EMPLOYMENT TRIBUNALS

Claimant: Miss L Duggan

Respondent: Beechdale Care Limited

Heard at: Nottingham **On:** 29th July 30th July 2020 and 25th and 26th August 2020

Before: Employment Judge Rachel Broughton (sitting alone)

Representatives

Claimant: In Person
Respondent: Mr Self - Counsel

RESERVED JUDGMENT

- The Judgement of the Tribunal is that;

  (1) The Claimant's claim of unfair dismissal under section 94 and 98 of the Employment Rights Act 1996 is well founded and succeeds.

  (2) The Claimant's claim of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 is dismissed.

  (3)The Claimant's unlawful deduction from wages claim under section 13 of the Employment Rights Act 1996 is dismissed on withdrawal

- The claim will be listed for a hearing to determine remedy and the Respondent's application for costs.

REASONS

The Claim

1. The Claimant was employed from 2012 by the Respondent to work at Beechdale Manor Care Home, hereafter referred to as the Home, as a care assistant. The Claimant reported into the senior care assistant, Ms Grainger.

2. It is not in dispute between the parties that on the morning of the 19 March 2019 two residents whose rooms were on the ground floor of the Home, had not been given their breakfast.

3. Following a disciplinary process, which commenced on 20 March 2019 with the suspension of the Claimant, the Respondent terminated the Claimant's employment without notice on 27 March 2019 on the grounds of conduct. It was alleged that she had deliberately neglected, two residents and as such committed

an act of gross misconduct. The registered manager's view that the action was deliberate was based on his belief that she had done this to 'make a point' about understaffing reinforced by the evidence of her fellow care assistant, Mr Reap who asserted during the disciplinary investigation that he had offered to help feed the residents but this help had been refused by the Claimant.

4. The Claimant's case is that she was not solely responsible for the failure to ensure the two residents had their breakfast, that the ground floor was understaffed on the morning in question and that she was dismissed unfairly in those circumstances and/or because she had made protected disclosures about understaffing at the Home.

5. The Claimant issued proceedings against the Respondent for unfair dismissal pursuant to section 94 and 98 Employment Rights Act 1996 and automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996.

The Background to the Hearing

6. It is necessary to set out in this judgement the circumstances leading up to the final hearing in August 2020 because the Respondent has made an application for costs which we did not have time to deal with at the hearing. The background and the circumstances in which the hearing in July were adjourned, are relevant to the grounds of that application.

7. The claim was originally listed for a two-day hearing to commence on 23 March 2020. Because of the Covid19 pandemic and considering the Presidential Guidance on the Conduct of Employment Tribunal proceedings during the pandemic, the hearing was converted to a preliminary hearing for case management purposes. The case became before me at that preliminary hearing on 23 March. During the preliminary hearing I discussed with the parties the options available to them which included conducting the hearing remotely via a could video platform (CVP).

8. The Claimant elected to proceed with a hearing via CVP and confirmed that she was able to arrange the technology to enable her to do so, it having been explained to her what was required. The Claimant explained that she would no longer be calling witnesses and therefore would only need to make arrangements to give her own evidence remotely. The Respondent also agreed to a hearing via CVP. The case management orders included that that the Respondent would file the joint bundle electronically.

29th July CVP Hearing

Initial Discussion of the Issues

9. During the course of the first morning of the hearing I went through the issues in the case with the parties. The Claimant explained that her unlawful deduction from wages claim had been resolved, she was satisfied now that she had received the correct payment and was withdrawing that part of her claim.

10. With regards to the automatic unfair dismissal claim, the Claimant confirmed that there are two alleged protected disclosures; the first being a collective letter (Collective Letter) that was left for the Registered manager of the Home. The Claimant had given the date of the Collective Letter as early March 2019 at a preliminary hearing before Employment Judge Jeram on 19 November 2019.

11. The second alleged protected disclosure is a verbal disclosure made on 19 March 2020. The Claimant's witness statement alleged that she had said to the registered

manager on the 19 March 2020 that the staffing levels were "*not safe*". Mr Self conceded that at the hearing, that if the Tribunal were to find that that the Claimant had used the wording "*unsafe*", the Respondent accepts that it would have been reasonable to believe that the disclosure was in the public interest. It is not accepted by the Respondent however that this word was used.

12. Mr Self informed the Tribunal that he understood that the Claimant was alleging that the alleged disclosures tended to show that the health and safety of the residents had been, was being or was likely to be endangered and/or breach of a legal obligation and that the Respondent accepted that in the circumstances of this case; "*it does not make much difference*" whether the Tribunal find the alleged disclosure amounts to a disclosure regarding health and safety or breach of a legal obligation, because it amounts to the "*same thing"* i.e. the Respondent's obligation toward the welfare of residents at the Home, which he confirmed the Respondent accepts is a public interest matter.

Documents

13. The Claimant had sent into the Employment Tribunal additional documents by email on 27 July 2020 namely office rotas. Mr Self had seen those documents and raised no objection to those being included within the joint bundle.

14. The Claimant then produced remotely, a further bundle of documents which she informed the Tribunal she wanted to rely upon but which were not in the joint bundle which had been filed with the Tribunal. The Claimant explained that this was a bundle of documents that she had produced at the attended preliminary hearing on 19 November 2019 and had assumed that the Tribunal would have retained the documents. The Claimant had also not sent a copy of the documents to the Respondent. The Claimant explained that she intended to refer to the documents when cross examining the Respondent's witnesses who were due to give their evidence on the first day of the hearing. The Claimant described the contents of the additional bundle and on the face of it they appeared to be relevant. They mainly consisted of the Respondent's rotas and job allocation sheets. Mr Self requested that the hearing be adjourned off until the following day to give him sufficient time to review the documents once the Claimant had provided copies and taken instructions from his witnesses. The Claimant confirmed the number of questions she had prepared for each witness, and Mr Self was of the view that all the evidence should be capable of being heard in the one remaining day.

15. The Claimant also mentioned that she wanted to include within the bundle a copy of a WhatsApp message from one of the individuals who provided a statement during the disciplinary hearing, who alleges in the message that the signature on his/her witness statement had been forged. Mr Self objected to further late disclosure not least because he complained this raised such a fundamental and serious issue, alleging that the Respondent had potentially attempted to pervert the course of justice. I heard representations from both parties. Taking into consideration the lateness of the disclosure, the problems of establishing the provenance of any such WhatsApp message and the evidential weight which therefore could be attached to it, I was not persuaded that it was in the interests of the overriding objective to allow in this piece of evidence at this stage. I took into consideration the requirement to put the parties on an equal footing and I explained to the Claimant that if the individual in question was prepared to give evidence on oath that her signature had been forged and appear as a witness on the second day to be cross examined by the Respondent, the Claimant could make an application for her evidence to be admitted and I would hear that application. In the event the Claimant did not make an application to call this

individual as a witness and no further application was made to admit the documents into evidence.

Adjournment

16. We then adjourned the hearing at about 11 am until the following morning. The Claimant agreed to email over direct to the Respondent and the Tribunal the additional documents. She was ordered to paginate the documents from page 144 onwards. I prepared and sent to the parties by email that afternoon, a written document setting out the issues as identified and agreed during the hearing, to allow the Claimant time to reflect on them in readiness for the second day.

17. The Claimant did not send the additional documents across to the Employment Tribunal until approximately 3pm on the 29th July. The Claimant complained that she was struggling to convert the documents into a PDF format. Most of the documents received were illegible.

18. If this had been an attended hearing, the problem with this additional disclosure could have been overcome easily and relatively quickly by copying the documents. The documents were in the main documents which were created by the Respondent (rotas, job allocation sheets and offer of employment letter) or documents they had seen such as character references she had brought with her to the disciplinary appeal hearing. There were a few additional documents relevant to mitigation and a WhatsApp message one of the Respondent's witnesses, Mr Reap had sent to the Claimant post dismissal. The nature of the late disclosure therefore did not in itself present any particular problems for the Respondent.

30th July hearing

19. At the reconvened hearing on the 30 July, Mr Self complained that the documents he had received from the Claimant were illegible however he was keen to take a 'pragmatic' view and proceed with the hearing. Many of the documents the Tribunal had received were likewise of poor quality and difficult to read.

20. Some time was spent trying to ascertain to what degree the content of documents which were illegible, were in dispute and which were duplicates of other documents which had been emailed to the Employment Tribunal on the 27th July. This was a challenging exercise to carry out remotely given the nature of the documents (i.e. various versions of rotas) however, it was agreed to attempt to proceed with the hearing and assess to what degree the illegible documents were to be relied upon.

Further Adjournment

21. The audio from the Claimant's computer was however poor, such that I had to frequently require her to repeat her questions during cross examination of the Respondent's first witness, Mr Kay-Warner. The Claimant at one point left the hearing and re-joined however, the audio continued to be problematic. The Claimant also attempted to cross examine Mr Kay-Warner with reference to some of the documents which were illegible and the content of which he disputed. I was increasingly concerned that a fair trial was not possible and that if we proceeded this may well severely prejudice the Claimant's case. The alternative was to adjourn and re-list the case for an attended hearing.

22. The problems were therefore twofold; poor audio and poor copies of some of the additional documents. Mr Self made the observation that in the course of 40 minutes the Claimant had only been able to ask 4 questions because of the need to repeat questions due to the sound quality. Mr Self commented that my observations regarding a fair trial were quite 'properly and fairly' made and that his

instructions were that an adjournment would not be opposed in the circumstances but that the Respondent would make an application for costs "*due to late disclosure"* in the sum of £3,900.

23. The Claimant requested a short adjournment in which to take advice. We duly adjourned following which the Claimant confirmed that she had taken advice and wanted to request an adjournment.

24. The case was adjourned and relisted for an attended hearing. Case management orders made by agreement which included that the Claimant serve a supplemental witness statement to set out her evidence in respect of the Collective Letter, which she had not addressed within her witness statement. Mr Self raised no objection to the Claimant serving a supplemental statement, and confirmed that as the Respondent's case was simply that the registered manager had not received the Collective Letter, it did not require leave to file any further witness statements.

25. The list of issues I had set out in writing were agreed by the Respondent. A further copy of the list of issues was attached with the Order setting out the case management orders for the relisted hearing and the Claimant was ordered to provide any comments on the list by 6 August 2020. No comments were received. The Claimant confirmed at the reconvened hearing that the issues were agreed and they are as set out below.

Reconvened Hearing: 25th and 26th August 2020

26. On the morning of the first day of the reconvened hearing the Claimant made an application to call two further witnesses to give evidence. The witnesses were in attendance at the hearing. Witness statements had been prepared for these witnesses and had been served on the Respondent on the morning of Friday 21 August 2020. The evidence of these witnesses was relevant to the issues and Mr Self accepted that he was in a position to deal with their evidence. The Claimant complained that she would be prejudiced if she could not introduce their evidence. Taking into account the relative prejudice that may be caused to the parties in accepting or refusing the application and the need to putting the parties on an equal footing, I determined that it was in the interests of the overriding objective to allow the Claimant to call the witnesses.

Evidence

27. I heard evidence first from the Respondent's witnesses; Mr Richard Brian James Kay - Warner, Registered manager at the Home, Mr Paul Reap, a Case assistant and Mr Jagdeep Singh Khatkar, a Director and Shareholder of the Respondent. The witnesses were cross examined by the Claimant.

28. On the second day of the hearing, I heard evidence from the Claimant and from her witness Mrs Shannon Norman. Mrs Tina Brady her second witness did not in the event attend the hearing on the second day due to a family matter. The Claimant was advised that her options were to apply for an adjournment to allow Ms Brady to attend to give evidence or proceed and apply for her statement to be submitted into evidence although less weight would be attached to it. The Claimant did not want a further adjournment and asked that the statement be submitted. Mr Self was invited but did not wish to make any representations and the application was granted.

29. In addition to the witness evidence, I also had regard to the documents in the bundle and the oral submissions of both parties. Mr Self also set his out submissions in writing. There was insufficient time to deal with remedy or the cost application as we did not finish the hearing until late on the second day. This

judgement is concerned therefore with issues of liability only.

Issues

The issues between the parties to be determined by the Tribunal were agreed to be as follows:

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

Respondent relies on conduct.

(ii) Did the Respondent genuinely believe that the Claimant had committed the act of misconduct relied upon?

(iii) Did the Respondent have in mind reasonable grounds upon which to sustain that belief at the time?

(iv) At the stage at which that belief was formed on those grounds, had the Respondent carried out as much investigation into the matter as was reasonable in all the circumstances?

(v) Was the dismissal fair or unfair in accordance with ERA section 98 (4) and in particular did the Respondent in all respects act within the so-called band of reasonable responses?

Remedy for unfair dismissal

(vi) If the Claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;

b. would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Public interest disclosure (PID)

(vii) Did the Claimant make one or more protected disclosures (ERA sections 43B (b) and/or (d);

a. Collective letter: left for Mr Kay– Warner in early March 2019.
b. The conversation with Mr Kay-- Warner on 19 March 2019

(viii) Was either disclosure a disclosure of information? (not just an allegation but conveying facts: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 352 EAT

a. Respondent does not accept any disclosure made
b. Respondent accepts that to tell someone there is 'insufficient' staff is a disclosure of information

(ix) Was the disclosure to the employer under section 43C Employment Rights Act 1996;

a. Respondent does not accept the letter was received
b. The Respondent accepts that the verbal disclosure was to the employer in accordance with section 43C.

(x) Was the information in the reasonable belief of the Claimant when making the disclosure, tending to show one of more types of wrongdoing;

That the health and safety of any individual has been, is being or is likely to be endangered.

That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

a. Respondent does not accept letter was received
b. Respondent does not accept Claimant held a reasonable belief

(xi) If so was the information in the reasonable belief of the Claimant in the public interest?

The Respondent accepts that if the Employment Tribunal find as a fact that the Claimant's disclosure/s included that the residents were 'unsafe' that it would be objectively reasonable to believe that this was in the public interest.

(xii) What was the principal reason the Claimant was dismissed and was it that s/he had made a protected disclosure?

Unauthorised deductions: section 13 Employment Rights Act 1996

(xiii) The Claimant's claim for an underpayment of 10 days' pay is withdrawn (the Claimant accepts there was no underpayment)

Findings of Fact

30. The Respondent operates the Home, which is registered with the Care Quality Commission (CQC), providing residential and nursing care for the elderly.

31. Mr Richard Kay -Warner was the registered manager at the relevant time and remains the registered manager as at the date of this hearing.

Terms of Employment

32. The terms of the Claimant's employment are set out in a contract of employment signed by the Claimant on 11th September 2012, a Staff Handbook, offer letter, application form and the job description which she also signed 11 September 2012. The job description (35) includes the following description of her role;

"*To assist in the provision of care and work **as part of the team** to achieve required standards. To ensure Service Users retain their dignity and individuality. To be involved in the general activities of the Care Centre. To maintain a safe and secure environment for Service Users, Staff Members and Visitors." [my stress]*

Background of the Home

33. The Home was purchased by the Respondent in January 2018. It is agreed between the parties that there was transfer of staff pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 ('TUPE'). The previous owner of the home was a company called Bondcare (Nottingham) Ltd, (Bondcare). Mr Richard Kay-Warner worked for Bondcare at the Home from October 2017 as a peripatetic manager. When the Home was taken over by the Respondent he was appointed into the role of its registered manager.

34. The immediate history behind the running of the Home is of some relevance. It is not in dispute that there had been issues with how the Home had been run by Bondcare and because of that, it had been under an 'embargo' for 18 months prior to purchase by the Respondent. The 'embargo' meant that no new local authority funded residents were to be placed within the Home.

35. It is not in dispute that the Home is registered to take 65 occupants. There had been, I accept prior to acquisition by the Respondent, due to the embargo, significantly less residents than the Home was registered to have.

36. The Respondent's evidence which was not disputed by the Claimant, is that although the Home was under occupied, Bondcare had decided not to reduce its staffing numbers out of concern that this may give the Local Authority more cause for concern and result in it having to close the Home before it was able to arrange a sale.

37. Although the Claimant referred to a report from the CQC (p.156) referring to 34 residents as at 9 August 2017 the Claimant did not dispute Mr Kay-Warner's evidence during cross examination, that this fell to 24 residents 6 months after this inspection. I therefore accept the evidence of Mr Richard Kay-Warner that there were 24 residents immediately prior to purchase by the Respondent. It was therefore significantly below its potential occupancy at that time.

Management Structure

38. The management structure of the Home, is that the registered manager reports into a director, Mr Khatkar. The undisputed evidence of Mr Khatkar is that at the time of the Claimant's dismissal, he and his wife were the only directors of the Home but that his wife played no active part in the running of the Home. There are

also; 4 nurses who report directly into the registered manager, a clinical lead (who is also a qualified nurse) and in charge of the clinical side, the team leader who overseas care and support, senior care assistants and care assistants.

Concerns by staff

39. It is not in dispute that following the Respondent's acquisition of the Home, the embargo was lifted and new residents joined the Home. There is a dispute over whether the staffing levels remained sufficient as the number of residents increased.

40. The Respondent's position is that there was adequate staffing but that staff at the Home including the Claimant, had become use to staffing ratios which were "*excessive*".

41. It is not in dispute that concerns were raised by staff about understaffing. Indeed, it was Mr Kay-Warner's evidence that he had several meetings and discussions with individuals including the Claimant, from the beginning of 2018 onwards. He did not allege that those concerns were mischievous or disingenuous. His evidence was that; "*whilst some of those staff accepted the position, a couple, including Miss Duggan, had difficulty in understanding the requirements and were of the view that following such requirements was not sufficient and the staffing rations should not have changed*…"

42. Mr Kay- Warner did not allege that these concerns, which continued to be raised by some of the staff (including the Claimant) post transfer, were not genuine, rather he referred them arising from 'a lack of understanding'.

43. I find therefore a balance of probabilities, on the evidence that these were genuine concerns, although this is of course not the same as a finding that they were reasonably held.

Staffing Levels

44. During the cross examination of Mr Kay-Warner, the Claimant referred to rotas for October to November 2017 (p.151) and November to December 2017 (p.149) which showed a total number of staff working on each shift (early and late shift) of 6 per shift; this was prior to the Respondent taking over the Home and prior to the lifting of the embargo, when according to the evidence of the Respondent the staffing levels were 1: 2.4. (i.e. one member of staff per 2.4 residents).

45. The Claimant then referred to a rota dated 6 August 2018 (p.152) which still showed 6 staff on duty, this included 3care assistants, 1 registered nurse and 2 senior care assistants. Mr Kay-Warner accepted that the rota showed 6 staff on duty that day, to cover two floors (ground and first floor). It was put to Mr Kay-Warner that the rota showed that staffing levels had not increased despite the evidence in his witness statement that there had been additional recruitment and despite more residents being admitted into the Home post embargo.

46. The evidence of Mr Kay-Warner was that following the Respondent's purchase of the Home there had been some additional recruitment however he accepted that the number of staff to resident ratios did increase however he maintained that he used a dependency tool to ensure the ratios remained sufficient.

47. The evidence of Mr Kay-Warner was that the staffing ratios met regulatory requirements. The Respondent did not produce any document that set out what the regulatory requirements were. His evidence was that the CQC do not provide set guidance on the ratios or on the tools to be used to decide the ratio, however

his undisputed evidence was that he used a dependency tool (a computer algorithm) and his own personal observations to determine whether staffing levels were sufficient in the Home at any given time. The undisputed evidence of Mr Kay-Warner was that the dependency tool works out each resident's personal care needs on a scale of low to high and works out a provision for safe staffing levels.

48. Mr Kay-Warner's evidence which was not disputed, is that he carried out a calculation of the number of staff required where; there were new admissions, a change in residents needs or otherwise on a monthly basis. His evidence was that in terms of his observations, he would personally check that resident's needs were met, the Home was calm and relaxed and staff were not "*running around*".

49. Mr Kay- Warner also gave evidence that If additional staff were needed the Home would call on agency staff however, when put to him, Mr Kay-Warner was unable to comment on whether or not the Home was using agency staff in August 2018. The Respondent had not disclosed any agency staff rotas or other documents to evidence that the staffing numbers at any particular time were increased by agency staff. Although Mr Kay- Warner's evidence was that the relevant documents were available albeit archived, The documents were not disclosed for the purposes of these proceedings.

50. Mr Kay-Warner was taken to another rota for February to March 2019. Mr Kay-Warner confirmed that the rota showed 5 care assistants on duty on 18th March and that for the days shown, 18th to the 24th, the rota shows between four and five care assistants on duty on each early and late shift (p.153). There were also 2 senior care assistants shown on the rota. Mr Kay-Warner did not dispute that the ground floor was at the time fully occupied. There were varying references to the ground floor being fully occupied when it had 19 or 18 residents however, I do not consider it is material to the issues in the case whether there were 18 or 19 residents however the floor allocation sheets record 19 rooms.

Role of nurses and senior care assistants

51. The Claimant's undisputed evidence is that the ground and the first-floor allocation sheets (which show allocated duties) are put with the main rota outside Mr Kay-Warner's office. The allocation sheets record the allocated duties. Mr Kay-Warner did not dispute that the allocation sheets he was taken to in the bundle for the 19 March recorded the carer assistants as allocated to the ground floor during that day shift but not the senior carer assistant. However, Mr Kay-Warner's evidence was that the senior care assistants are not 'supernumerary' and that the senior care assistant is included within the number of staff looking after the residents on the ground floor and that even where they are responsible for giving out the medication, they are still working on the floor along with the nurse, the team leader and the clinical lead and that they are "*responsible as a team*" for the care of the residents.

52. The nurses have their own rota as do the domestic and kitchen staff. Mr Kay-Warner's evidence was that the nurse on duty works wherever they are needed within the Home but that the "*majority of the time*" the nurse is based on the ground floor, 9the floor where the Claimant was working on the 19 March 20190. The Claimant put it to Mr Kay-Warner that the nurse on duty is actually based on the first floor where the residents with dementia are located. Further, it was put to Mr Kay- Warner that the senior carers cannot be classed as working alongside the care assistants because they do not have time to assist the care assistants because they have to give out medication. Mr Kay-Warner however disputed this, he alleged that it part of their job description to help with the care of residents and that in practice it is "*achievable*" for them to assist the care assistants.

53. Ms Norman who it is not in dispute, worked as a senior care assistant for the Respondent for nearly ten years, gave evidence that senior care assistants are counted in the numbers of staff, but that in practice they are too busy with other duties including administering medication, to assist the care assistants.

54. The Respondent did not call any senior care assistants or nurses to give evidence other than Mr Reap. Mr Reap however did not give evidence on behalf of the Respondent regarding the extent to which nurses and senior care assistants are able to assist care assistants on a day to day basis with the care of residents.

55. The Claimant asserts that Ms Cheryl McLaughlin, a senior care assistant who accompanied her to the disciplinary hearing on 27 March 2019, gave evidence at the disciplinary hearing that when nurses are on duty they are not based on the ground floor but on the first floor and that senior care assistants do not have time to assist the care assistants. The minutes of the disciplinary meeting include no record of such a comment made by Ms McLaughlin. The immediate response of Mr Kay-Warner when it was put to him in cross examination that the Respondent had failed to record what Ms McLaughlin had said in that meeting, was that Ms McLaughlin was; "*there to support you but not answer for you*". Mr Kay-Warner did not directly deny that Ms McLaughlin had made these comments at that meeting. He gave evidence however that the minutes of that meeting were *"correct".*

56. Mr Kay-Warner failed before this Employment Tribunal to provide a satisfactory explanation for not recording important comments made by the Claimant's companion at the disciplinary hearing. Those comments were supportive of the Claimant's evidence about how much support in practice the senior carers could provide to the care assistants.

57. Given Mr Kay-Warner's equivocal responses and the unsatisfactory explanation for failing to record all of Ms McLaughlin's comments, I find on a balance of probabilities that Ms McLaughlin had made these comments at the meeting. I also found Ms Norman to be an honest and reliable witness and I find on the balance of probabilities, that it is indeed the case that the nurse is based on the first floor with the residents who have dementia and that the senior care assistants are limited in practice in the support they could provide to the care assistants.

58. Mr Kay-Warner gave evidence that he carried out daily personal observations of the Home to help assess staffing levels. He had been working at the Home since 2017. I find on a balance of probabilities therefore, that Mr Kay-Warner knew what was happening in practice in the Home and this is why he did not investigate what Ms McLaughlin had said at the disciplinary meeting and that her comments were not included in the typed record of the disciplinary hearing because it was not supportive of the decision dismiss the Claimant.

59. Mr Kay-Warner's dependency tool may well have shown that x number of staff were required, but it must be right that it is how those staff are organised and operate in practice which determines whether residents are receiving appropriate levels of care.

60. Mrs Brady who provided a witness statement but was not able to give evidence under oath, was employed by the Home as a care worker for nearly 5 years, she refers in her statement to some nights there being only one carer on a floor however the Claimant gave no evidence about a single care assistant being on duty and did not reference any rotas to support that allegation. I therefore do not find on the evidence on a balance of probabilities, that there were nights with only one carer on a floor. I did not consider her evidence to be material to the issues in the case.

Disclosure 1: Collective Letter

61. The Claimant's case is that on the 18th February 2019, she was working with Ms Shannon Norman, Mr Paul Reap and the nurse in charge, Ms Michelle Meggitt. A resident required medical assistance and was attended to by Ms Norman. The nurse was required to give out the morning medication and was required on the first floor to attend to the residents with dementia. This left the Claimant and Mr Reap to attend to all the residents on the ground floor. There were between 18 to 21 residents on the ground floor (some having come down from the first floor for the day). The Claimant, Mr Reap, Ms Norman and Ms Meggitt believed it was unsafe for residents to have only 2 staff attend to them and they wrote a letter which was put under Mr Kay-Warner's office door.

62. The evidence of Ms Norman was that she personally put the letter under Mr Kay-Warner's door. The Claimant's evidence was that she was present and saw that it was put under the door although her witness statement does not specifically deal with who posted the letter and who witnessed this. It is not in dispute that Mr Kay-Warner shares this office with only one other person, an administrative assistant, Ms Lindsay Lowe. The evidence of Mr Khatkar which was not disputed, is that he also has a key to this office.

63. The Claimant's evidence is that the letter referred to her and her colleagues, believing it was "*unsafe"* for residents with only two staff on duty. The Claimant alleged that the letter was about the events of the 18th February 2019 and also a general complaint about understaffing. The Claimant did not set out in her evidence in chief exactly what else was stated in the letter. In cross examination, the Claimant's evidence was that the letter stated that; "we *were understaffed, unsafe and not enough staff for residents on the ground floor".*

64. The Claimant is recorded as having informed Employment Judge Jeram at the preliminary hearing on the 19 November 2019 that the letter was sent in early March 2019 however during cross examination, the Claimant alleged that what she had said at the case management hearing was not that the letter had been sent in early March but that she could not recollect the date but that it was a few days before her dismissal. The original claim form had not included any reference to the Collective Letter. I had recorded the March date in the list of issues which the Claimant had agreed. The date of the 18 February 2019 is the date given by Ms Norman in her witness statement.

65. Ms Norman gave evidence that she had been concerned that the care being provided on the 18 February 2019, due the number of staff, was of a poor standard. Ms Norman refers to this happening on most shifts. She alleged that the letter raised their concerns; that it was "***unsafe*** *the shifts are really busy and with only having two carers whilst I was helping the residents who needed medical attention left the care to be a poor standard due to residents needing both of them at the same time*" [sic]. Ms Norman's witness statement did not set out any further details of what was stated the Collective Letter. In cross examination Ms Norman referred to the letter being about a page to a page and a half in length. The closest she came to explaining further what was in it was that it; "*went into the incident on 18 February, about the residents and how I felt I couldn't help my carers - as a senior carer I felt I couldn't help, I couldn't be the extra help*".

66. Ms Norman's evidence was not wholly consistent with the Claimant's about what was stated in the letter, not only because neither of them could recall the full and exact wording of it but Ms Norman's recollection was that the letter referred only to the events of the 18th February whereas the Claimant alleged that it also raised more general concerns.

67. Although Ms Norman accepted that she had access to a photocopier she stated that she had not copied the letter. Her evidence was that she put the letter in an envelope and put it under Mr Kay-Warner's office door and wrote on the cover "*concern of manager"* at 8:10pm and then she returned to work.

68. Ms Norman did not follow up the letter by speaking to Mr Kay-Warner, her explanation for this is that he was not approachable and she felt it was for him to speak to them. She referred to being in lots of meetings with Mr Kay-Warner about staff and that he is "*not bothered"* and that his response is that he has "*not got time for it*". She referred under cross examination when questioned over her failure to take further action, despite believing residents to be at risk, to having raised concerns with CQC "*plenty of times*". She provided no further evidence about those complaints, however her evidence that she had made a number of concerns with the CQC was not challenged in cross examination.

69. Ms Norman presented as an honest witness who gave immediate and I find candid responses to questions, including when she could not recall precisely the wording of what was contained within the Collective Letter and when confirming that she had access to a photocopier but had not taken a photocopy of the letter.

70. Mr Kay-Warner denies ever receiving the letter.

71. The Respondent's witness, Mr Reap did not mention the letter in his witness statement. The Claimant who was unrepresented did not ask Mr Reap about the Collective Letter. Given the importance of this issue, I sought to clarify directly with Mr Reap what his evidence on this was. Mr Reap when asked about the Collective Letter and whether he had signed it, said only that he could not recall. I was not persuaded as to the probity of Mr Reap's evidence on this point. I was not convinced that Mr Reap would have no recollection of whether or not, only a short time prior to the Claimant being dismissed, he had co–signed a lengthy letter to the registered manager complaining that the Home was unsafe for residents.

72. I did not consider Mr Reap to be generally a satisfactory witness. His responses to most of the questions put to him in cross examination were brief,and he did not volunteer further elaboration. In respect of a number of questions relating to the events of 19 March 2019, he claimed a lack of recollection about matters put to him by the Claimant as accurate while his recollection was apparently much clearer when asked to recall events supportive of the Respondent's position although they took place during the same period of time. Mr Reap when asked by the Claimant how many residents required two carers to assist them on the ground floor, gave an answer which was not supportive of the Claimant's position but then contradicted his evidence in follow up cross examination by the Claimant (I deal with this further below).

73. I find on the balance of probabilities, taking into account all the evidence, including from the Claimant, Ms Norman and indeed Mr Reap's lack of an outright denial of their account of events, that the Collective Letter was prepared as described by the Claimant and Ms Norman. I also find on a balance of probabilities, that it referred to the situation in the Home being "*unsafe*" for residents due to understaffing. I also accept the evidence of the Claimant and Ms Norman that the Collective Letter it was put under Mr Kay-Warner's office door. The Claimant made no mention of the Collective Letter in her claim form, however, the Claimant was not legally represented when she prepared her claim form and she did not submit detailed particulars of claim. I find on a balance of probabilities that the Collective Letter was posted under Mr Kay-Warner's office door on the 18 February 2019. I do not consider however the exact date, whether it was February or early in March prior to the 19 March, to be material. I do not consider the Claimant's contradictory

evidence about the date the Collective Letter was sent, to be significant and certainly does not undermine the credibility of the evidence I heard about the content and other circumstances around the Collective Letter.

74. The Claimant's evidence was that she believed what was stated in the Collective Letter was in the public interest, because "*every resident would have been at risk".*

75. I also accept the evidence of the Claimant and Ms Norman regarding the events of the 18th February 2019, namely that there were only 2 carers to look after the residents on the ground floor and that they believed that this was unsafe. I heard no evidence from the Respondent on the staffing levels in the Home on the 18 February 2019. The Claimant and Ms Norman's account of how many staff were on duty was not challenged in cross examination.

76. I also accept the evidence of the Claimant and Ms Norman on a balance of probabilities, that the nurse on duty on 18 February 2019, Ms Leggitt had also signed the Collective Letter of concern.

77. I find on balance of probabilities, that the belief of the Claimant, Ms Norman who was a senior care assistant, the nurse on duty and Mr Reap was that the residents were "*unsafe*" due to insufficient staff to care for them, on the 18 February 2019. I accept the evidence of Ms Norman and the Claimant, that they genuinely believed this to be the case. I also find, taking into account my findings about the assistance that the senior care assistants and the nurse on duty were able to provide to the carers in practice and my findings that the Collective Letter was signed not just by the Claimant but a senior carer and a nurse, that on a balance of probabilities this belief was objectively a reasonable one for them to have held. I accept their evidence that there were not enough staff to look after those residents safely on the 18 February 2019.

78. Mr Kay-Warner denies having ever received the letter and thus the Respondent's position is that without knowledge, he cannot be found to have dismissed the Claimant because of any protected disclosure contained within it. If it was posted under his door, his evidence is that he did not receive it.

79. The Claimant's evidence and that of Ms Norman is that the letter was not handed to him and he never spoke to them about it. The Respondent does not dispute that the office is used by Mr Kay-Warner and Ms Lowe. Ms Norman's evidence which I accept, is that the envelope marked it for Mr Kay -Warner's attention. There is no direct evidence however that Mr Kay-Warner received it or indeed read it and his direct evidence is that he did not. I turn however to a comment that was made during the disciplinary hearing. Mr Kay-Warner's evidence was that the minutes of the meeting held with the Claimant on 27 March 2019, are accurate. The minutes (p.119) record the Claimant as stating;

"*Me and PR put a statement in weeks ago to say that 2 staff couldn't cope on the ground floor".*

80. There is no entry within the notes of the meeting of Mr Kay-Warner's response to this comment by the Claimant. The notes do not record him asking what statement the Claimant is referring to or denying that he had received any such statement. Mr Kay-Warner's evidence when asked about this entry, that he understood the reference to PR to be Paul Reap. When asked about this comment and what he understood it to be a reference to, his evidence was that he had not had a statement but presumed now that it referred to the Collective Letter but accepted that he had not asked what the Claimant was referring to at the time of the meeting.

81. The Respondent did not seek to call Ms Lowe to give evidence. Mr Kay-Warner

did not refer to any discussion he had had with Ms Lowe since becoming aware of the allegation that the Collective Letter had been left under his door, regarding whether she had seen it or not.

82. I infer from Mr Kay-Warner's failure to challenge or otherwise comment on the Claimant's reference to a statement being sent to him during the disciplinary hearing, that the most likely explanation for him not doing so, is because he already knew what the Claimant was referring to. No other explanation was put forward by Mr Kay-Warner.

83. I find on a balance of probabilities, that it is more likely than not, that the Collective Letter which I find was placed under Mr Kay-Warner's office door was received by him, whether he picked it up or it was handed over to him by Ms Lowe. I reach this finding based on the reference to the statement at the disciplinary hearing, Mr Kay-Warner's response to this being mentioned in the meeting and the fact that it is not in dispute that only Mr Kay- Warner and Ms Lowe used the office, (albeit Mr Khatkar also had a key but did not assert that he had received the letter). I find that there was no follow up to that letter by Mr Kay-Warner despite I accept the undisputed evidence of Ms Norman that it was a considerable letter running to a page or a page and a half and raising serious concerns from staff. I accept the evidence of Ms Norman and the Claimant on a balance of probabilities, that Mr Kay-Warner was not receptive to concerns raised about staffing numbers. Given the authors of the Collective Letter and the serious concerns raised it in, it would have been reasonable for him as the registered manager to have addressed those concerns directly with them. I also infer from the fact that a nurse and senior care have to resort to putting together a Collective Letter of concern and posting it under his office door, that they would not have done this had they felt that he would have been receptive to their concerns.

84. The Claimant however and indeed Ms Norman, do not complain that Mr Kay-Warner's behaviour toward them changed from the 18 February 2019. Ms Norman referred to Mr Kay-Warner as not "*being nice*" but she alleged that this was his normal behaviour and did not allege that he subjected her personally to any less favourable treatment due specifically to the Collective Letter.

85. Mr Reap also makes no such allegation about his treatment and he remains employed by the Respondent.

86. The Claimant in cross examination when it was put to her that she had not been subjected to any detrimental treatment from Mr Kay-Warner following the Collective Letter being put under his office door, accepted this but stated that "*he treats us all horribly*". She then during cross examination alleged that he had treated her differently from the first day she had raised concerns which was from the day the Respondent had taken over the Home and the embargo was lifted. She did not identify any specific treatment which was unfavourable nor had she identified this within her claim or within her evidence in chief nor had she put such claims to Mr Kay-Warner during his evidence. She then later commented that he had "*always been* awful *to me*" and accepted that there was no evidence that the Collective Letter had made any difference to his treatment of her.

Events of 19 March 2019

87. I now turn to the events of the 19 March 2019.

88. The Claimant referred Mr Kay-Warner to a staff rota covering the period from 18 March to the 14th April 2019 to (146). The Claimant was suspended on 20 March 2019.

89. The rota clearly shows 5 care assistants on shift from 18 March and then 4 on duty from 21st and 22 March 2019 (after the Claimant's suspension). This the Claimant alleges was the final rota which Mr Kay-Warner would put outside his room, it showed manuscript changes including the Claimant's absence from 21 March 2019. Mr Kay-Warner's evidence was that there was more than 1 rota, that there were rough rotas which were 'live tools' amended as the staffing situation changed. Mr Kay-Warner accepted however that the document at 146 was the final version of the rota for the 19 March 2019. Mr Kay -Warner's evidence however was that the figures that are shown on the rota, may not actually reflect the true number of people on shift because he may have had to increase those numbers to reflect the guidance provided by the dependency tool. During cross examination it was put to Mr Kay-Warner that when the Claimant had covered for staff, the rotas she had seen had not recorded that staff were providing 'cover', it merely recorded them as working and when he was asked where such extra staffing above the staffing levels shown on the rota would be recorded, he stated that the rotas showing this were archived. The documents had not been produced for the purpose of these proceedings. I therefore find on a balance or probabilities, that the rota reflected the actual number of carers on duty.

90. It is not in dispute that on 19 March 2019 the Claimant was working with Mr Reap to provide care to the residents on the ground floor at the Home.

91. The Claimant's evidence was that on arriving at work on 19 March 2019, she noticed that they were short staffed on the ground floor. Ms Grainger had to deal with medication which left only the Claimant and Mr Reap to look after the residents on the ground floor.

92. The Claimant's evidence is that they were looking after 21 residents, 18 from the ground floor and 3 from the first floor who had come down for the day. Mr Reap in his evidence could not recall how many residents they were looking after that day. Mr Kay-Warner's evidence was that there were 18 bedrooms on the ground floor but he could not recall whether 3 residents came down to the ground floor that day or not. I accept the Claimant's evidence that there were 21 residents on the ground floor that day.

93. The Claimant's evidence is that the nurse on duty Maria Baraboi had returned from annual leave and required a handover to bring her up to date. The handover meant that the Claimant and Mr Reap were late starting their shift that day because they had to wait until the end of the handover to be informed about their allocated duties. Mr Reap in his evidence confirmed that Ms Baraboi had been off work for four weeks leave and had only just come back on 19th March. His evidence was that it normally takes about 10 to 15 minutes to feed each resident and that they would normally finish feeding breakfasts at about 10 to 10:30 am at the latest. He also confirmed that because of the handover they had been late starting the breakfast that morning but he could not recall what time they started. The evidence of Ms Norman was that they normally finished serving breakfast to the residents at about 10:30 am but some mornings some residents may be unwell, there could be a death, there could be medical assistance required for a resident, or a number of other reasons why it may not be possible to complete the breakfast by 10:30am. The undisputed evidence of the Claimant is that handover normally finished at 8.15am.

94. I find on the balance of probabilities, that breakfast service is normally finished by 10 to 10:30, on a 'normal day' however on this day the carers were already behind after a 35-minute delay in handover.

95. Mr Reap's evidence was that he was allocated care of the residents in rooms 1 to 11 and the Claimant 12 to 19. Under cross examination he was asked how many

of the residents in rooms 1 to 11 required two carers to carry out their personal care in the mornings, his answer was 2. However, on being asked about the residents by reference to their room numbers under cross examination, he accepted that there were 3 who required 2 carers (rooms 2,4 and 5), he could not recall whether the residents in another 3 rooms also required 2 carers (rooms 1, 7, 9) and could not recollect at all who the resident was in another (room 10). His evidence under cross examination therefore was markedly different from his initial quite definitive response of only 2 residents needing two carers to attend to them. The relevance of this is that for those rooms 'allocated' to Mr Reap, on his own evidence at least 3 and possibly 6 or 7 out of 11 residents, would have required him to be assisted by the Claimant, or someone else that morning.

96. The Claimant's description in her evidence of the needs of the residents on the ground floor that day was not disputed, nor was her description of their needs as she explained it during the disciplinary hearing (p.120); her evidence was that the night staff had not assisted as only 2 residents were washed and dressed, one resident was wet and had been sick twice, another in bed had wet the bed and took the Claimant 30 minutes to attend to her/him, another resident was on the end of the bed and there was no buzzer and another resident had soiled the bed.

Disclosure 2

97. The Claimant it is not in dispute, went to the office of Mr Kay-Warner on the morning of the 19 March 2019, to express her concerns about the number of staff on duty to look after the residents on the ground floor.

98. What is disputed is what was said by the Claimant during that conversation.

99. The Claimant alleges that she told Mr Kay-Warner that she was not willing to work due to the shortage of staff and that it was "*unsafe for the residents*" because they were at full capacity on the ground floor and 3 residents had come down from another floor and the senior carer should not be included in the staffing numbers because they are required to give out the medication. Her evidence is that Mr Kay-Warner assured her that the activity co-ordinator Katherine Harrison, would be in at 9am to help with breakfasts and there would be more staff.

100. Mr Kay-Warner's account of that conversation is that the Claimant had gone to his office; "*to tell me that she thought there were insufficient staff on duty and that she was intending to go home unless more staff came in*". He also accepts that he mentioned that Katherine Harrison would be in but he alleges that he reassured her that there were enough staff on duty and other people were available on the ground floor if she required assistance.

101. The Claimant's claim form states; *"On the 19th March I raised concerns to my manager that before I started my 12 hour shift I was refusing to work as it was under staffed and unsafe for the residents 22 residents too 2 staff" [sic]*

102. Within the Claimant's manuscript notes which she took to the disciplinary hearing contained in the bundle (p.115) this also refers to her raising concerns that it was "*unsafe*" and under cross examination she maintained that she had stated it was "*unsafe*".

103. I find on a balance of probabilities that the Claimant complained of insufficient staffing and that it was unsafe.

104. The Claimant did not allege however that Mr Kay – Warner reacted badly to her when she raised these issues, rather her evidence is that he assured her more

support would be provided.

105. Mr Kay-Warner's evidence is that there were; 2 care assistants, a senior carer (Mrs Debbie Grainger) 2 nurses (Mrs Maria Baraboi and Stephen Haywood on induction), an activities co-ordinator (Mrs Katherine Harrison) and a team leader (Mrs Sandra Dudek), clinical lead (Ms Rhoda Mina) and a 3rd care assistant on induction (Brandon) and an administrator (Ms Lowe) i.e. 10 staff or as he put it in the disciplinary hearing; '10 physical bodies on the floor'.

106. It was put to Mr Kay-Warner that the rota does not show that the clinical lead was on shift that day, he did not deny this but alleged that payroll information showed that she was working. He said he had the payroll documents with him but they had not been disclosed. No application was made to admit the documents into evidence. Whether the clinical lead was actually on duty or not, Mr Kay-Warner accepted that she was not shown on the rota. The Claimant's evidence which was not disputed, was that she was not aware that the clinical leader was on shift that day. This is consistent with Mr Reap's statement provided during the disciplinary investigation where he names those working on the grounds floor on the19 March and fails to name the clinical lead. Mr Kay-Warner's evidence under cross examination was that the clinical lead was in the building, however accepted that he could not say if she stayed in her office all day because he was in a meeting. He did nonetheless count the clinical lead within the 10 people who were on the ground floor that day when taking into account the staff who were available to provide assistance.

107. I accept the Claimant's evidence on a balance of probabilities, that she was not aware, as she maintained at the disciplinary hearing, that the clinical leader was in the Home that day.

108. The Claimant referred Mr Kay-Warner to the staff allocation sheet which does not show Ms Grainger as working on the ground floor on the 19 March 2019. Mr Kay-Warner's evidence was that this had been filled out incorrectly by Ms Grainger (p.168).

109. Mr Kay-Warner's evidence was that one of the residents was ill on the morning of the 19 March 2019 and Lindsey Lowe, employed in an administrative capacity, was asked by him to provide support to that resident however, he accepted that she could not assist in feeding or any personal care. The resident was at high risk of falling and he had asked Ms Lowe to assist because Mrs Harrison was helping with breakfasts.

110. The Claimant questioned Mr Kay-Warner about the floor which Brendon was working on that day, his evidence was that he was working on the ground floor when Mr Kay-Warner saw him on his 'walk around' the Home. However, Mr Kay-Warner could not recall the time when had carried out his 'walk around' the Home and therefore whether Brendon was still on the ground floor later that morning. Later in cross- examination, Mr Kay-Warner's evidence was that he normally did his walk around between 8am and 9am.

111. Mr Kay- Warner also accepted that for on 19 March, Sandra Dudek was present in a meeting with him that morning. He was not specific about how long she was present at the meeting and in particular whether this was during the time when the breakfasts were being provided to the residents. None of this detail about who was actually doing what in the Home and where that morning, is contained within his own personal statement which he prepared for during the investigation process.

Allocation

112. The Claimant gave evidence that care assistants are not allocated to certain residents but allocated responsibility for completion of their 'books' which record their fluid and food intake. Her evidence is that a carer should not be held solely accountable for the residents whose books they are allocated, because some residents require two carers and all staff have a responsibility toward the residents. The allocation sheets issued on the 19 March 2019 (p.162) are simple documents with room numbers on the left-hand side; rooms 1 – 11 and 12 – 19 and the name of one of the care assistants on the right-hand side, one against each grouping of rooms. The Claimant's case is that to ensure the necessary paperwork is complete the carers are allocated the books of certain residents to complete. The Claimant does not accept that the allocation means that the care worker is solely responsible for the care of that particular resident, only for completion of the paperwork.

113. Mr Reap confirmed in cross examination that he helped the Claimant with some of the residents in rooms 12 – 19 during 19 March. His evidence was that as Claimant was sorting out the tea trolley he assisted her with the feeds from lunch time onwards. The food intake diaries, which record the resident's food and fluid intake each day (p.109/108) record Mr Reap helping provide food and fluids to residents in room 12 and 14. This is supportive of the Claimant's evidence that they had to work together to ensure the needs of the residents were met.

114. It was put to Mr Reap in cross examination that on the 19 March 2019, Mr Reap was doing feeds, the Claimant was sorting out the tea trolley and Ms Grainger was distributing medication on the first floor, however Mr Reap could not recall. When asked why on the 19 March another member of staff could not have helped with the tea trolley to free up the Claimant to feed the resident, he said that he did not know. Mr Reap accepted that during the morning he had required the assistance of the nurse on induction with feeding some of the residents in rooms 1- 11.

115. Ms Norman's evidence which was not disputed, was that if a resident requires the assistance of two carers, both will provide the necessary care but one carer will have been allocated responsibility for ensuring the residents records/book is completed. The carer who completes the book must be a carer who has provided the care. However, she explained that she does not consider it possible within a care home setting for carers to have set jobs because they have to respond to the residents needs and as carers they are responsible, together for all the residents. The 'books' are divided up to make it '*fairer'* in terms of the amount of paperwork/administrative duties they have to carry out. This is consistent with the Claimant's evidence that carers are allocated books because someone has to take responsibility for completing the necessary paperwork however the carer is not solely responsible for the care of the residents in those rooms. This is also consistent with the evidence of Mr Kay- Warner and Mr Khatkar about the collective responsibility of the staff to the residents and the Claimant's job description to; "*assist in the provision of care and work* ***as part of the team*** *to achieve required standards".*

Breakfasts

116. The Claimant's evidence is that she not only brought her concerns to Mr Kay-Warner's attention first thing in the morning at the start of her shift, she did so again later that morning. The Claimant alleges that Ms Kay-Warner was walking through the cafe in the Home at "*around"* 11.15am. The Claimant asked Mr Kay-Warner where their support was, he asked where Ms Grainger was and the Claimant replied that she did not know. The Claimant's evidence is that Mr Kay-Warner then sent Ms Grainger down to the ground floor.

117. Mr Kay-Warner initially denied having this conversation with the Claimant because he was "*in meetings and had people with me*" however he then stated

during cross examination that he could "*not recall*" seeing the Claimant at about 11:15am. He gave evidence however that he had done a 'walk around' the Home around "*mid-morning – before lunch*." His evidence was that this was not the first 'walk around' of the day.

118. During the disciplinary investigation, the Claimant raised this issue of having spoken with Mr Kay-Warner, albeit she referred to it taking place at 11:30am. The minutes of the hearing (which according to Mr Kay-Warner were accurate minutes) do not record him disputing during the hearing that this conversation with the Claimant had taken place. The Claimant also refers in the hearing to Ms Harrison having left the ground floor to do 'something else', leaving the Claimant and Mr Reap without support.

119. The timing of the alleged conversation which the Claimant had with Mr Kay – Warner, is largely consistent with the statement given by Ms Grainger's during the disciplinary investigation. Ms Grainger stated that she found out about the residents not having had their breakfast at 11:15am. In terms of timing; It is also consistent with Ms Harrison's witness statement given during the investigation, that she had stopped assisting with breakfasts at 11am (because '*her massage lady'* had arrived).

120. It was put to Mr Kay-Warner during cross examination that the Claimant had told him during that conversation that two residents had still not had their breakfast. The Claimant's witness statement refers to this conversation and raising the lack of support but not specifically that she mentioned that two residents had not had their breakfast. However, during the appeal and in her notes which she produced at the disciplinary hearing, she specifically mentioned informing him about the breakfast situation during that conversation. I find on a balance of probabilities, that not only did this conversation take place as recounted by the Claimant, but that the Claimant on a balance of probabilities had mentioned to Mr Kay-Warner that two residents had not been given their breakfast. Mr Kay-Warner could not recall the decision and therefore could not rebut what was said.

121. Mr Kay-Warner's evidence is that he had made finding, as set out in the investigation report, that Ms Grainger was not informed until 11:15am about the residents not having had their breakfast and that he had reached this finding in reliance on Ms Grainger's account of events from the interview with her on the 26th March 2019 (p.101). However, Ms Grainger also states within that same witness statement that after the Claimant had told her at 11:15 am that the two residents had not had their breakfast, she had reported this to Mr Kay-Warner. Mr Kay-Warner however stated that he could "*not recall*" Ms Grainger reporting the situation to him.

122. Given that Mr Kay-Warner (with the assistance of Ms Mina) was the investigatory officer, it is concerning that given how serious the allegation against the Claimant was, his recollection of his involvement in those events, which was so material, was so vague during this hearing and not addressed in the witness statement which he had provided for the purposes of the disciplinary investigation.

123. The witness statement Mr Kay- Warner prepared for the investigation, was lacking in any significant detail, consisting of only 5 brief sentences. The statement does not comment on what Mr Kay-Warner did that day to ensure there was sufficient staff, it does not mention his observations of the Home or what if any conversations he had with staff (other than a brief comment on the discussion with the Claimant first thing in the morning). His statement refers to there being 10 physical staff on the ground floor 18 for residents but fails to make any attempt to detail what those 10 staff were actually doing that morning and when. He neglects for example to mention that Ms Dudek was in a meeting with him at least for part

of that morning, or that the clinical lead was not shown on the rota but was in her office and that staff may not have been aware that she was therefore present in the Home. He also does not address how available Ms Grainger was to assist the carers because she was dispensing medication or what other duties the nurses had to attend to that day and on which floor. He also does not address the limitations on the assistance that could be given by Ms Lowe or the carer on induction. He refers to the '10 physical bodies'; as if the number of bodies is a definitive answer to the issue of whether there was sufficient staff helping with the residents on the ground floor that morning.

124. On the balance of probabilities, I find that Mr Kay-Warner was alerted by the Claimant at around 11:15 to 11;30 am that morning about her concerns that there was insufficient support and that two residents had not been fed breakfast. On a balance of probabilities, I find that after the Claimant had spoken to him he he had instructed Ms Grainger to go down to the ground floor. I also find on a balance of probabilities, that Ms Grainger spoke to Mr Kay-Warner about the two residents who had not had their breakfast, following which the decision was made that it was now too late to give the residents their breakfast.

125. The Claimant's evidence which on the balance of probabilities I accept, is that she was sent by Ms Grainger on her break when Ms Grainger came down to the ground floor and that Ms Grainger told her that she would deal with the breakfasts. The Claimant's evidence on this is consistent with the timings in Ms Grainger's statement and reference to the Claimant and Mr Reap taking their breaks and of Ms Grainger communicating the decision not to give the two residents breakfast. Mr Reap also accepted that he saw the Claimant return from a break although he could not recall the time. Mr Reap also confirmed in his evidence during cross examination accepted that he had taken his break at 10:30am.

126. It was put to Mr Kay-Warner that the Claimant was responsible for personal care on 19 March but not for feeding the residents breakfast because Ms Harrison had been tasked specifically to help with breakfasts. Mr Kay-Warner refuted this, on the basis that "*everyone is responsible for the resident's care"*, that it was the Claimant who wrote in the resident's care notes and that part of her care role was to provide breakfast. His evidence was that Ms Harrison's role was to assist with serving, that *"Katherine may take the food to the rooms and carers also take food to the rooms"* and that it is expected that the carers will assist the residents who need assisted feeds. His evidence was that it is; "*everyone's role to assist the residents"* with breakfast and that it was *"not solely Katherine Harrison".* Mr Kay-Warner's explanation for only suspending the Claimant was because; *"the record was in your hand*" and he referred to the entry stating that the reason for the residents not having breakfast was *"due to no staff*". This 'record' is a reference to the care notes or 'books' which record the residents' fluid and food intake.

127. Mr Reap confirmed when put to him in cross examination, that when he worked with the Claimant she fulfilled all the task allocated to her and that she was a good worker.

Suspension

128. On 20 March 2019 the Claimant was suspended.

129. The evidence in chief of Mr Kay-Warner is that following the end of the Claimant's shift on the 19th March 2019, Ms Dudek, team leader brought him the residents books which included the comment made by the Claimant that two residents had not been fed breakfast "*due to no staff*" (108- 109/113- 114). The Claimant's undisputed evidence is that Mr Kay-Warner called her on her day off on 20 March at around 5pm and when she explained that she could not come into

the Home that evening (because she was going out for her father's birthday) but would be in the next day, he suspended her over the telephone. The Claimant asked why she had been suspended and was told it was because of what *"was written in one of the daily record books*".

130. During cross examination Mr Kay-Warner did not dispute that he had left the office at 5pm on 19 March and that the Claimant had not completed her shift until 8pm. Under cross examination he conceded that he was given the notes "*early-ish afternoon*". Mr Kay-Warner's did not seek to explain why his witness statement included evidence which he accepted under cross examination, was incorrect. Mr Kay- Warner had not spoken to the Claimant about the incident before her shift had ended, but had allowed her to finish her shift despite the alleged connect that she had deliberately neglect residents earlier that day.

131. The Claimant's evidence is that she had personally informed Ms Dudak of the situation with the two residents when she had handed her the residents 'books'.

Investigation

132. Mr Kay-Warner then prepared his very brief witness statement on the 20 March. There are also handwritten statements from Ms Baraboi, Mr Reap and Ms Harrison on 20 March and a short-typed statement Ms Lowe on 25 March 2019.

133. The evidence of Mr Kay-Warner is that based on that evidence which includes his own, he decided that there was a need for disciplinary action and he wrote to the Claimant on 21 March 2019 inviting her to a disciplinary meeting on 27 March 2019. He then decided that further statements should be obtained.

134. Ms Mina the Clinical lead then took statements on a pro forma question sheet from; Ms Harrison, Mr Reap, Ms Grainger, Ms Dudek, Ms Baraboi, and Ms Harrison.

135. The investigation report dated 27 March 2019 is signed off by Mr Kay-Warner as the investigating officer.

136. Ms Harrison in her witness statements, stated that she informed the Claimant at 10:30am that only two of the four assisted feeds had been done and that Brendon, the carer on induction offered to help but that Ms Grainger was not sure he could because he was on induction and later informed him that he could not. She states that at 11am breakfast service had finished and she had to leave as *"my massage lady had arrived".* It appears clear from what she had put in her statement, that she was not in a position to provide assistance to the carers from that point.

137. Mr Kay-Warner when asked why Mrs Grainger was having to check whether an inductee was able to help, he merely explained that Brendon was a new starter and that Ms Grainger had to check if he could help because some residents have a special diet, he did not explain however why she was needed the help of a carer on induction with so many alleged qualified staff present the ground floor to support the carers. Mr Kay-Warner did not explore this with Ms Grainger during the investigation process.

138. Mr Kay-Warner did not as part of the investigation provide a further witness statement himself or otherwise respond to the evidence of Ms Grainger that she had notified him at 11:15am that the two residents had not been fed. He did not address that allegation. He also did not disclose that he had spoken to the Claimant at around 11:15 that morning and that she had alerted him to the lack of adequate

support on the ground floor. His statement I find, produced as part of the investigation falsely alleged that the Claimant "*at no point*" had raised that the two residents had not been fed.

139. When asked about the conflict in evidence of Ms Harrison who alleges in her statement for the investigation, that Ms Grainger knew about the problem with the breakfasts much earlier, at 10:30am, his explanation of how he had resolved that conflict was not that he spoken to them and sought further clarity but that; "*I based it on Mrs Grainger's evidence".* He did not attempt to explain why he preferred Ms Grainger's evidence, (which would attach less blame to Ms Grainger) but then neglected to address during the investigation what Ms Grainger had also said in the same statement about having reported the situation to him. Mr Kay-Warner appears to have 'cherry picked' from the witness statements obtained during the investigation, the evidence which supported a narrative of the Claimant neglecting the residents deliberately and of her being principally responsible for that.

140. I find on the balance of probabilities, that Mr Kay-Warner gave a misleading account of his involvement in the events of that day during the investigation and disciplinary proceedings, omitting relevant evidence from his own statement and failing to disclose this during the disciplinary and subsequent appeal.

Disciplinary hearing

141. The Claimant attended the disciplinary investigation on 27 March 2019 with Ms McLaughlin. I accept the Claimant's evidence that the notes fail to record evidence put forward by Ms McLaughlin. I accept the notes have been edited to remove comments that she made and Mr Kay- Warner failed to provide a satisfactory and acceptable reason for doing so.

142. Mr Kay-Warner was a material witness and appointed himself investigating officer, he now chaired the disciplinary hearing. There is an obvious risk of being not only a material witness, but being in charge of the investigation and then conducting the disciplinary hearing.

143. Mr Kay-Warner confirmed that the clinical lead and the team leader are involved in dealing with disciplinary matters at the Home. In explaining why therefore he chaired the disciplinary hearing, his explanation was that the Respondent is a small company, the clinical lead had conducted all the meetings with the witnesses at the time, there was no one in a relevant role to do the disciplinary and that Mr Khatkar was deal with any appeal. I do not find this a satisfactory explanation. The clinical lead for example have been appointed as the investigating officer or Mr Khatkar could have conducted the disciplinary hearing, even if he also conducted the appeal. Mr Khatkar was more removed from the events of the 19 March then Mr Kay- Warner. There was no evidence that there had been any consideration of alternatives to Mr Kay- Warner conducting both the investigation and disciplinary hearing.

144. The Claimant raised at the disciplinary hearing direct with Mr Kay-Warner that she had spoken to him in the morning at 11:30am about the lack of support on the ground floor. The minutes record that he did not deny this conversation with her but also did not confirm that it had taken place. Given his evidence before this tribunal was that he could not recollect that conversation (which I do not accept is credible), I find that he did not therefore take it into account when forming his belief that she had deliberately neglected the residents, that she had alerted him that morning to the difficulties they were having on the ground floor.

145. The Claimant explained in the disciplinary hearing that she did not know that

the clinical lead was in the Home on 19 March. As Mr Kay -Warner accepted during this hearing, the clinical lead was not shown on the rota. It is to be noted that none of the witnesses refer in their statements to seeking support from the clinical lead.

146. The Claimant also raised in the disciplinary hearing that Ms Grainger was on another floor giving medication the morning of the 19 March, therefore she was not present to assist the carers on the ground floor, until Mr Kay-Warner had sent her down from the first floor.

147. The witness statement given during the investigation from the nurse, Ms Baraboi mentions that she was working on "both floors" that day. She also mentions that she was not aware of the breakfast situation until late afternoon but there was no further investigation to clarify whether that was because she was not working on the first floor first thing in the morning, and nor is this explored at the disciplinary hearing.

148. Mr Kay-Warner puts it to the Claimant at the disciplinary hearing meeting, that there were reports of people offering to help but does not explain who offered help and she denies this. The only evidence of actual offers of help however is the statement from Mr Reap, where he alleges in his statement that he offered at about 10:30 am to feed the residents, which the Claimant denies and asserts that he did not have time to do so.

149. The Claimant explains during the disciplinary hearing that Ms Harrison was dealing with breakfast, Ms Grainger was dealing with medication and Ms Baraboi was dealing with medication and the diary. The Claimant did not know where Ms Dudek was and was not aware the clinical lead was working that day. She accepts that the nurse Stephen Harrington assisted with two feeds but she alleges that when Mr Kay-Warner spoke to her later that morning, the nurses were sat at their desks not helping.

150. The Claimant explained to Mr Kay- Warner in some detail the problems the carer assistants had to deal with that morning; residents having wet their beds for example. The Claimant explains that handover was late, that all the residents were still in bed when they started their shift and there was no tea trolley. Mr Kay-Warner does not however during this hearing explore this with her, he states that the Claimant "*should not have put no staff"* on the books and repeats during the hearing that there were 10 or 9 physical bodies on the floor.

151. Mr Kay-Warner asks the Claimant whether she is aware that senior care assistants and the nurse should be supporting at breakfast however he does not assert that the nurse was assisting that day, only that she should have been.

152. The Claimant informs Mr Kay-Warner that she had gone up to the first floor to get hoist that morning, (which is supported by Mr Reap's statement) and that while on the first floor she had told the other senior care assistant, Ms McLaughlin that it was *"hard down there*", and that Ms McLaughlin therefore offered to help. The notes record Ms McLaughlin confirming this and informing Mr Kay-Warner that she had asked Ms Grainger that morning if she needed help but that Ms Grainger told her no. Mr Kay-Warner makes the comment that;

"*At this moment in time I can only go on what I have got and* ***I will look into some things …"***

153. Despite all the matters raised by the Claimant about what was happening on the ground floor and her attempts to raise this with another senior care assistant and indeed with Mr Kay- Warner himself that morning, and despite Mr Kay- Warner

then informing her that he will into some things, he then and without a break in proceedings, informs the Claimant that she is being dismissed. There is no engagement with the Claimant during this hearing about the matters she raises in her defence. Mr Kay- Warner repeats like a mantra that there were 10 physical bodies on the ground floor without dealing with any of the issues the Claimant raises about what support was actually available.

154. Mr Kay-Warner's evidence in chief expanded on the reason for dismissal (para 16), explaining that having considered all the evidence, he was of the view that her actions;

"*in failing to feed two residents, and writing up the reason for this as being due to no staff,* ***were more than likely to be deliberate*** *and that she had, purposefully, taken that course of action to 'make a point' rather than because she was genuinely unable to undertake those duties. As such she was culpable for neglect in respect of the two residents concerned.* ***My View in this regard was reinforced by the statement provided by Paul Reap (p95)*** *in which he confirmed that he had offered to feed the residents involved but this had been declined* by Miss Duggan". [my stress]

155. Mr Kay-Warner had, he alleges, formed the belief that the Claimant had deliberately left two residents without breakfast "*to make a point*". He refers to this belief being supported by the evidence of Mr Reap. Mr Reap did not allege in his statement during the disciplinary investigation that the Claimant did not feed these residents as a deliberate act 'to make a point'. It is a serious allegation of deliberate neglect.

156. Mr Kay-Warner clearly considered Mr Reap's evidence to be important to his finding that the Claimant's actions were deliberate.

157. When Mr Kay-Warner was asked to explain how he reconciled the conflict in Mr Reap and the Claimant's evidence (the Claimant having denied that Mr Reap had offered to assist with the breakfasts for the two residents), Mr Kay–Warner's explanation was that; "*knowing also that and having known Ms Duggan if she had concerns she would have made me aware of it. I was not made aware of it until after the fact".* This is I find a wholly unsatisfactory response. It fails to take into account the Claimant's evidence that she had raised her concerns directly with Mr Kay-Warner at about 11:15am and raised concerns with Ms McLaughlin, a senior carer which is not consistent with the allegation that she had refused help. There was no evidence provided of any consideration of whether Mr Reap had an ulterior motive for alleging he had offered help, including whether he himself felt at risk of disclination action.

158. There was no adjournment of the hearing and no further investigation. Mr Kay-Warner gave himself no time to reflect and deliberate. He did not carry out any further investigation despite referring to his intention of doing so.

159. Mr Kay-Warner's evidence is that he would discuss what sanction to apply in disciplinary matters with the director, Mr Khatkar. His evidence was that; "I *would discuss with the director. After making findings of fact, I would discuss which sanction to apply".* When asked to clarify whether the process he followed was to discuss which sanction to apply with the director, the Claimant's evidence was; "*I have to explain to my next in line".* He said he discussed the Claimant's case with Mr Khatkar and he decided sanction after "*going through everything with the director*".

160. In re- examination, Mr Self asked Mr Kay-Warner whether he had listened to what he had been told and made the decision there and then at the disciplinary hearing to dismiss, to which Mr Kay-Warner simply replied 'yes'. I do not attach any material evidential weight to this answer in light of how the question was put, it was a leading question and was not consistent with the prior evidence of Mr Kay-Warner.

161. I find on a balance of probabilities that Mr Kay- Warner was upset about what had been written on the resident's books and after reading Mr Reap's statement, he prematurely formed a view that the Claimant had been trying to ''prove a point' and that he approached the hearing with a closed mind. He was not prepared to consider the Claimant's representations and that is I find evident from how he conducted the disciplinary hearing. Mr Kay- Warner neglected to include within his own evidence key information he ignored other evidence which did not support the narrative he had formed that the Claimant was at fault and had deliberately neglected the residents and he did not carry out any further investigation despite indicating he would.

162. The Claimant did not allege during the disciplinary hearing that she had been suspended because of either of the alleged protected disclosure and she did not put it to Mr Kay-Warner during cross examination that he had dismissed her because of either the Collective Letter or the alleged protected disclosure on the morning of the 19 March 2019. However, Mr Kay-Warner had addressed this in his evidence in chief and denied receiving the Collective Letter and gave evidence that the second alleged disclosure "*had nothing to do with her dismissal*".

Appeal

163. The Claimant lodged an appeal by email of the 28 March 2019. The appeal hearing took place on 25 April 2019. The attendees were Mr Khatkar who Chaired the meeting accompanied by Ms Nina as a notetaker. The Claimant was accompanied again accompanied by Ms McLaughlin.

164. The Claimant's grounds of appeal were in essence that the statements of other staff members were untrue, that the statement of Mr Kay-Warner was exaggerated and she referred to her length of service and clean record.

165. The evidence of Mr Khatkar regarding his involvement in disciplinary matters is that the management of staff including disciplinary matters, is left up to the registered manager of the care homes in which he has an interest and he is "s*imply provided with reports/updates on any areas of concerns*…" and that his "*only role"* is to deal with appeals. There is no mention in Mr Khatkar's statement of any discussion with Mr Kay-Warner prior to the disciplinary hearing or of any report or update he had received regarding the situation with the Claimant. He refers to having had no "substantive" involvement until the 28 March 2029.

166. With regards to Mr Kay-Warner's evidence about discussing the sanction in advance with him, his evidence was that; "it would appear that Mr Kay-Warner had been apparently incorrect" and that; "*I was not involved in any stage of the disciplinary process, I was not present, he did not adjourn to call me* " however, he then stated that Mr Kay-Warner keeps him abreast of what happens in the Home and that he has to be aware of serious incidents and he was duty bound to tell him but that; "*he didn't take time out to speak to me* "

167. On being asked whether Mr Kay-Warner had discussed the disciplinary hearing with him beforehand, he "could not recall". I did not find Mr Khatkar's evidence to be convincing and I found his repeated reference to Mr Kay-Warner not having had

a break in the disciplinary hearing to evidence his lack of involvement in the disciplinary decision, to be a distraction. Given Mr Kay-Warner's clear evidence on this point, I find on a balance of probabilities that Mr Kay- Warner had discussed the findings he had made prior to holding the disciplinary hearing with the Claimant and the sanction he wanted to apply and that this was endorsed by Mr Khatkar, hence there was no need for Mr Kay-Warner to have a break before moving to dismiss.

168. Mr Khatkar referred in his evidence to another disciplinary matter where Mr Kay-Warner had carried out the investigation but Mr Khatkar carried out the disciplinary hearing because Mr Kay-Warner had been "too close to the event". The appeal would have been heard by one of the other directors at the time. In terms of who could have heard the disciplinary hearing, he referred to the clinical lead and team leader but referred to their capabilities being limited to supervision and not having, to his recollection, conducted a disciplinary hearing before. This was not consistent with Mr Kay-Warner's evidence about their involvement in disciplinary matters.

169. The Claimant had produced a character reference from colleagues however although Mr Khatkar said that he had considered them, he was not persuaded they had any substantial value. He referred to the "*majority of them being unsigned*". The appeal notes refer to only 3 signed letters, however within the bundle there were 6 letters, one with 5 signatures. Mr Khatkar could not recall how many were provided and mentioned the possibly of a typing error by the note taker. I find on balance that the appeal notes have failed to accurately reflect the number of signed character references provided. Mr Khatkar in cross examination had no recollection he said of the Claimant alleging at the appeal hearing that those who had given character references were fearful and did not want Mr Kay-Warner to see them. The notes clearly record however the Claimant mentioning staff being *"afraid".*

170. The notes of appeal hearing are within the bundle (124- 126) and are brief. The meeting lasted 45 minutes.

171. Mr Khatkar's evidence was that he formed a view that it was "*extremely unlikely*" that the Claimant's view that the statements made by other staff were untrue was likely to be correct because information and evidence had been provided to the CQC and safeguarding and they themselves *may* seek to verify. He did not allege however that there had actually been any investigation or verification process by CQC or safeguarding.

172. The Claimant raised at this hearing that Ms Lowe had not worked on the ground floor and that it had taken the Claimant 40 minutes to get one resident out of bed that morning, the resident had been left soaking wet by the night staff. Mr Khatkar repeats that based on the dependency tool there were sufficient staff on duty and that the senior care assistant and nurse cannot be disregarded when taking into account the staff available to assist the carers. The dependency tool however, as Mr Kay- Warner explained, still requires physical observations to be carried out. The tool therefore is not of itself and by itself, a safe measure of appropriate staffing levels.

173. His evidence in cross examination was that the case for him hinged on a couple of key facts; that Mr Reap alleged he offered to help with breakfasts that morning and Ms Harrison (who was assisting with the breakfasts) made it known prior to 10:30 am that two residents had not been fed. He stated that he believed that for the Claimant's version to be correct, those individuals must not have been telling the truth.

174. The appeal notes record Mr Khatkar informing the Claimant that according to "statements (i.e. plural), Mr Reap offered to help her, to which the Claimant replies that it is not true. However, Mr Khatkar when referred to this comment in the appeal notes, confirmed that the only statement was Mr Reap's however, that is not according to the notes, how it was presented to the Claimant.

175. The notes record the Claimant explaining to Mr Khatkar that she had spoken to Mr Kay-Warner at 11:15am on the 19 March and that she had told him that there were 2 more residents to be fed and she referred to Maria and Stephen, the nurses being present and that they should have heard the conversation. She explains how Ms Grainger had then come back on to the ground floor.

176. Mr Khatkar's evidence was that at the end of the appeal hearing he decided that there were issues he wanted to clarify and he intended to carry out his own investigations.

177. Mr Khatkar did not speak to the nurses Maria or Stephen to verify the Claimant's account of alerting Mr Kay- Warner to the residents not having had breakfast

178. Mr Khatkar alleged in cross examination that he only interviewed Mr Kay-Warner, Mr Reap and Ms Harrison to confirm what was said. However, there is no written minutes of those meetings. Mr Kay-Warner did not in his evidence refer to any such further interviews taking place.

179. Mr Khatkar's evidence was that his interview with Mr Reap consisted of him asking him "*did you say that*" about offering to help with the feeds and stressing it was important. Mr Reap in his evidence however made no reference whatsoever to any such conversation taking place.

180. Mr Khatkar referred to a manuscript sentence he had written in the margin of the statements of Ms Harrison and Mr Reap. The note in the margin of Mr Reap's statement states that Mr Reap had confirmed the content of his statement. The note in Ms Harrison's statement refers to her knowing two breakfasts had not been given.

181. His evidence was not that he asked any further questions of those witnesses,

182. Mr Khatkar, alleges he kept a "*sort of pad*" for phone calls and minutes but he did not disclose that pad. He did not say it was not available but that he archived his pads in the office however he admitted that he had not looked for his notes for the purposes of this hearing. I infer from the fact that Mr Khatkar made handwritten notes on the witness statements and has not disclosed any further notes, that no further notes were in fact taken. I infer from the quality of the notes and the brevity of the meetings with the witnesses and limited scope of his enquiries, that Mr Khatkar who presented as an intelligent and articulate individual, with experience of running more than one care home, simply did not attach much importance or seriousness to this appeal process.

183. It was not however put to Mr Khatkar by the Claimant that those alleged conversations did not take place and hence I find on a balance of probabilities, considering Mr Khatkar's evidence and the manuscript notes, that meetings did take place with Mr Reap and Ms Harrison. However, those discussions I find were extremely limited, amounting to little nothing more than asking them to reaffirm their previous statements.

184. With respect to Mr Kay-Warner, Mr Khatkar's evidence was vague about what was discussed; "I *would have spoken to Mr Kay-Warner as part of the appeal and*

I think conversations would centre around staff in the building".

185. If the Claimant was reaching out for additional support and making it known to the registered manager and indeed a senior carer, that carers on the ground floor were struggling to attend to the residents' needs, that is inconsistent with and cannot reasonably support a belief that she refused help and neglected residents deliberately to 'make a point' about staffing.

186. It is incredible that Mr Khatkar did not diligently follow this up to understand exactly what had gone wrong that day causing two residents not to receive their breakfasts. When asked about the allegation that the Claimant had alerted Mr Kay-Warner about the residents not having breakfast, Mr Khatkar replied that he did not investigate this allegation because the; "*focus was that he had not told me on the day".*

187. Mr Khatkar confirmed that when speaking to Mr Kay-Warner the extent of his questioning was not whether or not this discussion with the Claimant had taken place, but whether Mr Kay-Warner had told Mr Khatkar about it on the day. There was no indication from Mr Khatkar that he thought it relevant whether or not the Claimant had raised with Mr Kay-Warner that morning that the residents had not yet had their breakfast. I find on his own evidence, that Mr Khatkar did not even ask Mr Kay-Warner whether this conversation had taken place but this goes to the heart of the fairness of the process; whether Mr Kay-Warner had conducted a fair hearing with an open mind in circumstances where it appears that he may have omitted key evidence from the disciplinary and appeal process about his own involvement, presenting potentially a seriously misleading or inaccurate account of events.

188. Mr Khatkar also confirmed that he had not sought to establish what had been discussed between the Claimant and Mr Kay-Warner at the start of her shift on the 19 March.

189. Mr Khatkar accepted in his evidence that there would have been a handover but he was not aware whether the nurse had been returning from leave after 4 weeks. When asked what he had established about whether on that day due to the handover, breakfast had started later than usual, his evidence was that he did not seek to establish that because he did not think it was part of the appeal. However, it is clear in the disciplinary notes, which Mr Khatkar stated he had read in advance of the appeal hearing, that the Claimant refers throughout to the timings of that day and that;

"*Everyone was in bed, handover was late, told Richard 11:15 about feeds, so no tea trolley was done".* [my stress]

190. Mr Khatkar also accepted in evidence, that he did not establish with Ms Grainger why she had checked (according to Ms Harrisons statement) whether a carer on induction was able to assist with feeds if Paul Reap was available and had offered at 10:30 to help.

191. Mr Khatkar admitted in evidence that he did not concern himself with Ms Grainger's conduct on the 19th March; "*to be honest with you- focus at the time was that there was opportunity to feed – Paul offered and not taken up*". By the same token however, if he had accepted Ms Harrisons evidence, her evidence was also that Ms Grainger had been aware of the situation much earlier i.e. by 10:30am and yet as a senior care supervising the Claimant, Mr Khatkar did not concern

himself with her conduct that morning. There was also evidence from Ms McLaughlin that she had offered to help at 10:am after being alerted by the Claimant to the difficulties on the ground floor, but this had been rejected.

192. I do not find there was any attempt by Mr Khatkar to investigate matters raised by the Claimant at the disciplinary or appeal meeting in her defence and whether there had been properly investigated and considered as part of the disciplinary process, including the following;

- whether the Claimant had alerted Mrs McLaughlin that the carers were having difficulties
- whether Mr Kay- Warner accepted that the Claimant had alerted him at about 11:15/11:30 to the residents not having had breakfast
- whether Mrs McLaughlin's had offered help which was turned down by Mrs Grainger
- whether the Nurses were not assisting from 11am
- whether the carers were aware that the clinical lead was working that day,
- whether and when the team leader was present on the ground floor,
- whether and when Ms Baraboi was present on the ground floor that morning,
- whether handover was late and the impact this had
- whether Mrs Grainger had informed Mr Kay-Warner at about 11:15/11:30 of the fact two residents had not been fed

193. Mr Khatkar referred to the *'real differentiator'* being Mr Reap and his evidence. Mr Khatkar states that there may be other reasons why a resident is not fed, exceptional occurrences as he put it, that "*things happen in life and things do not always go to plan"* and that he was looking for some sort of explanation but what he got from the Claimant was that people were lying.

194. I do not accept that it was reasonable for Mr Khatkar to simply repeat Mr Kay-Warner's assertion that there were 9 or 10 people all present and able to assist with the residents on the ground floor on the morning of the 19 March 2019.

195. Mr Khatkar's evidence was that he was not doing a *"rerun"* of the disciplinary procedure, his role was to look at evidence used to make the decision and whether it was reasonable or not. His evidence was that he focussed on the original decision and if "*there was a serious flaw"* and whether evidence had been ignored or overlooked but he did not restart the investigation or interview other staff. His evidence was that he "*focused on what the decision hinged on*" and hence asked the Claimant about Mr Reap's evidence. Mr Khatkar stated that Mr Reap's statement had "*tipped the balance*" between a written warning and whether there had been a bona fide reason for residents not being fed.

196. Mr Khatkar when was asked what the outcome would have been if the finding had not been that Mr Reap had offered to assist with the breakfasts, and he referred to it being "*very difficult to say".* He stated that "*things don't always go to plan*" and *"things go amiss*". His evidence was the disciplinary sanction could be very different depending on the reasons.

197. After Mr Khatkar had spoken to Mr Kay-Warner, Mr Reap and Ms Harrison, he did not hold a further meeting with the Claimant. The Claimant was simply sent a letter dated 16th May 2019 which did not address his findings or explain why her appeal had been dismissed, it merely stated that he was upholding the decision after considering all the facts. The Claimant was entitled to know why her appeal had not been upheld but no explanation was given.

198. I find that Mr Khatkar, as evidenced from; the notes of the appeal, the cursory discussions with Mr Reap and Ms Harrison, the absence of any detail about what was discussed with Mr Kay- Warner, the failure to follow up on relevant matters raised by the Claimant, the paucity of the notes he took and the failure to give his reasons for dismissing the appeal, paid lip service to the appeal process. I do not find that he carried out a reasonable appeal process.

199. The Claimant in her evidence under cross examination alleged for the first time that she had not been shown the witness statements at the disciplinary or appeal hearing, however she had never put this allegation to any of the witnesses and nor had she raised this in her original or supplemental witness statement. She accepted that she must have been told what Mr Reap had alleged about the offer of assistance. As this was never put to the witnesses, this is a not a matter which I have taken into account when considering the fairness of the process.

200. The Claimant had not raised at the appeal that the reason for her dismissal was because of the protected disclosures. Mr Khatkar denied in cross examination that the Collective Letter and the concerns the Claimant had raised with Mr Kay-Warner on the morning of the 19 March 2019, had been the principal reason for her dismissal.

The Legal Principles

201. Before reaching my conclusions in relation to the issues before me, I have had regard to the law which I am required to apply when considering the matters for consideration;

The Reason for Dismissal – section 98 (1) and (2) ERA

202. It is up to the employer to show the reason for dismissal and that it was a potentially fair one namely that it falls within the scope of section 98 (1) and (2) of the Employment Rights Act1996 (ERA) and can justify the dismissal of the employee. A 'reason for dismissal' has been described as: 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott v Mott, Kay and Anderson 1975 ICR 323, CA.**

203. At the stage of establishing the reason, the burden of proof is on the employer and what is not required at this stage, is for the employer to prove that the reason justified the dismissal. Whether the reason justified the dismissal or not is a matter for the Tribunal to assess when considering the question of reasonableness. It is however sufficient that the employer genuinely believed the reason given and did so on reasonable grounds.

Reasonableness - section 98 (4) ERA

204. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 (1) ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98 (4) ERA which provides that 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 rescores 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.

205. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably.

206. Mr Justice Browne- Wilkinson in his judgement in **Iceland Frozen Foods Ltd V Jones ICR 17 EAT** set out the law in terms of the approach a Tribunal must adopt as follows;

a. The starting out should always be the words of section 98 (4) themselves

b. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the member of the Tribunal) consider the dismissal to be fair

c. In judging the reasonableness of the employers conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of three employers

d. In many (though not all) cases there is a band of reasonable responses to the employees conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.

e. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair

207. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL** firmly established that procedural fairness is highly relevant to the reasonableness test under section 98 (4). If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced.

Conduct

208. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show;

- It believed the employee guilty of misconduct
- It had in mind reasonable grounds upon which to sustain that belief
- At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

Procedural Fairness

209. The Court of Appeal in **Taylor v OVS Group Limited 2006 ICR 1602, CA** stated that; '…*it is trite law that section 98(4) requires the employment tribunal to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's*

task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss." In the Court of Appeals view, where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee.

Acas Code

The Acas Code of Practice on Disciplinary and Grievance Procedures includes the follow guidance on the role of companions; "*17. The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case."*

210. The Acas Code also provides that at paragraph 27: "*The appeal should be dealt with impartially and, wherever possible by a manager who has not previously been involved in the case".*

Contributory Fault

211. In **Nelson v BBC (NO.2) 1980 ICR 110 CA** the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy
- it must have actually caused or contributed to the dismissal
- it must be just and equitable to reduce the award by the proportion specified.

212. With regards to the basic award, the relevant statutory provision is section 122 (2) ERA; "*where the Tribunal considers that **any conduct** of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.*"

213. The equivalent provision in respect of the compensatory award is section 123 (6) ERA; "Where the Tribunal finds that the dismissal was **to any extent caused or contributed to by any action** of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

214. Section 122 (2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any* kind of conduct on the employee's part that occurred prior to the dismissal. To justify a reduction to the compensatory award the conduct must be shown to have caused or contributed to the employee's dismissal.

Polkey Deduction

215. The question of whether procedural irregularities rendering a dismissal unfair, really made any difference to the outcome is to be taken into account when assessing compensation: **In Polkey V Dayton Services Ltd 1988 ICR 142 HL**.

Automatic Unfair Dismissal

Disclosures qualifying for protection

216. Section 43A of Employment Rights Act 1996 (ERA) defines a 'protected disclosure' as a qualifying disclosure as defined by section 43B ERA which is made by a worker in accordance with any of sections 43C to 43H.

217. The opening words of section 43B of ERA provide that:

"(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 –*."

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

(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

(d) that the health and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject".

Disclosure of information: section 43B ERA

218. The disclosure must be of *information*. This requires for conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT.**

219. The word 'disclosure' does not require that the information was formerly unknown. Section 43L(3) provides that 'any reference in this Part (i.e. the provisions of Part IVA) to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'.

220. The Respondent concedes that with respect to all 3 of the alleged protected disclosures, they were disclosures of *information.*

Reasonable belief

221. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the *'reasonable belief'* of the worker:

- be made in the public interest, and
- tends to show one or more of the types of malpractice set out in (a) to (f) has been is being or is likely to take place.

Public Interest

222. 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

the disclosures; see Lord Justice Underhill's comments **Chesterton Global Ltd.v Nurmohamed [2018] ICR**

731 at paragraphs 27 to 30;

"28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.
…
All that matters is that the Tribunal finds that one of the six relevant failures has occurred, is occurring, or is likely to occur and should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the Tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it…"

Reasonable belief in the wrongdoing

223. To qualify for protection the disclosure, the whistle-blower must also have had a reasonable belief that the information disclosed tended to show that the alleged wrongdoing had been/was being/was likely to be, committed. It is not relevant however whether or not it turned out to be wrong, the same principles as to reasonableness apply to the wrongdoing as to the public interest requirement.

224. As the EAT put it in ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*****,** there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'. The EAT observed as long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

225. The worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The EAT considered the meaning of 'likely' in this context in ***Kraus v Penna plc and anor 2004 IRLR 260, EAT*****.** In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation'.

226. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective section 43B (1) requires a *reasonable* belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*****,** which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

Endangerment of health and safety

227. 'Health and safety' is a well understood phrase and so it will usually be obvious whether the subject matter of the disclosure has the potential to fall within Section 43B(1)(d).

Identifying legal obligation

228. In ***Fincham v HM Prison Service EAT 0925/01*** **:** Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'. However, in ***Bolton School v Evans 2006 IRLR 500, EAT*** held that, although the employee 'did not in terms identify any specific legal obligation' and no doubt 'would not have been able to recite chapter and verse', nonetheless it would have been obvious that his concern was that private information, and sensitive information about pupils, could get into the wrong hands. The EAT was therefore satisfied that it was appreciated that this could give rise to a potential legal liability.

Manner of Disclosure

Disclosure to employer

229. In relation to the first and second alleged protected disclosures, the Claimant relies upon Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker's employer will be a protected disclosure.

Dismissal

230. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

231. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Denning MR in ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*****.** If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under under section 103A will not be made out.

232. As Lord Justice Elias confirmed in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*, the causation test for unfair

dismissal is stricter than that for unlawful detriment under section 47B . A claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it *materially influences* the decision-maker. Section 103A requires the disclosure to be the *primary motivation* for a dismissal.

Reason – causation

233. The question of whether the making of the disclosure was the reason (or principal reason) for the dismissal requires an enquiry into what facts or beliefs caused the decision-maker to decide to dismiss. Where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question of whether that disclosure was protected must be determined objectively by the tribunal, it is not relevant whether the decision maker dismissed believing (wrongly) that the disclosure was not protected.

234. The question for the Tribunal is why did the alleged discriminator act as he did and what , consciously or unconsciously, was his reason for doing so.'

Burden of Proof

235. The burden of proof under section 103A was considered by the Court of Appeal in ***Kuzel v Roche Products Ltd 2008 ICR 799, CA,*** on appeal to the Court of Appeal, Lord Justice Mummery reiterated that the principles in ***Maund v Penwith District Council 1984 ICR 143, CA*** and ***Smith v Hayle Town Council 1978 ICR 996, CA*** apply to S.103A claims and set out essentially a three-stage approach to section 103A claims:

56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.

57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that

the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

Drawing inferences.

236. Given the need to establish a sufficient causal link between the making of the protected disclosure and the act of dismissal, a Tribunal may draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. In *Kuzel v Roche Products Ltd* Mummery LJ that a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.

The Respondents Submissions

237. <u>The First Protected Disclosure</u>

238. Counsel in summary, referred to the alleged Collective Letter not having been mentioned in the claim form and only raised by the Claimant at the preliminary hearing on 19 November 2019 which is the first time the Claimant actually asserted that any protected disclosure played a part in her dismissal. The oral disclosure on 19 March being mentioned but only as part of the day's events. The absence of any reference to the Collective Letter in her first witness statement and the alleged signatories to the Collective Letter only detailed for the first time in the Claimant's supplemental witness statement and Ms Norman's. The date of the Collective Letter was changed to 18 February 2019, the substance of its contents remain unknown and no copy of it was made. The Claimant asked no questions of Mr Reap in cross examination.

239. Counsel referred to the sentence in the disciplinary hearing which refers to the Claimant and 'PR' putting in a statements to say staff could not cope and asserts that as only PR and the Claimant is mentioned it does not appear to be a reference to the Collective Letter and that in any event she does not refer to it the Collective letter or complaints of the morning on the 19 March 2019 as the reason for the disciplinary action.

240. Counsel argues that the Tribunal should find that there was no Collective Letter, in the alternative it was not seen by Mr Kay-Warner, it was not suggested that he was not telling the truth about this issue and even if he had, he did not do subject the Claimant to any unfavourable treatment following this.

<u>The Second Disclosure</u>

241. This was the only real point expanded upon in any material respect during oral

submissions, and counsel asserted that there had been number of manifestations of such conversations with Mr Kay Warner before this and that the tribunal should accept that what has said is limited to what is set out in paragraph page 8 of Mr Kay- Warner's witness statement that there were "insufficient staff" and that she was intending to go home unless more staff came in. The Claimant he points out, in cross examination stated she made the latter comment to 'provoke a reaction', which he asserts shows she is prepared to raise concerns with Mr Kay Warner. It is further asserted that it is "unlikely" that the principal reason or dismissal was a conversation on a "well-worn topic".

The Dismissal

242. Counsel argues that there was no need for the Claimant to write in the Food Intake Diary "nothing due to no staff" and "hasn't had anything due to no staff" and that it was a "perfectly fair and reasonable conclusion" for the Respondent to find that the Claimant did it in this way to make a point. Ms Dudek reported the issue to Mr Kay Warner and there is no suggestion that she was part of a conspiracy to "frame" the Claimant and her prompt attention underscores.

243. It is averred that Mr Kay Warner was duty bound to investigate and did so "before making any decision as to what to do next". It is averred that the key statement comes from Mr Reap in that he was going to feed the patients but the Claimant indicated that she would take responsibility for it.

244. The allegation was a serious one and the decision to suspend again fell within a band of reasonable responses on the basis that there was a need to protect the residents from what could have been a deliberate act of neglect and also to permit further investigation. That decision fell within a reasonable band of responses.

245. It is averred that the size of the business was such that it was appropriate for Mr Kay-Warner to conduct both the investigation and the disciplinary hearing. Others below him were equally involved and taking into account the seriousness of the allegation it was appropriate that it was heard by the registered manager and that if there is an issue over fairness in this regard it is alleged that the appeal cured the defect because Mr Khatkar conducted the appeal and had no prior dealings with the incident.

246. It is asserted that the Claimant was clearly able to fully defend herself against the allegations at the disciplinary hearing and he refers to the notes supporting his contention.

247. It is averred that Mr Kay- Warner's conclusion was one that fell within a band of reasonable responses. Paul Reap's statement which he maintained during cross examination was key to that finding and there was no reason why that should not have been believed. It is averred that once that finding of fact was made then it followed that the Claimant must be summarily dismissed.

248. The Claimant's appeal it is asserted states no more than she had told the truth and others had lied. Mr Khatkar heard the appeal and it is submitted made some further investigations including speaking to key witnesses and decided to dismiss the appeal which was within the band of reasonable responses to do so.

249. Counsel referred to the Court of Appeal case of **Taylor v OCS Group Ltd 2006 ICR 1602, CA** and invited the Tribunal to look at the whole of the disciplinary proceed and find that the appeal cured any defects in the disciplinary process.

250. In the event that the dismissal is deemed to be unfair then it is asserted that any compensation should be reduced in that any award would not be just and equitable

and/or that the Claimant's conduct was blameworthy and culpable in that she did not feed residents deliberately or alternatively she just did not feed them when it was her responsibility. Those residents could have been fed by Mr Reap had the Claimant not indicated she would do it. The Tribunal should reduce any compensation for basic and compensatory award by 100%. Further if there are procedural failings a Polkey reduction should be made.

251. Counsel argues that the Burchell Test has been met.

The Claimant's Submissions

252. The Claimant made her submissions orally.

253. Her submissions were in summary that concerns were raised before the 19 March 2019, and Mr Kay Warner and Mr Khatkar were aware of them. That the appeal investigation was not fair as Mr Khatkar did not ask the appropriate witnesses; Ms Grainger and Ms McLoughlin about the events of that day and that she had raised her concerned about understaffing that morning.

254. She refers to the inconsistency in Mr Kay-Warner's account of having received the residents' books from Ms Dudek after the Claimant's shift had ended but then changed his evidence to receiving it late afternoon and therefore he could have spoken to the Claimant that same say and asked for her account of events but chose not to do so.

255. The Claimant referred to her clean disciplinary record and Mr Reap's confirmation that she was a good worker who always completed her tasks.

256. The Claimant referred to feeling singled out and that Ms Harrison, Ms Grainger, Ms Lowe, Mr Reap and indeed Mr Kay-Warner all knew the residents had not had breakfast and she was the only one suspended. She asserts Mr Reap did not offer to help her and he did not have the time to do so and at 10:30 he left for his break, which he confirmed.

Conclusions

Public interest disclosures (PID)

Collective letter

257. For the reasons set out in the findings, the Claimant was I find a signatory to the Collective Letter. It is conceded by the Respondent that if the Claimant made a disclosure which stated; "*unsafe*" that would be a disclosure made in the public interest.

258. I find that the Claimant held a genuine belief when making the disclosure that it tended to show that the health and safety of the residents at the Home was being or was likely to be endangered.

259. In terms of whether that belief was reasonable; I have taken into account who were signatories to the letter and that none of the Respondent's witness including Mr Kay-Warner, were in a position to comment on the staffing in the Home on the 18 February 2019. I find therefore that the Claimant's belief was not only genuine it was an objectively a reasonable belief to have held.

260. I accept that the Claimant's evidence that she believed she was making a disclosure which was in the public interest as set out in the findings.

261. The Collective Letter was posted underneath the door of Mr Kay-Warner's office and I find that he had received and read it. The disclosure was made to the Respondent's registered manager of the Home and thus to the Claimant's employer in accordance with section 43C Employment Rights Act 1996.

The conversation with Mr Kay-Warner on 19 March 2019: Protected Disclosure?

262. There was a discussion between the Claimant and Mr Kay-Warner in which the Claimant complained about insufficient staff and again referred to the situation being "unsafe".

263. The disclosure was made direct to Mr Kay-Warner and was therefore made in accordance with section 43C Employment Rights Act 1996.

264. The Claimant I find held a genuine belief that there were insufficient staff and that the Home was unsafe for the residents and I conclude that her belief was reasonably held. While Mr Kay-Warner maintains that his dependency tool showed there was sufficient staff, he accepted that he had informed her after she had complained about the staffing levels, that Ms Harrison would be assisting with breakfasts and that he then arranged for Ms Lowe to provide assistance with a poorly resident. The fact that Mr Kay-Warner informed the Claimant that Ms Harrison would be helping later that morning, indicates as a minimum that he appreciated further support in the form of Ms Harrison, was required.

265. There was also a delayed handover to contend with that morning and I accept that Mr Kay-Warner has exaggerated the staff who were physically working on the ground floor and available to help the carers that morning. The nurse was working between floors and I find on balance of probabilities, that she spent the morning on the first floor where the nurses I find were based. Ms Grainger, I find on a balance of probabilities was on the first floor during the morning dealing with medication. The carer on induction could not help with breakfast. The clinical lead was not visible on the ground floor and the Claimant did not I accept, realise she was working that day. The team leaded spent at least some of that morning in a meeting with Mr Kay-Warner.

266. For Mr Kay-Warner to maintain that there were 10 physical bodies on the ground floor was therefore I find, a deliberate overstatement and misrepresentation of the support available. I accept that the Claimant when she made the disclosure held a reasonable belief that the information tended to show that the health and safety of the residents on the ground floor was being or was likely to be endangered. It is not in dispute that the Claimant would in those circumstances have made the disclosure in the public interest and I accept that she believed it was in the public interest when she made it.

267. The Claimant in respect of both disclosures argues in the alternative that her disclosures tended to show that the Respondent had failed, was failing or is likely to fail to comply with a legal obligation to which it was subject. Mr Self conceded that if the Claimant made a disclosure that it was "*unsafe*" due to insufficient staff it does not make any material difference whether it is alleged to be a disclosure about a health and safety or a breach of a legal obligation. The Claimant did not identify the specific legal obligation however, this is the sort of case as identified by the EAT in ***Bolton School v Evans 2006 IRLR 500, EAT*** where although the Claimant did not in terms identify any specific legal obligation, it would have been obvious that her concern was that the health and safety of residents was at risk and I am satisfied that it was appreciated that this could give rise to a potential legal liability and indeed the Respondent did not seek to argue otherwise in its

evidence or submissions.

268. The Claimant was dismissed and has established that she made two protected disclosures. It is for the Respondent to show what the reason for dismissal was. The Respondent's case is that the Claimant was dismissed because of the act of misconduct namely that two residents had not been given their breakfast and that the Claimant's explanation that there were no staff on duty was not true. Mr Kay – Warner's evidence before this tribunal was that he had formed the view that it was more than likely to have been deliberate and that she had purposefully taken that course of action to "*make a point*" rather than because she genuinely could not undertake those duties.

269. I turn first to the investigation that was carried out.

Investigation

270. The Claimant was suspended without being given an opportunity to respond to the allegations first.

271. Mr Kay-Warner then obtained a number of statements from witnesses and based on those statements, without any investigation meeting taking place with the Claimant or any statement obtained from her, he decided to proceed to a disciplinary hearing.

272. The statement which Mr Kay-Warner prepared personally setting out his involvement in the events of the 19 March, was extremely brief and inadequate in that it failed to address in any detail the staffing situation on the 19 March. It failed to set out how he had decided on the levels of staffing and what observations if any he had carried out that day. It failed to deal with the discussion which I find that he had with the Claimant when he was walking around the Home at between 11:15 to 11:30am when I find that the Claimant raised her concerns with him. I also find that it failed to include the conversation which I find as a fact that he had with Ms Grainger that morning when she alerted him to the fact that two residents had not had their breakfast. Those were material omissions.

273. This is not a case of a disciplinary officer making a decision based on witness statements which he does not know to be misleading or false.

274. Prior to the disciplinary hearing Ms Mina obtained further witness statements, however they consist of nothing more than answers, often no more than a few words or short sentences, in response to 5 or 6 pro forma questions.

Disciplinary Hearing and Findings

275. Mr Kay-Warner did not approach the decision-making process with an open mind. Had he done so he would have taken into account the evidence which did not support his alleged belief that the Claimant had set out to 'make a point' by deliberately neglecting the residents.

276. Mr Kay-Warner failed to disclose and take into account during the disciplinary process that the Claimant had spoken to him that morning at about 11:15/11:30 about the problems on the ground floor. He did not deny their conversation during the disciplinary hearing when the Claimant raised it but he did not acknowledge it either.

277. It was unreasonable not to have not recorded the representations made by Ms

McLoughlin at the disciplinary hearing about what support in practice which the nurses and the senior care staff can provide to the carers.

278. It was also unreasonable not to investigate further Ms McLoughlin's account that she had been alerted by the Claimant to the problems they were having and had offered her help to Ms Grainger that morning only for her help to have been turned down.

279. I also find for the reasons set out in my findings, that Mr Kay-Warner had exaggerated the support which was available on the ground floor that day and he failed to consider the representations of the Claimant about what other staff were doing that morning and where they were working and indeed whether the Claimant would have been aware that they were even on duty in the case of the Clinical lead. He repeats as a mantra that there were 10 physical bodies without sufficient investigation into who was where and when.

280. There are obvious inconsistencies in the statements of some witnesses, with Ms Harrison alleging she alerted Ms Harrison at 10:30am and Ms Grainger stating in her statement that she was not aware of the residents not having had breakfast until 11:15am. There was no attempt to establish whether Mrs Grainger had been alerted much earlier than she alleged and if so, what she should have done as a senior career in charge to ensure the breakfasts were given. Mr Kay-Warner accepts Mrs Grainger evidence about the time when she knew, without any reasoning given in the disciplinary hearing for preferring her account to Ms Harrisons. Although he prefers Ms Grainger's evidence on this point, he does not accept her evidence when it comes to implicating him, in that he did not accept that she had reported the situation to him that morning, his evidence was that he could not recall any discussion.

281. Mr Kay-Warner states that his view that the Claimant's actions were deliberate was reinforced by Mr Reap's account. His explanation of how he reconciled the conflict in their evidence was wholly unsatisfactory.

282. If the Claimant had taken steps to alert Mr Kay-Warner to the situation on the ground floor at 11:15/11:30 and alerted Ms McLaughlin also earlier that morning that help was required, the only reasonable conclusion to draw from those actions would be that she was reaching out for support and not that she was deliberately neglecting the residents to 'make a point' about understaffing.

283. The Claimant was not the only person responsible for the care of the residents. Both Mr Kay-Warner and Mr Khatkar referred all the staff on duty having a duty to care for the residents. The only explanation given by Mr Kay- Warner for why the Claimant was the only one suspended, was that she had completed the resident's books and included the entry about the non-feeding being due to 'no staff'. There was a failure to consider the potential responsibility and culpability of other members of staff. Mr Kay- Warner was not interested in looking any further than the Claimant.

284. Mr Kay-Warner had also failed to address how the Claimant could provide personal care, such as getting residents out of a wet bed and also assist with feeding residents, when the two tasks it was not disputed, cannot be carried out at the same time. Ms McLoughlin as a senior care assistant gave important evidence about what happened in practice in the Home regardless of how many "physical bodies" the dependency tool stated were needed. Not only do I find that Mr Kay-Warner did not take that into account, I find that the notes of what she said had been deliberately edited from the record of the disciplinary hearing.

285. Mr- Kay- Warner I find, was clearly from the record of the disciplinary hearing, upset about the entry in the residents' books. On a balance or probabilities, I find that he formed a view, perhaps in part from the fact the Claimant had raised staffing issues with him that same morning, but also from Mr Reap's statement, that he Claimant had refused help to make a point about staffing. However, I find that this view formed at the outset of the investigation impaired the way Mr Kay-Warner approached the disciplinary process. He did not carry out a reasonable investigation but was concerned only with relying on the evidence which supported this narrative of the Claimant's culpability. He closed his mind to the possibility that there may have been an innocent and reasonable explanation.

286. I find that the Respondent had failed to carry out as much investigation into the matter as was reasonable in all the circumstances and that the way the investigation and disciplinary hearing was carried out was outside the band of reasonable responses. The process was fundamentally flawed.

287. The Respondent did not have in mind reasonable grounds upon which to sustain a belief that the Claimant had deliberately not fed the two residents at the Home.

288. I do not however find on the evidence that the reason or principal reason for the decision to dismiss the Claimant was because of the Collective Letter. The Claimant's own evidence is that she was not subject to any different treatment after it was sent. Mr Reap remains employed by the Respondent and he was a co-signatory. Ms Norman's evidence also, was that she had not been subjected to any different, treatment after sending the Collective Letter. I find on the balance of probabilities, that Mr Kay-Warner whose evidence was that he had received various complaints, more likely than not, simply did not engage with those concerns and ignored the letter.

289. I have also considered whether the concerns the Claimant raised in the morning with him on the 19 March, was the reason or principal reason for dismissal. I have also taken into account that it is was not unusual for concerns to be raised with Mr Kay – Warner. The Claimant does not allege that he reacted badly to the concerns she raised but rather assured her that more staff would be available to help.

290. I find on the balance of probabilities, that it is more likely than not that Mr Kay-Warner was upset when he read the entry on the residents notes and indeed he refers to this in the disciplinary hearing; "*you should not have put no staff"* and indeed in his evidence in chief he stated; " *I was of the view that her actions in failing to feed the two residents, and writing up the reasons as being " due to no staff" , were more likely to be deliberate*". The Claimant however does not allege that what she wrote on the records was a protected disclosure or that it was what she wrote that resulted in her dismissal.

291. Although the discussion on the morning of the 19 March may well have been factor which led Mr Kay-Warner to suspect that there was a deliberateness in her conduct, this was then reinforced by the witness statement of Mr Reap.

292. I do not find on the evidence that the reason or principal reason for her dismissal however was the disclosure that she had made that morning about insufficient staff, although that may well have unfairly influenced his perception of her behaviour. However, this is not a detriment claim, we are concerned in this case only what was the reason or principal reason.

293. Although I have taken into account the size of the Respondent and the limited management team, I find that it was outside the band of reasonable responses for

Mr Kay- Warner to conduct both the investigation and disciplinary hearing in circumstances where he was also a witness. Further, I find he failed to act with impartiality. I was not convinced by the explanation around why the team leader or the clinical lead could not have at least conducted the investigation. Further, as set out in my findings, Mr Khatkar had been involved in the disciplinary process, in that Mr Kay-Warner discussed the findings with him and the sanction. Although Mrs Khatkar is not involved in the day to day running of the Home, she is a statutory director and it was not explained why she could not have conducted the appeal. I find that there was a breach of the Acas Code in that Mr Khatkar dealt with the appeal despite having been involved in the disciplinary decision making process and further and in any event, he failed to deal with the appeal impartially. The fairness of the appeal was tainted by Mr Khatkar's previous involvement.

294. I find that Mr Kay-Warner had spoken to Mr Khatkar about what sanction to apply and that he had done this before the disciplinary hearing hence why he did not need to take a break before dismissing the Claimant. I find that Mr Kay-Warner went into that disciplinary hearing meeting not prepared to engage with the Claimant's representations hence his failure to carry out any further investigation despite stating that he would do so.

295. I find on the balance of probabilities that Mr Kay- Warner approached that disciplinary hearing with a closed mind, he intended to dismiss, had obtained approval from Mr Khatkar to do so and implemented that decision. It was an unfair and unreasonable way in which to treat the Claimant, the findings of neglect having the potential to cause significant damage to her career and professional reputation.

Appeal

296. Mr Khatkar's evidence is that he was not re-running the disciplinary, he was only checking that it was fair and no evidence had been overlooked. As set out in my findings, he failed to carry out any meaningful review of how the disciplinary process had been conducted and whether evidence had been overlooked.

297. In terms of general fairness, the courts have established that defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not a rule of law that only a rehearing as opposed to a review, is capable of curing earlier defects: *Taylor v OCS Group Ltd* (above). The tribunal's task under section 98 (4), is to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an early stage, the tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.

298. The appeal whether described as not a re-run of the disciplinary or otherwise, did not in this case 'cure' defects in the original disciplinary process. I find that it was on the facts as found, nothing more than a 'rubber stamping' of the decision which I find Mr Khatkar had already discussed with Mr Kay-Warner before the disciplinary hearing and approved, to dismiss the Claimant.

299. For the reasons set out in my findings, the way the appeal was conducted was itself outside the band of reasonable responses. The Claimant was denied the opportunity of demonstrating that the reason for her dismissal was not sufficient for the purpose of section 98 (4). The non-statutory Acas guide, 'Discipline and grievances at work' (July 2020), which accompanies the statutory Acas Code of Practice recommends that an employer should confirm in writing the result of an appeal and the reasons for the decision. The Claimant was merely informed in this case that the original decision was uphold with no explanation of the reasons for that decision.

300. Each stage of the disciplinary process, from investigation through to the appeal stage, was conducted in a manner which was outside the band of reasonable responses. The Respondent did not act reasonably in dismissing the Claimant for the alleged misconduct in the circumstances.

Summary

301. Mr Kay-Warner I find, leapt to conclusions prior to conclusion of the investigation which deprived the Claimant of a fair disciplinary hearing. The Claimant had been employed by the Respondent for a significant number of years and had a clean disciplinary record and the concerns which she raised about the staffing levels, I find were genuine. There was significant evidence which was not taken into account and reliance on evidence because it supported the premature and therefore unreasonable belief, that the Claimant had rejected an offer of help in order to make a point about staffing. The investigation and disciplinary process was fundamentally flawed and not cured by the appeal.

302. In all the circumstances of the case, I find that the Claimant was unfairly dismissed contrary to section 954Employment rights act 1996 but not to pursuant to section 103A.

Contributory Fault

303. I do not find on the evidence and on the balance of probabilities, that the dismissal was to any extent caused or contributed by any action of the complainant such that it would be just and equitable to reduce the amount of the compensatory award pursuant to section 123 (6) ERA. While the residents were not fed, and that is of course without doubt a serious matter, I do not find that the Claimant deliberately left the residents without breakfast. I find that on a balance of probabilities, she was working in difficult circumstances and that she did not have sufficient support, whether due to insufficient staff or inadequate organisation of those staff on the day, the responsibility for which must fall on those in more senior, supervisory or managerial positions within the Home.

304. With respect to section 122 (2) ERA, this provision gives tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal. I do not consider that it is just and equitable to reduce the basic award either. I do not accept on the evidence that the Claimant's conduct was blameworthy or culpable.

Polkey Deduction

305. This is not a case where there has been a merely procedural lapse or omission, where it may be may be relatively straightforward to envisage what may have happened if procedures had been carried out fairly. What went wrong in this case was more fundamental, and went very much 'to the heart of the matter'. This is a case where there was a seriously flawed dismissal procedure and I therefore I do not consider it just and equitable to embark on a 'sea of speculation' about what might have happened had the Respondent acted totally differently.

306. In the circumstances given my findings and how fundamentally flawed the investigation and disciplinary proceedings were, this is not a case where any Polkey deduction would be appropriate.

Remedy

307. The matter will be set down for a one-day remedy hearing to determine the compensation to be awarded.

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Employment Judge

Date: 24 November 2020

JUDGMENT SENT TO THE PARTIES ON

22 January 2021

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FOR THE TRIBUNAL OFFICE