhibited or told others he was feeling distress.

272. Thereafter, Ms Wilkinson was concerned about the claimant's conduct in contacting safeguarding/ the advocate, which led to the claimant's phone conversation with SA and the follow up contact by CW and AS who both then questioned the claimant's fitness to practice. In the Tribunal's judgment Ms Wilkinson viewed that situation with SU2 (including the subsequent contact with SA), particularly, in regard to the events on 25 September, as potentially serious enough that it warranted a disciplinary investigation. However, initially at least, that was tempered by a decision, probably both born of the wider desire to try to find a way to get the working relationship with the claimant under control and because of Ms Wilkinson's awareness of the impact that the first suspension had on the claimant, not to suspend the claimant.

273. As the events of 30 September 2016 unfolded Ms Wilkinson, in conjunction with Ms Young and DE decided to suspend the claimant. Additional disciplinary allegations were added as to how the claimant had conducted herself that day on the 30th September and her wider conduct in relation to SU2. However, a disciplinary investigation would have commenced against the claimant without those additional developments and allegations in any event.

Whistleblowing/ protected disclosure detriment

274. Having made those findings of fact about the reason why Ms Wilkinson placed the claimant under a disciplinary investigation the Tribunal has to consider what role the claimant's protected disclosure played, if any.

275. Here the Tribunal had particular regard to the suspension script that was drafted on 30 September 2016 and its observation that "*we have heard your employee concern and employee concern appeal, and have for the last 9 months tried to get the working relationship back on track, but it feels as though your behaviours and actions, and inappropriate elevation of issues to external bodies are in retaliation to the organisation. It is unworkable and making local governing authorities question your fitness to practice as well as placing people using our service in a vulnerable position, to the extent that they are refusing care from you*." Ms Wilkinson also commented in her interview with SJ in April 2017 that the organisation really had to react when safeguarding had questioned the claimant's fitness to practice. This shows the importance with which safeguarding was viewed.

276. The Tribunal considers that the claimant's protected disclosure to SA did play a material influence in the decision to place the claimant under a disciplinary investigation. In reaching this decision the Tribunal acknowledges that the case law states that a Tribunal can, in appropriate cases, draw a distinction between the fact of making a protected disclosure and the manner or way in which the employee goes about making the disclosure. It can be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. But the Tribunal must ensure the factors relied

upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer act as it did. [4]

277. Whilst the Tribunal accepts that some of Ms Wilkinson's concerns about the claimant's disclosure to SA related to the claimant speaking about her own personal situation and not that of SU2, the general manner in which she conducted herself during the call and the subsequent questioning of the claimant's fitness to practice, the Tribunal also considers that an operative factor was also the fact that the claimant had tried to contact safeguarding and the advocate and in turn had the discussion with SA about SU2 and made her allegation about the conduct of Ms Wilkinson.

278. It was, no doubt, embarrassing for the organisation and Ms Wilkinson to have safeguarding/ social services contacting them in the way they did about the claimant's conduct and in questioning the claimant's fitness to practice. But it must also have been embarrassing to have such an allegation of inappropriate conduct leveled at Ms Wilkinson and made to, as is described in the suspension script, a governing body, even if Ms Wilkinson knew there was a valid explanation as to why she had taken the letter to SU2 to sign. As the suspension script shows, the claimant was being seen by Ms Wilkinson as acting in a retaliating manner against the respondent (and particularly Ms Wilkinson as service manager). The Tribunal considers that view of the claimant acting in a retaliating manner related not just to the claimant complaining about her own treatment by the respondent to SA, but also the claimant alleging to SA that Ms Wilkinson had acted inappropriately with SU2 (the protected disclosure). The Tribunal therefore does not consider the reasons for placing the claimant under a disciplinary investigation are genuinely separable from the protected disclosure. The protected disclosure is a part of it. The Tribunal finds that the claimant's protected disclosure was a material influence on the decision by Ms Wilkinson to place the claimant under a disciplinary investigation.

279. Subject to the issue of time limits, the claim for whistleblowing detriment relating to the commencing of a disciplinary investigation against the claimant would succeed.

280. The Tribunal does, however, have to consider the question of time limits. For the reasons that follow, the claimant's complaint about starting the disciplinary investigation is the only complaint of whistleblowing detriment/ dismissal that succeeds. There are therefore no other later events that it can be linked to allege an ongoing course of detrimental treatment that could serve to extend the time limits.

281. The claimant was told she was being placed under a disciplinary investigation on 30 September 2016. The formal letter was dated 3 October 2016. Even if the latter

[4] See for example Panayiotou v Chief Constable of Hampshire [2014] IRLR 500

date were the operative date it would mean that the claimant would have had to enter Acas early conciliation by 2 January 2017. The claimant did not commence early conciliation until 10 July 2017. The claim presented on 6 September 2017 made no mention of this complaint; it was focused initially purely on matters relating to the NMC hearing. The claimant then made her application to amend on 22 November 2017. The claim was therefore presented some 6 months late and the application to amend made some 8 months late and was therefore brought out of time.

282. The Tribunal has an inherent jurisdiction to consider whether to extend time. The test we have to apply is whether it was reasonably practicable for the complaint to have been presented in time and, if not, whether it was presented within a reasonable time period thereafter.

283. The Tribunal considers that it would have been reasonably practicable for the claimant to have presented her claim within time. The claimant gave no evidence that she was, for example, unaware of Tribunal time limits. She had access to trade union advice. She is an intelligent individual capable of researching and understanding time limits. The claimant also knew, from her perspective, that she had grounds to complain about her treatment as she did internally. Whilst accepting that the claimant was under a lot of pressure with her suspension ongoing NMC proceedings and the actual disciplinary in relation to SU2 being outstanding, on balance the Tribunal remains of the view that it would have been reasonably practicable for the claimant to have presented this complaint within time.

284. Overall therefore the protected disclosure detriment claim about placing the claimant under a disciplinary investigation does not succeed as it was presented out of time and the Tribunal has not exercised its discretion to extend time. That complaint is therefore dismissed as the Tribunal has no jurisdiction to hear it.

Direct race discrimination

285. The claimant also asserts that the decision to place her under a disciplinary investigation was direct race discrimination. Here, the Tribunal does not accept that SM and ME are appropriate comparators as they were not in materially similar relevant circumstances to the claimant. They had not been accused of engaging in inappropriate conversations with a vulnerable service user or making an inappropriate safeguarding referral. The Tribunal cannot also see an evidential basis for concluding that a hypothetical comparator of a different race but in not materially different circumstances to the claimant would be treated differently to the claimant.

286. The Tribunal has found the reason why Ms Wilkinson reached the decision that she did, and it is unconnected to the claimant's race. But in any event the claimant did

not demonstrate a sufficient prima facie case that would shift the burden of proof to the respondent.

287. This complaint of direct race discrimination is not well founded and is dismissed.

Victimisation

288. The claimant had by this stage brought her first grievance. The Tribunal does not find that the claimant's grievance was a material influence on the decision to place the claimant under a disciplinary investigation. The Tribunal has set out its findings of fact as to why Ms Wilkinson decided to take such a step and it did not include the claimant's grievance. But in any event the claimant did not demonstrate a sufficient prima facie case that would shift the burden of proof to the respondent.

289. This complaint of victimisation is not well founded and dismissed.

The decision to suspend the claimant

The reason for the claimant's suspension

290. The Tribunal makes a finding of fact that Ms Wilkinson (with advice from Ms Young and DE) decided to suspend the claimant because of the claimant's conduct on 30 September 2020. In particular, the claimant's refusal in any way to meet with Ms Wilkinson and Ms Young that day and in leaving work early without discussing her departure with Ms Wilkinson.

291. The Tribunal considers that Ms Wilkinson reached the view that at that point in time the claimant could not safely remain within the workplace. There was a genuine need from Ms Wilkinson's perspective to discuss the situation with SU2 with the claimant, his refusal of care by her and how that relationship and care arrangement would be taken forward. Furthermore, at a time when Ms Wilkinson and Ms Young were trying to find a way to get the working relationship running more smoothly, the claimant's conduct that day left Ms Wilkinson doubting the viability of that strategy at that point in time.

Whisteblowing detriment

292. The Tribunal does not consider that the claimant's protected disclosure had a material influence on the decision to suspend the claimant. The initial decision, we have found was to not suspend the claimant. That changed not in response to the claimant's protected disclosure but in response to her conduct on 30 September in refusing to meet and then leaving work early.

293. This complaint of protected disclosure detriment is not well founded and is dismissed.

Direct race discrimination

294. The claimant also asserts that the decision to suspend her was direct race discrimination. Here, the Tribunal does not accept that SM and ME are appropriate comparators as they were not in materially similar relevant circumstances to the claimant. The Tribunal cannot also see an evidential basis for concluding that a hypothetical comparator of a different race but in not materially different circumstances to the claimant would be treated differently to the claimant.

295. The Tribunal has found the reason why Ms Wilkinson reached the decision that she did, and it is unconnected to the claimant's race. But in any event the claimant did not demonstrate a sufficient prima facie case that would shift the burden of proof to the respondent.

296. This complaint of direct race discrimination is not well founded and is dismissed.

Victimisation

297. The claimant had by this stage brought her first grievance. The Tribunal does not find that the claimant's grievance was a material influence on the decision to suspend the claimant. The Tribunal has set out its findings of fact as to why Ms Wilkinson decided to take such a step and it did not include the claimant's grievance. But in any event the claimant did not demonstrate a sufficient prima facie case that would shift the burden of proof to the respondent.

298. This complaint of victimisation is not well founded and dismissed.

The decision to dismiss

The reasons for the claimant's dismissal

299. Turning to the decision to dismiss the claimant, the Tribunal has to consider primarily what was operating in the mind of Ms Browning.

300. The Tribunal finds as a matter of fact that Ms Browning decided to dismiss the claimant:

(a) because she considered the claimant had acted inappropriately in relation to SU2, in particular by engaging him in discussions about other staff bullying the claimant on the 12 September;

(b) because she considered the claimant had acted inappropriately in her dealings with SU2 on 25 September. In particular, by bringing in the two carers as witnesses which Ms Browning considered had only heightened

SU2's distress and had not been to SU2's benefit but had instead been used as a means to highlight what the claimant saw as poor practice by Ms Wilkinson;

(c) because she considered the claimant had acted inappropriately in involving the two carers on 25 September in making them witnesses to what SU2 was saying and asking them to make statements and contact safeguarding; all of which they felt uncomfortable about;

(d) because she considered the claimant had inappropriately contacted safeguarding and thereafter the social worker, SA, on 25 September to raise an issue that was in her own self interest and benefit and not that of SU2 and her demeanor in that phone call including at times being incoherent and becoming irate when questioned;

(e) because, she considered the claimant had refused a reasonable management request to meet with Ms Wilkinson on 30 September 2020;

(f) because she considered the claimant had left shift early on 30 September without notifying Ms Wilkinson.

301. The Tribunal also finds that Ms Browning genuinely considered that the allegations against the claimant were made out and that they amounted to gross misconduct justifying summary dismissal. Ms Browning decided to dismiss the claimant because of the combination of these things. However, of particular importance and weight were her conclusions that the claimant had acted inappropriately in her dealings with SU2 as a vulnerable service user culminating in what she saw as the claimant using SU2's situation on the 25 September to further the claimant's own agenda in highlighting what the claimant saw as poor practice on the part of Ms Wilkinson and in escalating that to safeguarding/ social services.

<u>"Automatic" unfair dismissal – protected disclosure</u>

302. The Tribunal has to consider what was the reason or principal reason for the claimant's dismissal and was it because of the claimant's protected disclosure. The test is different to the protected disclosure detriment claim.

303. Here the Tribunal considers that the reason for the claimant's dismissal, as operating in Ms Browning's mind, was that she genuinely considered the claimant was guilty of misconduct as summarised above.

304. The Tribunal does not find that the reason or principal reason for the claimant's dismissal was the fact of the claimant making the protected disclosure about Ms Wilkinson to SA. Ms Browning had conduct reasons other than just the contact with SA for dismissing the claimant but even in relation to that contact with SA Ms

Browning's concerns lay more with the claimant, in the view of Ms Browning, making a referral that was personal in motive and the way the claimant conducted herself in that call. It is important to remember here that the Tribunal is not concerned with what it considers the claimant's motivations were in speaking with SA. Instead, we have to decide what Ms Browning's views were on what she thought the claimant was doing, what was operating in her mind, and how that fed into her decision to dismiss the claimant.

305. The claimant's complaint of automatic unfair dismissal on the ground of making a protected disclosure is therefore unsuccessful and is dismissed.

Direct race discrimination

306. The Tribunal also does not find that in dismissing the claimant Ms Browning, because of race, treated the claimant less favourably than she treats or would treat others. The Tribunal remains of the view that neither ME or SM are an appropriate comparator. The Tribunal does not consider it established that a hypothetical comparator in a not materially different situation to the claimant would be treated more favourably.

307. The Tribunal has made a finding of fact that Ms Browning decided to dismiss the claimant because she considered the claimant guilty of misconduct, which is a reason unrelated to the claimant's race. In any event, the claimant has not established a prima face case of discrimination that would shift the burden of proof to the respondent.

308. This complaint of direct race discrimination is not well founded and is dismissed.

Victimisation

309. The Tribunal has found that Ms Browning decided to dismiss the claimant because she considered the claimant to be guilty of misconduct. The Tribunal finds that it was for that reason and not because of the claimant had done a protected act by bringing her grievances. In any event, the claimant has not established a prima face case of discrimination that would shift the burden of proof to the respondent.

310. This complaint of victimisation is not well founded and is dismissed.

"Ordinary" Unfair dismissal

Reason for dismissal

311. The Tribunal finds that Ms Browning's reasons for dismissing the claimant are set out above. The reasons all relate to conduct which is a potentially fair reason for dismissing the claimant.

Reasonable belief

312. Turning to the Burchell test, the Tribunal is satisfied that those reasons/ that belief in misconduct was genuinely held by Ms Browning.

313. The Tribunal then has to consider whether that belief was reasonably held by Ms Browning, based on a reasonable investigation, applying at all times the range of reasonable responses test.

314. In relation to the claimant's interactions with SU2, Ms Browning had before her the claimant's denial that she had an inappropriate discussion with SU2 and assertion that it was SU2 who told the claimant unsolicited that he would support the claimant if she was being bullied. There is some partial support for that in the carers statements. The claimant was also able to give Ms Browning her account of having told Ms Wilkinson, when challenged, that she had not said she was being bullied to SU2 and that SU2 was trying to defend her. She also had, to a certain extent, Ms Wilkinson's account of the claimant saying that SU2 was acting has her protector [675]. The claimant also told Ms Browning about the events on 16 September where she explained that SU2 had again told her that staff were bullying her, that she had told him not to worry and she would refer it to Ms Wilkinson. She gave her account of SU2 being in the office with her and the claimant rubbing his arm in a reassuring manner.

315. As against that Ms Browning had SU2's written statement of 12 September that the claimant had led the conversation saying she was fed up and staff were bullying her, and his subsequent statement to GM taken on 20 September. She also had before her the records made by PD, MK and CK that SU2 was complaining to them that the claimant had been telling him that staff were bullying her and he did not think he should be involved. The claimant was also able to tell Ms Browning that she considered less weight should be given to SU2's evidence as opposed to her own given he was known for challenging behaviour and he had allegedly been abusive to the claimant in the past, for which he had been made to apologise. She said more detail would be in his care plan.

316. Ms Browning's oral evidence was that she weighed the claimant's arguments into account but in the end decided it was more likely that the claimant had led the conversation on the 12 September and it was inappropriate to do so. In part, this was because she found the claimant's account of returning to work and SU2 suddenly embarking on such a conversation, unsolicited, as being improbable. Whilst she acknowledged SU2's conditions she also took into account the consistency with which he was reporting to others what he said the claimant was saying to him and that he was upset and did not want to be involved. She considered there was an inherent consistency in his account. Ms Browning had to take the claimant's version of events into account, but she was not bound to prefer it. Ms Browning's conclusion on the information before her was in the range of reasonable responses open to her as was her viewpoint that this was not

the type of discussion that a member of staff should be having with a vulnerable service user and that SU2 had been pulled into a situation that was not in his interest and which upset him.

317. In relation to the interaction with SU2 on 25 September, Ms Browning had the written statements of HE and SB that they were called into the room by the claimant to witness either SU2 or the claimant saying (their accounts differ in who was talking) that SU2 had said that Ms Wilkinson had asked him to sign a letter on the Saturday night about bullying. HE said it was about the staff bullying the claimant. SB said it was about staff complaining the claimant was bullying them. The claimant was able to give Ms Browning her own account. Ms Browning also had as background what she was told by the claimant and others as to what had happened between the 12 September and 25 September. Ms Browning's view was that what was particularly inappropriate about the claimant's conduct that morning was bringing in the two carers as witnesses which she considered only served to increase SU2's distress and not temper it, that it was also not in SU2's best interests to do so, but was, in Ms Browning's view, used by the claimant as an opportunity to highlight what the claimant saw as poor practice by Ms Wilkinson. She considered that the claimant was using SU2 in a way that could be categorised as abusive. Her opinion was that there were other internal avenues the claimant could have ultilised. On the evidence before her such a conclusion was within the range of reasonable responses open to Ms Browning. Whilst the Tribunal itself considered that the claimant may have called the carers in as witnesses, in part at least, because of her own experiences in relation to SU1, and that the claimant had mixed motives for the actions she took, it does not mean that Ms Browning's different viewpoint on what the claimant was doing and why was outside the range of reasonable responses. The Tribunal accepts it was inside that range.

318. Turning to the elevation of an issue to external bodies, Ms Browning had before her HE and SB's statements. She had the out of hours form completed by SA. She had Ms Wilkinson's account of being called on the day by HE and SB. She had a limited extract from the daily narrative including the GP entry. She had Ms Wilkinson's account in her timeline about the follow up calls from safeguarding. She had the account that the claimant gave her. Ms Browning ultimately concluded that she considered the claimant had not called safeguarding/ had the conversation with SA for the benefit of SU2 but to further her personal grievances against the respondent. The Tribunal here, having heard all the evidence it did within the relative formality of employment tribunal proceedings, has found that the claimant acted with mixed motivations which included the welfare of SU2. We reached, in part, a different conclusion to Ms Browning. However, it does not mean that Ms Browning's different conclusions were outside the range of reasonable responses open to an employer. We find that her conclusion was within the reasonable range on the evidence before her; particularly in light of the form completed by SA. Again, as already stated, whilst she had to take the claimant's version of events into account, she was not bound to accept it. In light

of SA's report it was also within the range of reasonable responses for Ms Browning to conclude that the claimant had at times appeared incoherent and irate when challenged and that it was conduct that would, and indeed did, reflect poor on the respondent.

319. Turning to the position of the carers, Ms Browning had Ms Wilkinson's account in her timeline, stating that SB and HE had been unhappy about being asked to make statements by the claimant or to contact safeguarding. She has Ms Wilkinson's account that SB and HE had called her the morning of 25 September expressing concerns. Ms Browning was aware that SB and HE had declined to comment further other than that which was in their original statements. She had the claimant's account. Whilst the evidence from SB and HE was limited the Tribunal considers it was within the range of reasonable responses to conclude that it had been inappropriate to involve them in the way the claimant had and that it had caused them some stress.

320. In relation to the events of 30 September Ms Browning had Ms Young's interview notes and her notes from that day, Ms Wilkinson's timeline, and the interview notes with AC. She had the claimant's account which included that she had approached MK, in front of AC, to tell MK that she was not going to the meeting and wished to be allowed to go home early and that she had wanted to postpone the meeting so that a union representative could attend with her. She had the claimant's account of how she was feeling bullied and unwell. Ms Browning's view that that claimant had refused a reasonable management request to attend a meeting was within the range of reasonable responses. Ms Browning had before her information including that the claimant knew that SU2 had started to refuse her delivering his care, she had been told there needed to be a discussion about him, amongst other things and that the request to attend was a reasonable management request. She had the account from AC that he could not recall witnessing anything inappropriate.

321. Looking at the allegation that the claimant left the shift without speaking to a senior member of staff, Ms Browning had before her the claimant's account that she had, in effect, sought permission from MK, in the presence of AC. Ms Browning failed to appreciate that MK was in a senior position to the claimant, believing that she was a colleague. In the Tribunal's view it would have been sensible for the position to have been checked with MK, even if the investigating officer had not already done so. However, it was also within the range of reasonable responses to form the view that the claimant should have in any event told Ms Wilkinson personally given that Ms Wilkinson was waiting for the claimant. Ms Browning describes this as serious because service users could be left in a vulnerable position with one staff member being down on shift. The claimant's view is that she was supernumerary as she was supposed to be in a meeting and AC was an additional nurse on shift and that she had cleared cover with MK and AC before leaving. The Tribunal considers that more weight could have been given to that analysis but that it was within the range of reasonable responses to

consider that leaving the workplace early could have jeopardised the wellbeing of SU2 (in not resolving how his care would be handled) and it would not be good practice to have a situation in general where staff were leaving work early without the service manager being aware.

Reasonable investigation / procedural fairness

322. Turning to the reasonableness of the investigation and the disciplinary process the Tribunal notes that the record of SJ's interview with SU2 was lost. He was a key individual, and a vulnerable person who would be difficult to re-interview. Any reasonable employer would have taken steps to preserve whatever SU2 had to say and to disclose it in the disciplinary process. It will now never be known what it is he said. Likewise Ms Wilkinson's disciplinary investigation interview with SJ was lost.

323. The Tribunal also considers that the disciplinary process was subject to unreasonable delay. After the claimant's investigatory interview on 7 November 2016 nothing substantive happened until April 2017, a delay of 5 months. Whilst the claimant had given SJ her second grievance on 7 November it is not the case that the grievance was being investigated in that period. The grievance investigation did not start until the April. There is no evidence of any dialogue with the claimant about the handling of the grievance and the disciplinary investigation and whether the latter should be put on hold. It is not until 29 March 2017 that MW in HR advised that they should be investigated together but two separate reports produced. Yet, it was always known that the claimant was bringing a grievance that would be investigated alongside the disciplinary investigation as GM told the claimant on 30 September 2016 that her grievances would be passed to SJ to handle. When matters were picked up again in the April, by which time everything should have been done to expedite it, the short investigatory interview with AC did not take place until 26 June 2017 and whilst the investigation report was finalised on 28 June the outcome letter was not produced until 20 July.

324. Whilst appreciating that the claimant did then pursue a grievance outcome appeal, there was again no dialogue with her about the impact on the disciplinary case. The Acas Code says that it can be appropriate for proceedings to run in tandem. It was not necessarily in the claimant's interests to have the processes take so long when at the same time she had the NMC proceedings relating to SU1 hanging over her. The Tribunal is not satisfied that the conclusion of the disciplinary investigation report was reasonably expedited. Whatever the respondent's position was with SJ he was their employee and the allocated investigatory officer whose actions or inactions they are responsible for. Notwithstanding the grievance appeal the Tribunal is satisfied that any reasonable employer would have had the disciplinary investigatory report finalised, even if in draft form, at an earlier stage. Indeed it is likely doing so would have avoided evidence being lost.

325. Whilst it is said there was no prejudice to the claimant in any delay as she was able to fully give her account to Ms Browning, the case law makes clear that is not the touchstone of unfairness. Further, as already stated, what SU2 in fact said will always been unknown. The delay also flies in the face of the correspondence sent to the claimant when she was suspended about the expediency of the investigation, the ACAS Code of Practice and the respondent's own disciplinary policy which talks of a prompt investigation usually expected to last not more than 15 working days (with the capacity to appoint an external consulted if timescales cannot be met). The Tribunal's concerns about the delay in this case are compounded by the lack of any evidence of the claimant's suspension being reviewed, which is again contrary to the ACAS Code of Practice. There seems absent in this case any overarching consideration of the claimant who remained the respondent's employee and who, it was acutely known to the respondent also had hanging over her the NMC case relating to SU1 which she had been cleared of in the respondent's own disciplinary process, and who (again known to the respondent) had been subject to an extended suspension and investigatory process that first time around in respect of which the claimant's first grievance had been upheld. The claimant's situation was out of the ordinary and any reasonable employer would have better monitored and expedited the whole process. Notwithstanding the issues with SJ this is an employer who had reasonable resources available to it.

326. The Tribunal also considers that any reasonable employer would have sent the claimant her notes from her disciplinary interview with SJ for checking and comment. Not the least because SJ told her it would be done. Whilst noting that Ms Browning gave the claimant the opportunity to give her account and did not reach her decision until the full interview note had been obtained, the Tribunal considers that any reasonable employer would have sent the claimant the record promptly for checking and return. These were serious allegations levelled against the claimant. She was deprived of the opportunity to have her account fully considered once the investigation was concluded and a decision made to take her to a formal disciplinary hearing. A reasonable employer would also have ensured the claimant had her full interview note and not just the 1 page she was sent prior to the disciplinary hearing.

327. The Tribunal also considers that Ms Browning should have let the claimant submit her email of 17 September [316]. Ms Browning conceded in evidence that she probably did not read it at the disciplinary because BB told her it was not relevant as it related to the claimant's grievance. However, whilst it was headed "complaint against bullying" it did actually set out what the claimant was saying happened between 12 and 17 September in relation to SU2. The claimant ended up having little time to

prepare for the disciplinary hearing (1 week) compared to the length of time the respondent had to prepare and she was doing so a year after the events in question. A reasonable employer would have allowed the claimant to submit the email and to take it into account.

328. The Tribunal was also troubled about the failure to retrieve all of the entries relevant to the events with SU2 from his records. There was only an extract from the daily narrative. It has not been possible to isolate in evidence how or why the narrative extract was limited in the way it was. The Tribunal considers that a reasonable employer would have located and disclosed all of the relevant entries that related to the sequence of events with SU2.

329. The Tribunal also considers that it would have been reasonable for the respondent to have asked MK about whether the claimant had her authority to leave work early on 30 September. It would also have been sensible to have kept a documented trail of the enquiries that AB undertook after the disciplinary hearing before deciding to dismiss. The Tribunal does not consider that the other requests for documents and witnesses that the claimant made were unreasonably refused by the respondent based on what the claimant had told them (or not told them) about why she considered them relevant.

330. The Tribunal does also weigh into the equation that they were satisfied that Ms Browning in general allowed the claimant to give her account and that Ms Browning and Mr Clubb at appeal stage came to the matter afresh and considered it independently. The claimant was given the right of appeal.

331. Ultimately, the assessment for the Tribunal is to consider the matter in the round under section 98(4) and to consider whether the claimant's dismissal is fair or unfair having regard to the reason shown by the respondent, depending on whether in the circumstances (including the size and administrative resources of the respondent) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant. That must be determined in accordance with the equity and substantial merits of the case whilst reminding ourselves that it is not our role to stand in the shoes of the employer and of the need to apply the range of reasonable responses test. The Tribunal here ultimately finds that the respondent's handling of the disciplinary process, particularly with regard to the losing of evidence, not permitting all of the claimant's evidence, compounded by delay and viewed in light of the respondent's size and resources means that the respondent acted outside the range of reasonable responses in treating the reason as a sufficient reason for dismissing the claimant. The ordinary unfair dismissal claim therefore succeeds.

332. It will be a matter for the remedy hearing to assess the questions, of whether there should be any adjustment to any award to the claimant to reflect any prospect of the claimant having been dismissed in any event if a fair procedure were followed (often referred to as Polkey because that is the name of the case where the principle comes from) and any adjustment, if relevant, for contributory fault.

Royal Mail Group v Jhuti [2019] UKSC 55

333. For completeness, the Tribunal records that it was aware of the above Supreme Court decision that addressed the scenario that can arise in some cases where a dismissing officer genuinely dismisses an employee acting in good faith on the evidence they are presented with, unknowing that the disciplinary case is bogus because of the actions of a line manager in manipulating evidence, for example, because of a protected disclosure. The Supreme Court accepted that in such a scenario in an unfair dismissal case the state of mind of the line manager can be attributed to the employer. The Supreme Court also commented that such a situation will be rare as ordinarily a Tribunal need only look at the reasons given by the decision maker. This is because usually the employee will have raised what they consider is truly happening and the decision maker will have addressed all the rival contentions of what has prompted the employer to seek to dismiss.

334. The Tribunal in this case did not consider it established that Ms Wilkinson or Ms Young or SJ or anyone else had deliberately manipulated the evidence in this case to mislead Ms Browning whether in response to the claimant's protected disclosure or for any other reason. Ms Wilkinson's concerns were genuinely held and the claimant genuinely put through the disciplinary investigation and hearing process.

Conclusion

335. The claimant's complaints of direct race discrimination, victimisation, protected disclosure detriment and "automatic" unfair dismissal because of making a protected disclosure are not well founded and are dismissed. The claimant's complaint of "ordinary" unfair dismissal succeeds and will proceed to a remedy hearing.

Employment Judge Harfield

23 September 2020

JUDGMENT SENT TO THE PARTIES
ON
23 September 2020

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS