Case Number: 3312414/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs M Szalkowska	v	HC-One Limited

Heard at: Watford (via CVP) **On**: 25-29 January and (in private) 1 and 3 February 2021

Before: Employment Judge Hyams **Members:** Mr M Kaltz
Mr S Woodward

Appearances:

For the claimant: Ms L Millin, of counsel
For the respondents: Mr I McGlashen, Representative

UNANIMOUS RESERVED LIABILITY JUDGMENT

1. The claimant was dismissed unfairly within the meaning of section 98 of the Employment Rights Act 1996.

2. The claimant was dismissed unfairly within the meaning of section 103A of that Act.

3. The respondent treated the claimant detrimentally for making a protected disclosure within the meaning of section 43A of that Act, contrary to section 47B of that Act.

4. The respondent dismissed the claimant wrongfully. The claimant was entitled to contractual notice pay, which the respondent wrongly failed to pay her.

REASONS

The claims and the issues

1 The claimant was dismissed by the respondent without notice on (the parties agreed) 21 December 2018 from her post as the manager of a 36-bed unit, in a care home complex owned by the respondent at Hatfield, Hertfordshire. The 36-bed unit was called Johnson House and is referred to as such by us below. The care home complex is called St Christopher's Care Home ("the Home").

2 The claimant had by then been employed by the respondent since October 2017, when the respondent bought the care home complex, along with others, from BUPA, for whom the claimant had worked continuously since 2011. That transfer was (it was not discussed and it was evidently agreed) a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246. Thus, the claimant had sufficient length of service to be able to claim that her dismissal was unfair within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996"), and she did so. She claimed in addition that she had been dismissed unfairly within the meaning of section 103A of that Act, i.e. that the principal reason for her dismissal was that she had made a protected disclosure within the meaning of section 43A of the ERA 1996. She also claimed, separately, that she had been subjected to detrimental treatment for making that disclosure, contrary to section 47B of the ERA 1996. Finally, the claimant claimed that her dismissal was wrongful, in that there was, she claimed, no justification in the law of contract for dismissing her without notice.

3 The respondent's case was that the claimant was dismissed for misconduct, that that misconduct was gross misconduct so that it justified her summary dismissal (it being the respondent's case that the claimant had committed a breach of the implied term of trust and confidence by doing the things that the respondent said she had done), and that the dismissal was fair. It was also denied that the claimant had been subjected to detrimental treatment of any sort as a result of her making, or dismissed principally because she had made, a protected disclosure. The respondent did not accept that the claimant had made a protected disclosure within the meaning of section 43A of the ERA 1996, although it did accept that the claimant had put before the respondent the letter which it was the claimant's principal case was such a disclosure and was the principal reason for her dismissal. The letter was put before Ms Ioana Diana Moraru-Manole, who was at the time the Home's Manager and who was known by all concerned in her role for the respondent as "Diana". The claimant was dismissed following a disciplinary hearing conducted by Mr Declan Miskelly on 13 December 2018. The claimant appealed against that decision to dismiss her, and her appeal was heard by Ms Amanda Scott, who dismissed the appeal.

4 The case was the subject of a preliminary case management hearing, conducted by Employment Judge ("EJ") Alliott on 16 January 2020. The claimant attended that hearing unrepresented. The respondent was represented by Mr McGlashan. EJ Alliott listed the issues in paragraph 4 of the case management record, at

pages 39-41, i.e. pages 39-41 of the bundle of documents put before us for the hearing of 25-29 January 2021. (Any reference to a page below is, unless otherwise stated, to a page of that bundle.)

5 In paragraphs 4.8 to 4.10, EJ Alliott listed the issues relating to detriment in the following manner (the numbering having gone slightly awry in the original, in that paragraphs 4.10.1 and 4.10.2 should have been paragraphs 4.9.1 and 4.9.2):

> "4.8 Did the respondent subject the claimant to any detriments, as set out below?
>
> 4.9 The alleged detriments the claimant relies on are as follows:
>
> 4.10.1 Ms loana Moraru-Manole not involving the claimant in an inspection of Johnson House on 7 October 2018.
>
> 4.10.2 Ms loana Moraru-Manole transferring the claimant to Marsden House on 25 October 2018.
>
> 4.10 I record here that the conduct of Ms loana Moraru-Manole relating to and leading up to the claimant's dismissal will be included under the dismissal claim and are not cited here as detriments."

6 On the fifth day of the hearing, during submissions, Ms Millin sought permission to amend the list of issues so that it stated that the claimant had been treated detrimentally within the meaning of section 47B of the ERA 1996 by the whole course of conduct from 5 October 2018 (and not, as EJ Alliott apparently understood) 7 October 2018 onwards to the time of her dismissal. As EJ Hyams pointed out, the list of issues was not a pleading, and as far as the question of what claims were before the tribunal was concerned, the key was what was in (or treated as being in) the ET1 claim form, i.e. the details of the claim. If there was in fact a claim in place of the sort that Ms Millin sought to advance, then the issue was one of fairness, namely whether or not it would be unfair to the respondent to permit the claimant to advance her claim on the basis that she had been treated detrimentally from 5 October 2018 onwards up to the time of her dismissal (as it was properly to be analysed in the light of the decision of the Court of Appeal in *Melia v Magna Kansei Limited* [2005] EWCA Civ 1547, [2006] ICR 410, to which we return in paragraph 193 below), despite the manner in which EJ Alliott had recorded the issues.

7 The details of the claim were attached to the ET1 form. In paragraph 41, at page 22, this was said, under the heading "Summary":

> "Diana Moraru-Manole has conducted a sustained campaign of bullying, harassment, and intimidation against me. I have been victimised for raising a legitimate concern (with others) about her experience and competence – fears that have been borne out in practice – and for making a whistleblowing

> complaint that her actions constituted a threat to patient safety. I believe she has concocted accusations and evidence against me to justify dismissing me. Procedures throughout were grossly inadequate and unfair, and there seems to have been a deliberate intention to exclude HR from all meetings: the investigation, the disciplinary and the appeal. I believe that senior management has been complicit in covering up the wrongdoing that has been committed, as part of an exercise in damage limitation. This has added insult to injury. This is a company that prides itself on its kindness!
>
> I have been hounded out of my job, my personal and professional reputation has been trashed, and my career and livelihood have been ruined by DMM's vindictive actions."

8 Having considered that passage, we concluded that on the facts, the claim that the claimant had been subjected to detrimental treatment in respect of all of the things done to her after she gave the respondent her letter of 20 August 2018 at pages 239-240, was "live" and continued to be pressed after the hearing of 16 January 2020, albeit that the events "relating to and leading up to the claimant's dismissal" were (in our view mistakenly) listed as being bound up with the dismissal itself.

9 Nevertheless, an issue of jurisdiction arose (that was not recorded by EJ Alliott) in respect of any event which preceded 18 November 2018, in that a claim was in time only if the event about which complaint was made occurred on or after that day, unless (1) time was extended on the basis that it was not reasonably practicable to make the claim within the primary time limit of three months or (2) the event was either (a) part of an act extending over a period ending on or after 18 November 2018 or (b) part of a series of similar events that ended on or after 18 November 2018. That was the result of (1) section 48 of the ERA 1996 and (2) the fact, recorded by EJ Alliott, that the claimant contacted ACAS to start the period of early conciliation on 7 January 2019 and ACAS issued the early conciliation certificate on 1 February 2019.

10 We ascertained that a claim of detrimental treatment was in time in respect of the manner in which Ms Moraru-Manole had acted towards the claimant during an interview held on 4 December 2018 and the decision of Ms Moraru-Manole made on that day that the claimant should be subjected to a disciplinary hearing on 13 December 2018. Thus, the claim of detrimental treatment within the meaning of section 47B of the ERA 1998 was in time at least in that respect if we permitted the claimant to advance it. Mr McGlashen submitted that it would be unfair to the respondent to permit the claimant now to advance her claim of detrimental treatment within the meaning of section 47B otherwise than as stated by EJ Alliott. However, we noted that the claimant had been unrepresented at the hearing of 16 January 2020 before EJ Alliott, and that EJ Alliott's characterisation of the claim of detriment as being bound up with the claimant's dismissal was made apparently without having been referred to *Melia*. Bearing it in mind that if the detrimental treatment had to be regarded as being within the meaning of dismissal then the

claim of such treatment could not (as a matter of law) be advanced separately, and bearing in mind the other factors to which we refer in this paragraph and the two preceding paragraphs above, we concluded that it was in the interests of justice to permit the claimant to advance her claim of detrimental treatment within the meaning of section 47B on the basis that what occurred up to (but not including) the hearing of 13 December 2018 after which she was dismissed was not part of her dismissal, and that the sequence of events before her dismissal was part of a series of similar acts within the meaning of section 48(3)(a) of the ERA 1996, or alternatively an act extending over a period. Whether the claim of detrimental treatment on that basis was well-founded was another matter, of course, but we considered that the claimant should be allowed to advance that claim.

11 The issues in the case fell to be determined therefore in a slightly different manner from that which was recorded by EJ Alliott. We saw no need to elaborate any further on them here in the light of what we say above. We return to the issues and discuss them in the light of the applicable law, to which we refer in paragraphs 178-193 below, after referring to the relevant evidence and stating our findings of fact in paragraphs 17-177 below.

The evidence which was before us

12 We heard oral evidence from the claimant on her own behalf and from the following witnesses on her behalf:

12.1 Mr Michael Connell, who worked (and continues to work) for the respondent as a carer;

12.2 Ms Diane Winter, who worked for the respondent as a health care assistant;

12.3 Ms Martyna Speyer, who worked for the respondent as a nursing assistant; and

12.4 Ms Ami Gauden, who worked, and continues to work for the respondent, as a health care assistant.

13 We heard oral evidence on behalf of the respondents from the following witnesses:

13.1 Ms Diane Moraru-Manole, who from 10 August 2018 onwards worked, and continues to work, for the respondent as the Manager of the Home;

13.2 Mr Declan Miskelly, who used to work for the respondent as the manager of the respondent's care home in Stevenage; and

13.3 Ms Amanda Scott, who worked for the respondent as its Managing Director for the South.

14 The respondent put before us a 345-page bundle of documents, to which we added two documents which were disclosed by the respondent during the second day of the hearing. Those documents were the respondent's whistleblowing procedure (pages 346-352) and a note of an interview of two members of the staff of Johnson House carried out by Ms Moraru-Manole on 5 October 2018 (pages 353-357) to which we return in a number of places below. The claimant put before us signed witness statements made by Mr Numer Clet (to whom we refer further below), Ms Lilian Ofondu, and Ms Yolanda dela Torre (to whom we refer further below), but did not call them to give evidence. We therefore admitted those witness statements into the evidence before us but bore it in mind that their makers had not been cross-examined.

The procedure which we followed

15 We heard oral evidence first from Ms Scott, as Mr McGlashen said that she was available to give evidence only during the afternoon of Monday 25 January 2021. We pointed out that that did not mean that she could not in practice give evidence on the following day and that if necessary her evidence might need, if it was going to be completed, to be heard on the following day. In the event, we sat late in order to enable Ms Scott to complete her evidence on 25 January 2021. Ms Moraru-Manole was not present when Ms Scott gave evidence to us. Ms Moraru-Manole then gave oral evidence during the whole of 26 January 2021, when we again sat late to enable the witness's evidence to be completed on that day rather than on the following day. Overnight, i.e. that evening, we were told that Mr Miskelly was not able to give evidence on the following two days, so on the next day, Wednesday 27 January 2021, we heard oral evidence from Mr Connell, Ms Winter, Ms Gauden and the claimant. The claimant's oral evidence was not concluded by the end of 27 January. It was completed by noon on 28 January 2021. We then heard oral evidence from Ms Speyer. Her evidence took less than an hour. We then adjourned the hearing until the following morning, and gave the parties time to prepare written submissions. We then were able to read parts of the bundle which we had not before then had time to read. We resumed the hearing the next morning at 10.00am, and after time being given to the claimant to check the bundle to make sure that all of the documents she wanted in it were in fact in it and therefore before us, we heard oral evidence from Mr Miskelly.

16 We turn now to the factual background. In what follows immediately below, we refer to the evidence before us and the matters that were agreed and in the course of doing so we make some initial findings of fact. We then state our conclusions on a number of further issues of fact which required determination. We then state the applicable legal principles to be applied by us, after which we state our conclusions on the claims. In stating our conclusions on the material factual issues, we describe several material conflicts of evidence and state how we resolved them, and for what reasons.

The facts

The claimant

17 The claimant is a qualified general nurse, with over 20 years' experience of working with people with dementia. She also has an MA from Poland in supporting and caring for people with learning disabilities. She was employed at the Home from 11 February 2011 until 21 December 2018, for the final four years of that period as the manager of Johnson House.

The structure of the Home and its staffing

18 The claimant described the structure of the Home in paragraph 2 of her witness statement, which we accepted, in the following terms:

> "St Christopher's is made up of five houses, each run by a Unit Manager with a Deputy Unit Manager and a team of nurses, nursing assistants and health care assistants, both permanent and bank staff. The Unit Managers all report to the Home Manager, who in turn reports to the Regional Manager. There is also a Deputy Home Manager and a Clinical Services Manager who report to the Home Manager. The Home was run by BUPA until October 2017 when it was taken over by HC-One."

19 We also accepted the claimant's description of the staffing of Johnson House and the role in which Ms Moraru-Manole had worked for the respondent until April 2018. That description was in paragraphs 7 and 8 of the claimant's witness statement, and was as follows:

> "7. Johnson House is a U-shaped building with three sides, with 36 beds in total. I used to run the unit with two carers to each side, under the day-to-day supervision of a Nursing Assistant, with two qualified nurses (including myself when on duty) to cover the whole unit (or occasionally a nurse and a nursing assistant). The day shift worked from 08:00 - 20:00 and the night shift from 20:00 - 08:00. My normal working hours were 08:00 - 17:00 Monday to Friday, but I occasionally worked until 20:00 on an overtime basis, as required. Before a handover, whether morning or evening, the staff will check the paperwork during the last 2-3 hours of the shift. Then, in the last hour of the shift, the nursing staff will walk round the whole unit, room by room, again checking the paperwork.
>
> 8. In September 2017 the Deputy Unit Manager of Marsden House, Ioana Moraru-Manole, known as Diana, was appointed part-time Clinical Services Manager in addition to her House position. The purpose of that role is to gather information from all the units on current issues and to audit paperwork, care plans, medications, infection control, etc, with the

objective of identifying issues to be addressed so as to improve standards of care."

Ms Moraru-Manole's roles for the respondent

20 Ms Moraru-Manole left the respondent's employment in April 2018, when she went to work for a care home which was still owned by BUPA. The claimant described the manner in which Ms Moraru-Manole returned to work at the Home in paragraphs 11 and 12 of her (the claimant's) witness statement. We accepted them. They bear repeating in full.

"11. In July 2018, I was on a training course with the Unit Manager of Marsden House, Yolanda dela Torre, when we were told on the grapevine that Diana would be rejoining St Christopher's as Home Manager. We discussed this with the other Unit Managers and agreed that this would be a disaster for the home and its residents and staff. We were most concerned that this was an unsuitable appointment in view of Diana's inexperience, lack of communication and teamworking skills, and her domineering and dismissive attitude towards people at all levels. We were concerned that there would be a serious impact on residents' safety, especially on those residents with dementia and/or challenging behaviour. We also felt that staff morale would be adversely affected and that relationships throughout the home would deteriorate, with consequent reduction in the quality of care. We agreed to send a letter of protest to the Regional Manager, Helen Finlay. Yolanda, who had been Diana's line manager before she left, drafted the letter and passed the hand-written letter to the Residents' Experience Manager, Sheena Lewis, for typing up and passing to Helen. However, the interim Home Manager, Mary Quinn, found out about it and told Sheena not to get involved, and informed Helen. That was the last we saw or heard about our letter. The next day Helen came to the home and called a meeting of the five Unit Managers with Numer Clet and reprimanded us. Yolanda in particular spoke up about her experience of Diana in Marsden House. Helen said that the decision had been made and we must give her a chance. I spoke to Helen again privately afterwards and amplified my concerns from my experience of Diana as Clinical Services Manager, but it made no difference.

12. Diana started at St Christopher's on 10 August 2018 and immediately set about making changes. One of her first actions was to reduce staffing levels in Johnson House (my house), even though Johnson had more residents and more challenging behaviour than other houses. She did not explain or justify her actions, which were communicated verbally. This change would mean one less carer during a very busy time of day. I was concerned that this put the safety of my high dependency residents at risk and result in a lower standard of care, and that we would not be able to meet the needs of vulnerable people living with advanced dementia. I discussed this with the Deputy Home Manager Numer Clet, who encouraged me to write to Diana explaining the issues of dependency. On 20 August I wrote a detailed letter

to Diana to protest formally at this staff reduction on grounds of residents' safety and practicality [page 239]. I showed the letter to Numer Clet who agreed that it was fair and reasonable [see Witness Statement Numer Clet]. I also showed it to Sheena Lewis (Residents' Experience Manager) and told Alistair Betts (Area Quality Director) of what I was doing and why."

The claimant's claimed "whistleblowing" letter

21 The letter was at pages 239-240. It was addressed to Ms Moraru-Manole as "Dear Diana". Ms Moraru-Manole accepted (in the manner stated in the following paragraph below) that she had received and read it soon after it was written. It was in these terms:

"I would like to express my concern regarding the reduction of staff in Johnson house.

Johnson house is a dementia unit, we nurse 36 residents. We used to have 7 carers during the day. From 15.08.18 this is reduced to 6 carers. We are the biggest unit in St. Christopher's, we have 2 nurses for 36 residents and if you compare this with other houses we have 6 more residents and we feel that this should be compensated by one care[r] this has been taken away.

We have 27 high dependency residents and 9 medium.

6 residents with a very high risk of falls. 1 requires constant observation.

20 with a risk of falls.

5 residents with behaviour which challenges the staff.

22 residents require full assistance with eating and drinking. Some of the residents have developed swallowing difficulties and require more than 20 minutes to assist them. 5 residents need help and encouragement. 4 residents MUST is 2 and 4 residents MUST is 1.

18 residents are hoisted for all transfers.

Looking after 36 residents is a challenging and complex task. Especially with residents who are entering in the last stage of dementia where they become less able to express themselves in an understandable way. Also for residents who display behaviour which challenges staff and need close observation to maintain their own safety and that of other residents. This is especially in the afternoon when the residents become tired and their presentation changes. They appear restless, agitated, unsteady and at a high risk of falls.

During the day our community area is alive as there are many residents. For them this is a perfect way of socialising and enables staff to observe our

residents closely. For the hostess this is convenient as she can remain in the lounge area and offer fluids and food. This prevents dehydration and urine tract infections. Also for the Activities coordinator it is convenient as enables her to provide a group activity. Thanks to the team work of nurses, health care assistant, hostess and activity coordinator the communal area is kept as safe as possible. It is not safe to leave the communal area without a Heath care assistant in the afternoons.

Dementia unit must have an adequate number of staff to meet the needs of people living with dementia to prevent falls, infections, pressure sore formation or weight loss. Johnson houses team goal is to maximize the potential of our residents, enhance the feeling of comfort and well being, relieve stress, build a close and professional relationship with our residents and their family.

I believe that even with 7 carers throughout the day it is a challenge and requires an experienced, dedicated and passionate staff. Looking after residents is not a job and it is our mission. We think that the reduction in staff has a bad impact on our residents, staff moral and relatives impression. We feel overloaded and afraid that the safety of our residents will suffer.

With the reduction of staff we have to rearrange the Johnson team routine in order to maintain the safety as much as possible of our residents living with advanced dementia. We have to reduce the number of residents who come to the lounge, as in the afternoon we will be short of staff. This might have an impact on the residents wellbeing, food and fluids intake and the progression of dementia due to less stimulation.

Johnson house team would love to follow the HC ONE mission and provide kindness and a secure environment for residents living with dementia. However due to the reduction of staff numbers we are unable to carry out our mission in the same way as we used to.

Staff feel frustrated, disappointed and not supported. As a unit manager I am a concerned that this might reflect on staff performance and motivation to provide the high quality of care. Most importantly the reduction in numbers is putting our residents at risk and this is not satisfactory."

22 All that Ms Moraru-Manole said about that letter in her witness statement was this:

"19 On or around 20th August 2018, I found a letter from the claimant in my pigeon-hole. She expressed concern about the reduction of staff on Johnson. Pages 239.

20 I dealt with the issue of staffing levels on Johnson, among other issues at a meeting on 28th August 2018. Page 100."

23 In fact, the document at page 100 was a set of minutes of a meeting of the staff of Johnson House, which had been prepared at the request or direction of the claimant, and when Ms Moraru-Manole was cross-examined on them, she said that she had been invited to the meeting, and she agreed that it had been run by the claimant. That record showed that the claimant had said to the staff of Johnson House a number of things about the keeping of records and the care of the residents. We note here that the following things were recorded in those notes:

23.1 "Hourly check, behaviour chart, daily must be matched."

23.2 "From 14.00 there are 6 carers. The carer who will leave the unit must make sure the task [sic] are completed, residents remain safe and documentation is done."

23.3 "Fluids must always be available. Water jugs sterilised and changed daily. Encourage food and fluids intake. Fluids and food monitoring must be carried out and documented in a timely manner on daily notes and fluids and thicken fluids chart."

23.4 "Documentation to be done on time and in an appropriate manner. All documentation of the residents must have name of the residents, date of birth."

24 The respondent's whistleblowing procedure provided (at page 349) under the heading "How to raise a concern":

> "As a first step, you should normally raise concerns with your immediate manager or their superior. However, this may depend on the seriousness and sensitivity of the issues involved and who is suspected of the malpractice. For example, if the whistleblower believes the management is involved, it would be inappropriate to raise it directly with them. This can be escalated through the Operational team or the whistleblower may take the allegation direct to any of the following Whistleblowing helplines: [numbers were given.]
>
> HC-One Oval Homes can also complete an online web report via the SeeHearSpeakUp website (www.seehearspeakup.co.uk/en/file-a-report). In order to file a report, you must insert the organisation's user name and password. The user name is HC-One and the password is Healthcare or by e-mailing your concerns to report@seehearspeakup.co.uk."

25 Under the heading "How HC-One will respond", this was said (at pages 349-350):

> "The person to whom you report your concerns under this procedure must, in turn, report them to the Chief Operating Officer within 24 hours.
>
> Within ten working days of an allegation being raised, the person investigating the allegation will write to you:

- Acknowledging that the concern has been received
- Indicating how HC-One proposes to deal with the matter
- Supplying you with the information on staff support mechanisms
- Telling you whether further investigations will take place and if not, why not".

26 Ms Moraru-Manole did none of those things in response to the claimant's letter at pages 239-240 which we have set out in paragraph 21 above. When pressed in cross-examination on the reason why she did not take any of those steps, Ms Moraru-Manole said that she had "discussed [the letter] further with Helen Finlay", and that she (Ms Moraru-Manole) "[could not] recall why she could not, or did not" discuss the letter with the claimant.

27 When Ms Moraru-Manole was asked in cross-examination to respond to the content of the letter, she said that the first step in determining the required number of staff for a care home was determining the dependencies of the residents and that in doing that it was necessary to look at the residents' care plans, which were written by the nurses. Ms Moraru-Manole then said: "Staffing is agreed with the CQC [i.e. the Care Quality Commission] and the local authority". Ms Scott had, unknown to Ms Moraru-Manole, said to us when giving evidence the day before that "the CQC do not determine staffing levels". EJ Hyams then put it to Ms Moraru-Manole that in his experience, both as a lawyer and as a judge, neither the CQC nor the local authority (nor, in fact, the relevant health service purchaser of care home services, in this case the East and North Hertfordshire Clinical Commissioning Group ("the CCG")) determined staffing levels. Ms Moraru-Manole then acknowledged that that was so, but said that the CQC will "question you if it is at the minimum".

28 Ms Moraru-Manole was then asked by Ms Millin why the respondent's whistleblowing policy was not in the bundle (which at that time it was not) and it was put to her that it should be. Ms Moraru-Manole then said that it was "available on the communities", by which she clarified later she meant the five units at the Home, of which Johnson House was one, and that "the company's number [was] available", by which she meant the respondent's telephone number. We had on the day before asked for the respondent's whistleblowing procedure to be sent to us. Within a few minutes of the exchange to which we refer in the first two sentences of this paragraph, the respondent's whistleblowing procedure was sent by email to us and Ms Millin by Mr McGlashen.

The next relevant event: meeting between the claimant and Ms Moraru-Manole of 2 October 2018

29 The first relevant event which occurred after the claimant had held the meeting of 28 August 2018 to which we refer in paragraphs 22 and 23 above, was referred to in paragraphs 23 and 24 of Ms Moraru-Manole's witness statement, which were in the following terms:

> "23 At the start of October 2018, Noreen Kahari, a Carer on Johnson, reported concerns about the unit's bad practice to me. Deputy Manager, Numer Clet, and I met the claimant and a Nursing Assistant, Regina Dancel, known as Gigi, on 2nd October 2018 to discuss whether food and fluid charts in Johnson were being completed accurately and Ms Dancel's role in managing the unit.
>
> 24 Ms Kahari said that she was no longer willing to work on Johnson. She later resigned. The notes of the meeting are on pages 103 and 104."

30 No letter of resignation from Ms Kahari was put before us. Nor was any other means of communicating her resignation indicated to us. The notes at pages 103-104 did not record that a lady called "Beth", who was, in fact, the Deputy Manager of Johnson House, was present, although she was recorded to have said something along with the claimant. The notes started in this way:

> "The meeting was urgently called because of the alarming concerned [sic] that Noreen had raised when the HM [Home Manager, i.e. Ms Moraru-Manole] and DM [Deputy Manager, i.e. Mr Numer Clet, who was stated to be the note-taker] were talking to Noreen about the cancellation of shifts that was happening in Johnson and that concern with the shifts of HCA Noreen."

31 Only the first page of the notes was relevant for present purposes. The passage immediately following the one which we have just set out was in these terms (references to "Gosia" being references to the claimant):

> "The meeting started at about 3PM in the afternoon and it was chaired by the HM.
>
> HM: There is concern that me and Numer are very worried about what Noreen had raised that are happening in Johnson House.
>
> DM: I was called by the HM whilst she was having the meeting with Noreen to hear what she was telling regarding the practice in Johnson. Going straight to the point and the HM is happy for me to tell about as the witness from what Noreen mentioned. The DM requested the HM to call the attention of UM [the Unit Manager, i.e. the claimant] and HCA Gigi [i.e. Health Care Assistant Ms Gigi Dancel] to rectify things that had been reported like the following:
>
> 1. That the food and fluid chart of DH was not properly filled up and the staff was just writing for the sake of completing it.
> 2. That Gigi was running the unit.
>
> HM: that there was an incident that the temperature outside was 40 and one resident with bruising was advised to cover with cardigan because the bruising was not reported. There was also concerned

> [sic] about bathing/showering the residents and that Noreen was telling that it was not happening. I am just concerned, I know you are doing it, but something like this should be discussed with you, so you will be aware about this concern.
>
> Gosia/Beth: If sometimes difficult to give bath, it was bed bath that was happening and its recorded.
>
> Gosia: It's not true, Derek has to be offered fluid as he was doing well once offered. That bruising was reported and the reason why advised to put light cardigan is to give him dignity and not exposing the hand with bruises but not hide it as it was reported already."

32 Ms Moraru-Manole accepted in cross-examination that the incident of bruising had been reported internally. Nothing more was made of that incident, but we noted that (a) Ms Moraru-Manole said that the reference to "40" was to 40 degrees Celsius and (b) she accepted that it was highly unlikely that the outside temperature would have been so high, since the record outside temperature for the United Kingdom is below that level.

The internal inspection of Mr Betts of 4 October 2018

33 The next relevant event was that two days later, Mr Alistair Betts, the respondent's Area Quality Director, visited the Home and carried out an in-house inspection. So far as relevant, the report of that inspection stated (at page 106) this in relation to Johnson House:

> "EC (Rm8-Johnson) - No issues noted to charts other than some hourly checks appeared to be systematically completed at a set time."

34 Ms Moraru-Manole said in answer to a question asked by EJ Hyams that the problem recorded by Mr Betts was that it was unlikely that hourly checks were carried out on the hour every hour, and that if all of the hourly checks were recorded to have been done at the same time then that would be proof positive of falsification of the records in the sense that the hourly checks of all records could not have been done at the same times every hour. That was because there were insufficient staff to stand by each resident every hour on the hour and carry out the relevant checks. However, at no time was any record relating to the care, health, well-being or food or fluid intake of patient "EC" disclosed to the claimant or put before us.

35 We record here for convenience that no record (redacted as necessary) relating to the care, health, well-being or food or fluid intake of any resident of Johnson House was put before us, let alone disclosed to the claimant, to support any assertion that could remotely be regarded as being to the effect that a record relating to such a resident was in some way not wholly accurate, or (to use the term used in this case frequently by the respondent) "falsified".

The drop-in visit of 5 October 2018 by representatives of the local authority and the CCG

36 On the day after Mr Betts' inspection, i.e. on 5 October 2018, there was what was referred to in the document at pages 111-117 a "Drop in visit" to the Home carried out jointly by a representative of the local authority and a representative of the CCG. The local authority's representative was recorded to be "Rosa Manning", and Mr Miskelly said that (a) he knew Ms Manning well and (b) she would never warn any care home in advance of an intended visit. However, the purpose of the visit to the Home of 5 October 2018 was recorded at page 116 to be "to Meet with the new manager and discuss progress against PAMMs action plan". We understood PAMMs to be an assessment tool. Mr Miskelly then said that Ms Manning would have been likely to call to see whether the home manager was there, before attending for a meeting whose purpose was recorded on page 116.

37 There was on page 114 this record:

> "Fluid balance charts
> Fluid balance charts are consistently completed and totalled. One resident was noted to have a target of 1500mls, this was achieved each day with 8 glasses of fluid (7 @200mls and 1 @300mls) over several days, visiting team challenged this as resident very slight, SLT instructions for thickened fluids and fluids offered on a teaspoon. No thickener or teaspoon within the residents room. Visiting team challenged the accuracy of the fluid chart and how this was achieved. The home manager advised that a STN had escalated to the home manager that daily records are not reflective of care delivered and stated that staff are falsifying records. The Home Manager and Area Quality Director undertook an audit to validate the actions on the home improvement plan and identified a similar concern. No safeguarding raised by the home at the time of the visit."

38 Mr Miskelly told us that he had long experience of working in and managing care homes. At the time of giving evidence to us, he had retired from full-time work and was working part-time as a staff nurse in the care field. He said that the words in the above section *"No thickener or teaspoon within the residents room."*, which at first sight to us appeared to be a criticism, were in fact positive in that it would have been a problem if there had been such thickener or teaspoon in the resident's room. Mr Miskelly then said, however, that the subsequent words "*The home manager advised that a STN had escalated to the home manager that daily records are not reflective of care delivered and stated that staff are falsifying records.*", were unusual, in that he would not expect to see such words, or words to their effect, in a report of an inspection carried out by a local authority and/or CCG. He and the respondent's other witnesses accepted that the regulatory body, i.e. the body which carries out inspections of care homes such as the Home under the relevant statutory regulatory regime, is the CQC and not the local authority or the CCG. The latter two bodies are public bodies which purchase care from the

owners of homes such as that at which the claimant was employed by the respondent, and in practice representatives of those bodies are permitted by the home owners to attend and inspect the homes, but those bodies have no formal role in that regard.

39 We saw too that the words "*The Home Manager and Area Quality Director undertook an audit to validate the actions on the home improvement plan and identified a similar concern*" were not supported by what Ms Moraru-Manole had written in her witness statement about the visit of Mr Betts the day before, which was this, in paragraph 15:

> "On 4th October 2018, one of the respondent's Area Quality Directors, Alistair Betts, visited the Home and expressed a concern that records of hourly checks on Johnson appeared to have been systematically completed at a set time. He put his concerns in a report. That report is on pages 105 to 110."

40 While there was in Mr Betts' report the short passage that we have set out in paragraph 33 above,

40.1 that passage could not in our view reasonably be regarded as an indication that residents' records were *"not reflective of care delivered*",

40.2 nor could that passage reasonably be regarded as being to the effect that "*staff are falsifying records*", and

40.3 it was not the case that Ms Moraru-Manole and Mr Betts had "*[undertaken] an audit*": rather, Mr Betts had simply carried out a visit and written a report of it, which had identified that there was one indication in relation to one set of records that some of them might have been written retrospectively.

41 Similarly, in paragraphs 26-28 of her witness statement, Ms Moraru-Manole said this about the report at pages 111-117:

> "26 On 5th October 2018, representatives from East and North Hertfordshire Clinical Commissioning Group (CCG), a body responsible for commissioning NHS services, visited the Home. The resulting report challenged the veracity of a fluid chart that recorded a resident, who was very slight, managing to drink 1500mls of fluid each day and found that Johnson's daily records did not reflect care being provided in real-time because there was only one entry per shift.
>
> 27 About Johnson, CCG instructed the Home:
>
> a to raise a safeguarding alert about falsifying fluid charts
>
> b to investigate whether any staff members should be disciplined

c to train the staff on the legal requirements for completing documents

d to conduct a daily audit to ensure that the daily records reflected the care that had been provided and accurately recorded the fluid intake

e to record information in real-time

f to reposition residents consistently in line with their care plans.

The report is from 111 to 117.

28 The concern was that folders and charts were being collected at the end of each shift rather than in real-time. The danger was that the information would be wrong."

42 In fact, as Ms Moraru-Manole accepted in oral evidence, neither the local authority nor the CCG were in a position to "instruct" the Home as to what to do. When she was asked why she said the words ""*The home manager advised that a STN had escalated to the home manager that daily records are not reflective of care delivered and stated that staff are falsifying records*", she said that (1) she thought that she had a duty (a) of the utmost honesty and (b) to reveal whatever was wrong with the home, and (2) it was to her own disadvantage to say the words.

The interview of Ms Iovu and Ms Vladu carried out by Ms Moraru-Manole on 5 October 2018

43 As we say in paragraph 14 above, a note of an interview carried out by Ms Moraru-Manole of two members of the staff of Johnson House on 5 October 2018 was disclosed only on 26 January 2021. We put it in the bundle as pages 353-357. The notes were reasonably well-written and were made, the document recorded, by Ms Jane Wheeler. The two members of staff interviewed by Ms Moraru-Manole were Ms Anca Vladu and Ms Elena Iovu. The body of the notes (in which references to DMM were to Ms Moraru-Manole) started:

"DMM

We had inspectors in today, and they have lodged an accusation that the charts/documentation have been falsified.

The reason I have asked you to both come and see me is that you were the last two people to fill in the records that I have here in this folder.

It shows hourly checks made by the same person all the time. The fluid charts are incorrect for this Resident

Anca

Not true, the Resident DH drinks 300ml via a teaspoon, you can come and see.

DMM

Please be honest with me, is DH drinking 300ml via a teaspoon?

Anca

Yes, DH is drinking 300ml."

44 At the end of Ms Moraru-Manole's cross-examination, Mr Kaltz asked her about that exchange and whether she accepted that what Ms Vladu was saying about the fluid intake of DH was accurate. Ms Moraru-Manole replied (as recorded by EJ Hyams and tidied up slightly):

> "I checked; I went with a nurse; and [the patient] had a good intake so I accepted it."

The relevant events of Sunday 7 October 2018

45 Ms Moraru-Manole's witness statement continued immediately after the passage set out in paragraph 41 above:

> "28 ... I explained to the staff that the records of the dementia community needed to be accurate. I gave an example of recording that they had seen a resident walking without purpose at 1400 and presuming they were fine at 1300 or 1200. They needed to observe and record regularly. That resident might have fallen earlier and been bruised but be walking later.
>
> 29 The claimant has accused me of hiding and sneaking around taking pictures. I am responsible for the home, so I need to visit every part of it and review the care and records of the care".

46 The reference to "hiding and sneaking around" was made by Ms Moraru-Manole because of something which had been written by Ms Winter to the respondent and sent by email to the whistleblowing email address to which we refer in paragraph 24 above. That email was at page 283 and was sent at 15:08 on 9 October 2018. It bears repeating in full. It was in these terms verbatim (i.e. including all textual flaws):

“On Sunday 7th October 2018 at appox 4.15pm I was informed by my colleague that our new manager was hiding and sneaking around taking pictures of documentation in rooms and of our unit on her phone. Our unit Nurse was informed and she approached Diana { the Manage} what are you doing? she replied Darling this is My House I can come whenever I want.

By the time I saw Diana she was in the lounge looking through care plans on the side I was working ... In front of Residents on our dementia Unit Diana said we are Liars. Our record keeping is fake ... My recording keeping was up to date and when I asked what the problem was she started talking about the style that the daily life is written ... Still in front of residents she started to compare our unit to other units that are not dementia units which can not be compared.

She was asked by our unit nurse to please explain to the staff in which way she wanted our notes to be written which she did ...

She suggested well actually said we was lying again when I asked since when did the style of daily notes change? She replied all the other units are written the way she just explained and said it has been this way for along time ... Thats when she was rude and said we all need to work on other units to learn how to work ... at this point I pointed out that I have worked at st christophers for 2 years previously as bank staff on all the units and I have always been shown to write daily notes in essay style .... she replied and said she doesnt understand why we don’t know how to write .... after she left my colleague confirmed with Francis House Dementia Unit across from us the style in which they write is how we have been record keeping.

we have previous inspections that our record keeping and logging is very good.

Still in the lounge now almost supper time approx 4.35 2 colleagues went to get the supper trolley Diana and her colleague still with us and again in front of residents Diana said we was lying about the amount of fluid intake of one of our bed ridden residents. This particular resident is on thickened fluids ... The tension and hostility was now increasing due to Dianas accusations and manner ... our Unit nurse replied we are lying?? Again?? our unit nurse made a drink for the resident in particular and said come with me Diana I will show you how well this resident drinks ..

Upon their return Diana told our unit nurse to take her off of protocall for thickened fluids and fluid chart ... This should not be done I spoke out to my unit nurse and suggested that we should not she needs to stay on the records for thickener protocall.

whilst we were serving residents supper Diana continued to stay on our unit not clear what she was doing ... myself and colleagues took paracetamol due to headaches and continued to work.

As a result of such behaviour which I firstly find unprofessional, being called a liar, feeling like we was totally attacked by a person who seeks pleasure out of power rather than being approachable and kind caring professional and a manager who wants to support her staff and units and that she has breached confidentiality by taking pictures on her personal phone, I am looking for other employment...
I visited my Unit today to speak with my unit manager who is a lovely lady cares about the resident and she informed me that she has had meetings with Diana about her concerns with the safety of our residents if they cut back on staff.... I really feel that Diana has a personal issue with our unit. She should not speak with any staff in the manner in which she did and certainly not in front of residents .. very unprofessional.
All staff that I spoke with today that was also working Sunday are really unhappy and confused with what happened.

To discuss anything further please feel free to contact me."

47 The claimant was not present at the Home on Sunday 7 October 2018, since (as we record in paragraph 19 above) she did not work weekends. When giving oral evidence to us, Ms Winter told us that she resigned from her employment with the respondent on 25 October 2018 because of the swap of the claimant and the manager of Marsden House referred to in paragraph 5 above as the transfer of the claimant to Marsden House on that day (which Ms Winter described in paragraph 11 of her witness statement, which we set out in paragraph 72 below) and that her last day of employment with the respondent was 11 November 2018. Ms Winter did not say whether or not she had had any response to her email of 9 October 2018 that we have set out in the preceding paragraph above, but it was responded to as we could see from the email at page 285, which was from a "Lorraine" (whose position and surname were not stated) and was in these terms:

"Good afternoon Diane,

I am aware that you are no longer working at the home, therefore we are only able to provide limited details. HC One update for your concern that you reported on 10 October 2018.

The Area Manager has had discussions with the Home Manager on the areas that have been highlighted and further training is being provided.

Thank you for contacting SeeHearSpeakUp."

48 Ms Moraru-Manole gave oral evidence that she had not seen the email at page 283 (which we have set out in paragraph 45 above) before it was disclosed by the

claimant (to whose personal email address it had been forwarded by Ms Winter at 5:50pm on 11 October 2018) in these proceedings.

49 When it was put to Ms Winter in cross-examination that if all entries on a series of charts for different residents were stated to be completed at the same time then that would be "falsification", Ms Winter said this (as recorded by EJ Hyams, with the text tidied up; the reference in it to "Elena" is to Ms Iovu, who was interviewed by Ms Moraru-Manole just two days before about record-keeping, as we record in paragraph 43 above):

> "I am glad that you raised that as I felt strongly about it myself. I worked on bank staff before I worked in the community [by which she meant Johnson House]. Elena when I started working on Johnson said do not put for example 13.04, keep it as 13.00 to keep it in line as it has to be on the hour. I expressed to her myself that if I put in an entry at 1.00pm then that was not possible. She said this was the time it needed to be done; so that if I was assisting someone with feeding I would put 1.00pm and in the comments area I would put in that I was assisting with feeding and put in the actual time."

50 Ms Winter's witness statement was in terms that reflected fully the email at page 283 that we have set out in paragraph 46 above. She was cross-examined heavily on it, including by it being put to her that Ms Moraru-Manole had not said either

50.1 "*Darling this is My House I can come whenever I want*", or

50.2 that the staff, including Ms Winter, were "*liars*" and that their "*record keeping [was] fake*".

51 Ms Moraru-Manole also denied saying those things. However,

51.1 having

51.1.1 heard both witnesses give evidence,

51.1.2 found Ms Winter to be an honest witness, doing her best to tell the truth, and

51.1.3 found it difficult to understand why Ms Moraru-Manole said (as recorded in paragraph 27 above) that staffing levels at the Home were agreed with the local authority and the CQC when that was plainly untrue, so that we had to conclude either that she was given to the use of inaccurate language or she was deliberately seeking to mislead us on a material matter (the issue of staffing having been the subject of the claimant's letter of 20 August 2018 set out in paragraph 21 above), and

51.2 bearing in mind the particularly important fact that the email at page 283 was sent only two days after the events which it purported to describe,

we concluded on the balance of probabilities that the email was accurate and accurately described Ms Winter's recollection on 9 October 2018 of what had occurred on 7 October 2018. That conclusion was fortified by the fact that when cross-examining Ms Winter about what Ms Moraru-Manole had said on 7 October 2018, Mr McGlashan said that Ms Moraru-Manole accepted that she had "pointed out" to Ms Winter and her colleagues on that day that "documents were falsified". That was not in Ms Moraru-Manole's witness statement, and (unless Mr McGlashan was mistaken in putting the question on that basis) it involved a recognition by her that she had accused the staff of falsifying records.

52 In all the above circumstances, we concluded that Ms Moraru-Manole did say precisely those things that Ms Winter had written about in her email to the whistleblowing email address of the respondent on 9 October 2018.

53 Another relevant thing that Ms Winter said occurred on 7 October 2018 was described by her in paragraph 8 of her witness statement, as follows:

> "Shortly afterwards Diana and her colleague were still in the lounge and she specifically accused us of lying about one resident and falsely documenting the amount of fluid she was drinking. This resident was on thickened fluids but was a good drinker. The nurse on duty was angry and said to Diana "are we lying again? - come with me and I will show you how this person drinks". When she saw that we were right she did not apologise, but said this resident should be taken off the protocol for thickened fluids, which would have been wrong. It seemed that Johnson was for some reason a target for criticism."

54 Ms Winter repeated the substance of that paragraph when she was asked in cross-examination about what had happened on 7 October 2018. She said that the nurse who took Ms Moraru-Manole to see the resident in question was Daniela. That evidence of Ms Winter was not challenged by Mr McGlashan, but in any event, we accepted it.

The "supervision" meeting of 22 October 2018

55 In paragraphs 31 and 32 of her witness statement, Ms Moraru-Manole said this:

> "31 I held a supervision meeting with the claimant on 22nd October 2018. The aim of supervision meetings is
>
> a to monitor and reflect on practice
>
> b review and prioritise work
>
> c provide guidance and support

d identify areas of work that need development.

32 During our meeting on 22nd October 2018, I told the claimant, among other things, to ensure that all daily notes reflected the care provided and that agency staff members were paired with permanent staff members. The notes of that supervision are at pages 120 and 121."

56 It was put to Ms Moraru-Manole in cross-examination that the meeting of 22 October 2018 was not arranged specifically for the claimant. Ms Moraru-Manole accepted that the "supervision" meeting had not been intended to be with the claimant personally (i.e. alone) and had been a "supervision" meeting of Ms Moraru-Manole with all five unit managers, including, of course, the claimant. So, Ms Moraru-Manole said, it was a group supervision. Ms Moraru-Manole then said that she had decided to ask the claimant to stay behind after the other unit managers had left, so that she could discuss the situation with the claimant. Ms Moraru-Manole then said that in fact the claimant had not attended the "supervision" meeting of the 5 unit managers, and that she had had a meeting with the claimant alone (but with Mr Clet present) at 7.00pm that day, and that the meeting went on until 9.00pm. When the claimant was giving oral evidence, she said that she could not recall whether or not she had an individual meeting with Ms Moraru-Manole before or after the meeting with the other unit managers, and that the document at pages 120-121 was given by Ms Moraru-Manole to all of the five unit managers, so that it was prepared for all of them and not just her. She said that Ms Moraru-Manole did not discuss the content of the document with her, and that she simply told her to sign it, which she (the claimant) did.

57 The document at pages 120-121 had in it this text, as its second bullet point:

> "During Unit Walk Round, UM [i.e. Unit Manager] to verify all residents folders, to ensure all daily notes are documented and reflects the care provided, with resident's consent and in his/her best interest. Nurse on duty to make an entry every 12 hours."

58 The claimant said that that text was not discussed with her by Ms Moraru-Manole. Given the whole of the text of the document at pages 120-121 and given that Ms Moraru-Manole accepted that she had had a supervision meeting with the Home's unit managers and not the claimant individually, we accepted that evidence of the claimant. We also accepted that the document at pages 120-121 was given to each unit manager, and not just the claimant.

The meeting of 24 October 2018

59 The next thing that happened was that on 24 October 2018, Ms Moraru-Manole called the claimant to a meeting with herself and Mr Clet. A note of the meeting was made, apparently by Mr Clet. There was a copy at pages 122-123. Ms

Moraru-Manole's witness statement described the reason for the meeting and what happened at it in this way:

> "33 After five people resigned from Johnson, citing the way that the claimant and Ms Dancel had treated them as the cause, I met the claimant to discuss it.
>
> 34 On 24th October 2018, I interviewed the claimant. She thought that she wasn't to blame for the resignations and said that the reason might be financial. I put to her that they complained that the claimant was not doing her job. They blamed her and Ms Dancel."

60 The note did not state the names of the five people who were said to have resigned. Neither Ms Moraru-Manole nor the claimant stated in their witness statements the names of any employees who (1) were working at Johnson House before 24 October 2018, (2) had resigned from that employment before then, and (3) might have resigned in response to the manner in which they were being treated by or on behalf of the respondent. Nor were there in the bundle any documents recording any such employees' resignations, whether in the form of a letter, an email, or a note or other record of what they had said to Ms Moraru-Manole or anyone else about the reason for their resignation, except for the letter dated 23 October 2018 from Mr Connell at page 284 whose text we set out in paragraph 93 below.

61 During the afternoon of Thursday 28 January 2021, when the parties' representatives were preparing written submissions, we realised that we had no evidence before us about the employees whose resignation before 24 October 2018 was relied on by Ms Moraru-Manole in paragraph 33 of her witness statement. We then, via EJ Hyams, sent an email asking the parties to come prepared the following day to say who they thought the five persons who had resigned were. Mr McGlashen then emailed, saying this (and only this):

> "The respondent's position is that the five people were Dadirai Tererra, Aleksandra Prokop, Noreen Kahari, Tyler Gurley and Michael Connell."

62 The claimant responded via Ms Millin, pointing out that Ms Scott had during the appeal hearing referred to resignations as having been caused by the claimant's conduct, and referring us to the page of the bundle where that was recorded. That was page 253, where Ms Scott was recorded to have referred to

62.1 Tyler Gurley

62.2 Jonathan Hunt

62.3 Michael Connell, and

62.4 Joseph (whose surname was not given).

63 As the claimant pointed out, there were in the bundle documents stated to be notes of interviews with the five people named by Mr McGlashan as set out in paragraph 61 above. Four of them were documents stated to be records of interviews carried out by Ms Moraru-Manole and one of the sets of notes was stated to be a record of an interview carried out by Ms Scott. The latter interview was of Ms Prokop, and was recorded (see paragraph 132.5 below, referring to page 302) to have taken place on 5 February 2019. The other interviews were noted to have taken place as follows:

63.1 Ms Gurley on 13 November 2018 (pages 146-148);

63.2 Mr Connell on 13 November 2018 (pages 152-155);

63.3 Ms Terera (not "Tererra", as stated by Mr McGlashen in his email set out in paragraph 61 above) on 16 November 2018 (pages 163-165); and

63.4 Ms Kahari on 16 November 2018 (pages 173-176).

64 We return below to the documents which were stated to be records of those interviews. At this point we pause to note that the documents all post-dated the meeting of 24 October 2018 at which Ms Moraru-Manole said to the claimant that there had been five resignations. We heard oral evidence from one of the five people that the respondent said had resigned because of the claimant's management and other conduct, and that was Mr Connell. His evidence was entirely positive about the claimant's management. He said that the note of the interview which was at pages 152-155 was in material respects inaccurate. He said that he had not seen it at the time and that he had not approved it.

65 The body of the document at pages 122-123 concerning the meeting of 24 October 2018 started in this way (the references to DMM being to Ms Moraru-Manole and the references to GS being to the claimant):

"DMM: The situation is about my concern regarding what is going on in Johnson with so many staff members resigning in one-week time

GS: I do not know. Maybe money is the reason. That is not my fault.

DMM: It is not reflecting like that when I spoke to people or to your staff and asked them why they are resigning.

GS: I do not know why, I cannot answer you that. That is their choice.

DMM: one person said that when she started in Johnson, people like maltreated her. The main point was Gigi. Five people are resigning all with same story and I involve HR on this issue. These people are

telling me that Gosia is just there not fulfilling her job and not doing anything.

GS: That is not true. If I am not performing my job how come all this ward rounds and sorting out things in Johnson is happening. Who will do those things in the first place?"

66 The document at pages 122-123 had in addition this passage, which might be thought to include indications of reasons for the resignations:

"GS: why staff are leaving?

DMM: maybe causing too much stress, but nobody was communicating with us. Even in some of our meetings like flash Meeting you are not attending.

GS: yes because sometimes we have social worker review.

DMM: when staff are stress, I think we have to sit down, talk about it, and think how we can motivate them.

GS: when somebody is reporting I want to be present to hear who is saying this and that

DMM: Gosia, they would not talk if you were around because they are worried that you will be cross with them. They also Feel that you are taking part of some staff other than managing them.

DMM: As manager, treat them well know the information very well.

GS: First time that I heard staff are telling me this kind of things.

DMM: Some people mention about friendly group having meal together not even to other group to join.

GS: I never ordered food for somebody.

DMM: Staff feel optimistic that Gigi be move. She will move to other unit and could not wait until November after her Holidays".

67 The note at pages 122-123 referred also to the decision, which was communicated to the claimant for the first time during the meeting of 24 October 2018, of Ms Moraru-Manole to act on a "suggestion" that the claimant be moved to Marsden Unit for a month. The suggestion was recorded by the note-taker in this way on page 122:

"DMM: I have spoken to Helen and Amanda from HR and they made the suggestion to move you to Marsden for the time being let us say a month and see how you will be performing there.

GS: Did you discuss with Yolanda [i.e. Ms dela Torre]?

DMM: Yes

GS: What did Yolanda say?

DMM: To be fair with Yolanda, she was not happy because she is managing well Marsden and considering that she do not have experience with Dementia nursing. It appears that she is not that happy however, she is happy to help the unit.

GS: If possible, I would like to request for a written paper that I would be in Marsden for temporary situation lets a month.

DMM: Yolanda will try for a week in Johnson.

DMM: you will be running Marsden as a unit manager; likewise, Yolanda will do the same in Johnson."

68 The subject was returned to on the next page, in the last part of the note:

"DMM: So you will swap with Yolanda tomorrow.

GS: I will think it over, it is hard decision for me to make quickly.

DMM: it quite a challenge for Yolanda. It is not me who picked Yolanda. Let me know as quickly as possible so I can Speak to Helen about it. Let me know the response.

GS: ok, thank you".

The swap of the claimant and Ms Yolanda dela Torre as managers of their respective units on 25 October 2018

69 When she was giving oral evidence, Ms Moraru-Manole said that she had got advice from HR only, i.e. and not also Amanda Scott about the proposed swap, despite referring to "Amanda" in the first entry set out in paragraph 67 above. Ms Scott did, however, undoubtedly get to know about the swap of the claimant and Ms dela Torre, since (a) the claimant reluctantly agreed to it, so that it went ahead on the next day, 25 October 2018, (b) Ms Scott was (she agreed) present at the Home along with Ms Finlay on that day (25 October 2018), and (c) the swap was disastrous, and as a result was (we concluded on the basis of the claimant's oral evidence that Ms Scott was present on that day with Ms Finlay, which evidence

was not challenged, and on the balance of probabilities) with the agreement of Ms Scott and Ms Finlay reversed by the end of that day.

70 Ms Moraru-Manole said only this in her witness statement about the swap:

> "35 Helen Finlay asked me to swap the claimant with the manager of Marsden Unit, Yolanda De Torres, because of the threat of staff resignations. It was reversed a day later so that we could investigate the matter formally. The notes of our meeting are on pages 122 and 123."

71 As we say in paragraph 14 above, Ms dela Torre had signed a witness statement, but did not give oral evidence. In paragraph 6 of that statement, she said this:

> "A couple of months after Diana started, she told me I would be moving to Johnson House the next day, and Gosia Szalkowska would be taking my place in Marsden House. I didn't want to do this as I didn't know any of the residents of Johnson or their needs, and had no experience of dementia nursing. There was no preparation or handover of any kind. I felt this was really unsafe and acting against the best interests of the residents. I thought Diana was doing this for her own satisfaction and did not think of the consequences. At the end of that first day I told Diana that I could not continue with this arrangement, and the transfer was cancelled.
>
> That day Area Manager Helen Finlay came to Johnson House and told me that she had been on an inspection the previous weekend (when I was not working) and found Marsden to be the only Unit that was not homely. I explained that all the other Units has been renovated. She said I should go to Bonnington House and see what they were doing, and do the same in Marsden, but did not explain what she meant. I had always had good reports from previous Home Managers, and Marsden and Johnson were always considered to be the best Units."

72 The claimant dealt with that swap in paragraphs 27-30 of her witness statement, to which it is not necessary to refer further here, except to say that they both accorded with the first part of the evidence of Ms dela Torre that we have set out in the preceding paragraph above and went significantly further in that what the claimant said in those paragraphs was to the effect that the swap had caused great alarm and concern on the part of at least some of the relatives of residents of, and some of the members of staff at, Johnson house. Ms Winter described what had happened on that day, and (as we say in paragraph 47 above) it was her evidence that she had resigned on that day because of the swap. She said this in paragraph 11 of her witness statement:

> "11. I handed in my resignation because of the dishonesty and poor management shown by Diana. On the same day Gosia was moved to Marsden House and the manager of Marsden House was sent to Johnson. This was not in the best interests of the residents as the other

> manager had no knowledge of our residents, and there had been no warning or handover. I was disgusted."

73 We accepted that evidence of the claimant and Ms Winter about the result of the swap of the claimant and Ms dela Torre as the managers of Johnson House and Marsden House on 25 October 2018. We concluded that the reason given by Ms Moraru-Manole in paragraph 35 of her witness statement, which we have set out in paragraph 70 above, for the reversal of that swap was not the real reason. The real reason was that the swap was a disaster. We add that we were surprised that the respondent had considered the swap suitable as a means to ascertain whether or not the claimant was indeed an inept or, worse, deliberately unpleasant or aggressive manager of people, and that if nothing else, the implementation of the swap showed that there was not at that time sufficient evidence to justify objectively the assertion that she was any of those things. In addition, that lack of sufficient evidence of those things made it hard to understand what Ms Moraru-Manole meant when she referred in paragraph 35 of her witness statement to "investigat[ing] the matter formally". The only way in which those words could be understood was as a justification for investigating why staff had resigned.

The claimant's suspension

74 Nothing relevant was in evidence as having occurred between 25 October 2018 and 5 November 2018 to justify the claimant being alleged to be in any way guilty of misconduct, let alone gross misconduct. Ms Moraru-Manole's witness statement continued, after the paragraph which we have set out in paragraph 70 above:

> "36. I wrote to the claimant on 5th November 2018 to suspend her on full pay while I investigated whether he [sic] had shown preferential treatment towards one employee and whether she had encouraged the falsification of care records."

75 The name of the "one employee" was not stated by Ms Moraru-Manole in her witness statement, or at any other time. The letter suspending the claimant was at pages 124-125 and started:

> "Further to our discussion on 24.10.2018 , I am writing to confirm that you have been suspended from duty with immediate effect whilst the following allegation(s) of misconduct is/are investigated
>
> - Allegation of preferential treatment toward individual employee
> - Allegation of encouraging employee to falsify care records".

76 Those two bullet points contained the only allegations which were made against the claimant at that time. It was in fact misleading to suggest in the passage preceding them that the claimant and Ms Moraru-Manole had on 24 October 2018 had a discussion about the possibility of the claimant being suspended. When she

was being cross-examined, Ms Moraru-Manole said that she had got approval from "HR" for the claimant's suspension and that she had sent an email to HR stating the basis for her proposal to suspend the claimant. Such an email was not in the bundle, and no such email had been disclosed. Mr McGlashen said that it would have been archived and that the respondent's IT department had been asked to find it. He said that when it was found, it would be disclosed. No such disclosure occurred.

77 In addition, Ms Moraru-Manole said when giving oral evidence that HR would have discussed the claimant's suspension with Ms Scott. Ms Scott had by then given evidence, and there was nothing in her witness statement about the events before the claimant appealed, so she was not asked about that issue.

The manner in which Ms Moraru-Manole then proceeded

78 Ms Moraru-Manole then interviewed 12 people. She did so without a note-taker, so that she herself made the records of the interviews of the persons whom she said she had interviewed. The notes were at pages 126-141 and 146-196. In none of them were these words, or words like them, present:

> "If you do not agree with the notes, just put your comments to add or amend."

79 Ms Moraru-Manole then called the claimant to an investigatory interview. She did so in the letter dated 3 December 2018 at page 197. The letter now had an additional allegation of misconduct, namely of "preferential treatment toward relatives". The notes which Ms Moraru-Manole had (it was her evidence to us) made at the time of interviewing the 12 employees to whom we refer in the first sentence of the preceding paragraph above were not sent to the claimant with that letter, or otherwise before the interview by Ms Moraru-Manole of the claimant.

80 That interview occurred on 4 December 2018. This time, i.e. uniquely in the investigation of Ms Moraru-Manole, there was a note-taker present. That was Mr Clet. The notes made by Mr Clet were at pages 198-207. On page 205, towards the end of the record of the interview, there were the words set out at the end of paragraph 78 above.

81 At pages 201-202, there was this passage in the notes (which we set out verbatim):

> "DMM:Next is about falsifying documents
> The local authority feels or use the term like that for any documents not actually done at the time, but competed retrospectively .Some Ex- Bupa homes had the same inspection and went to embargo as a result of bad practice on documentation. Staff related that in the last weeks they fell a higher level of pressure from you, as you were requesting all the time to complete the hourly checks , neglecting residents care.

GS: I prioritised residents. I did not encourage them to falsify, but to do the documents right away after attending to them. What is happening was they left it blank and then when I said finish and complete them, they think I am telling them to falsify that is wrong. I highlighted the issue to do straight away and yet they are not compliant to do it. I told them to do documentation in a correct manner and time.

DMM :Gigi is asking them to do the folder. Did you ever witnessed any falsification? According to statements, Gigi was asking them to write down fluids not offered, baths not completed , hourly checks not completed.

GS; I cannot answer that. We have a big unit with 36 residents and I have to do many things, I do not know if those things are happening as nobody told me that.

DMM :Read from statement that resident "DH" has to complete the food and fluid chart. As he was not reaching the target, Gigi requested another colleague to add some fluids. As she refused , Gigi pressurised another colleague until she complete it. You can not see Gigi and her friends signature anywhere, but they will put pressure on bank staff and new starters to fill it.

GS : I cannot agree if only they are not telling me, if they are not addressing to me."

82 The 12 people whom Ms Moraru-Manole said she had interviewed (we accepted that she had interviewed one of them, as he, Mr Connell, gave evidence to us: we return below to that evidence) included Gigi Dancel. The notes which Ms Moraru-Manole said she had made of her interview of Ms Dancel were at pages 126-130. Only at pages 127-128 was there a record of what Ms Dancel had said to Ms Moraru-Manole: pages 129-130 were in effect blank and page 126 and the first half of page 127 were introductory only. (That pattern was followed in all of the interview notes made by Ms Moraru-Manole, in that they contained relatively little by way of a substantive record of what the alleged interviewee had said.)

83 What Ms Moraru-Manole recorded Ms Dancel to have said (on 6 November 2018) was this and only this (verbatim):

"DMM: How long did you work in St Christopher's ?
RD: 15 years, one year in Marsden, and in the last 14 years in Johnson

DMM: Do you feel supported working in Johnson?
RD: No, if you ask Gosia for support, she will never answer or guide you. You need to take your own decisions and to hope that are the right ones. For example, yesterday, when I had my meeting with HR Managers, Gosia knocked at the door and she had a rude attitude , saying that I need to go and speak with them. I was in the middle of toileting somebody , and I told them that I will come as soon I will finish. They were very polite and friendly with

me, they understood that resident has priority . Honestly , we need a new Unit Manager, no support is offered to us by Gosia.

DMM: Can you provide me an example?
RD: It is no good communication. If you approach the staff rudely, what you will achieve?

DMM: Wat is your relation with Gosia?
RD: It is no friendship as colleagues think about us. She is delegating me, and I am acting on her request . Sometimes she is giving me tasks beyond my job description which makes me feel stressed . I rather be on the floor , because that spoils my relationship with my colleagues, thinking that I am lazy. In fact, I am doing Gosia's job. Care plans, 5 a day medication check, unit walk around, other papers that should be done by her.

DMM: Did you mention to Gosia that it is hard for you?
RD: What can I do? She is my manager and I need to follow her instructions.

DMM:Did you ever witnessed Gosia bullying your colleagues?
RD: Yes. When you and Numer came on that Sunday to check the documentation, on the following day she was shouting during handover "Check the hourly, check the hourly!" She put us to complete them for 8am, even if it was just 07:35. Is that right?

DMM: Were you or your colleagues asked to fill gaps in the documentation by Gosia?
RD: Yes, she would ask us to fill it, even if we did not complete the action.

DMM: Would you like to add anything?
RD: Yes, the unit Manager should deal the problems nicely. To make our home happy again, we need a new manager."

84 Nowhere in that passage was there a record of anything that would have supported the assertion of Ms Moraru-Manole that she had a statement that justified what she had said to the claimant on 4 December 2018, set out in paragraph 81 above, namely:

> 'that resident "DH" has to complete the food and fluid chart. As he was not reaching the target, Gigi requested another colleague to add some fluids. As she refused , Gigi pressurised another colleague until she complete it. You can not see Gigi and her friends signature anywhere, but they will put pressure on bank staff and new starters to fill it.'

85 The only thing in all of the notes that it was Ms Moraru-Manole's evidence were of the interviews of the 12 persons to whom we refer in the first sentence of paragraph 82 above that could remotely be said to resemble that asserted record

was in the note of the interview of Tyler Gurley at the top of page 148, which was in these terms:

> "DMM: Have you ever been asked to document actions not completed or to fill the gaps?
> TG: Yes. Gigi asked me to document bed baths as baths or showers. I was asked by Gosia one day to fill fluids that were not given, just because an inspector was in the building and the target was low. When I refused. she was talking with Gigi about me and I could hear it. Because of that, for many weeks I was allocated just with agency staff, until another colleague defended me, saying that it is not fair on me."

86 Furthermore, and rather more to the point, Ms Moraru-Manole had, as she told us as we record in paragraph 44 above, herself checked the position of DH on 5 October 2018 (when, using the terms supposedly used by Ms Gurley, "an inspector was in the building") and found that he did indeed drink the fluids that the records kept in that regard stated. In addition, Ms Moraru-Manole had in the manner we record in paragraphs 53 and 54 above, on 7 October 2018 done the same in relation to another resident. We therefore concluded that Ms Moraru-Manole had put an unfounded or false allegation of the falsification of fluid intake records to the claimant, which Ms Moraru-Manole must (or least ought to) have known was false, but which the claimant could not at that time know was not supported evidentially.

87 In fact, neither of the documents which purported to be records of the interviews of Ms Gurley and Ms Dancel was signed (by anyone). The claimant told us that Ms Terera had told her (since she, the claimant, was dismissed) that she (Ms Terera) had refused to sign the supposed record of what she (Ms Terera) had said to Ms Moraru-Manole because it was inaccurate, despite being put under a lot of pressure by Ms Moraru-Manole, Ms Scott and Ms Finlay to do so.

88 In fact, of the 12 sets of notes of interviews in the bundle, only six (i.e. half) were signed. The other six were not signed.

89 One of the signed documents was in the name of Mr Connell. As we say above, he gave oral evidence to us. He said that he was asked by Ms Moraru-Manole to sign the document before anything had been put onto it. The document was at pages 152-157, but the last two pages were blank. The original was not put before us. There was on page 154 this passage:

> "DMM: Some of your colleagues had reported that were treated differently by Gosia? Did it happen to you also?
> MC: Not with me . But I witnessed her bullying the night nurse, Dadirai [i.e. Ms Terera]. She is verbally aggressing her why she did not complete the charts after agency night staff, in the middle of handover, in front of everybody. The handovers are very long, more than 25 minutes. Dadirai sits sometimes until 10am to finish all the paper work.

DMM: Did you witnessed Gigi bullying your colleagues?
MC: Yes, she is treating bad the new starters. Most of them are leaving because of her. If Gigi doesn't like you, you will not have a good life in Johnson. Is Gigi and her group, then the others, and Gosia is in the middle, not taking any measurements. She bullied one of our colleagues, Elizabeth Webb, until the poor girl had resigned. Gigi was telling to our colleagues that Elizabeth is sleeping with me , but I am in a relationship and I have 3 children , just because she winked once to me."

90 Mr Connell said that it was true that Gigi had spread rumours about him being in a relationship with Elizabeth, and that that was the reason why he resigned from his job of carer with the respondent. In fact, the job that he was going to go to fell through, and he ended up not resigning and remaining an employee of the respondent. In paragraphs 5 and 6 of his witness statement, he said this:

> "5. Many of the things I am supposed to have said are just not true, or have been twisted to imply criticism of Gosia. To be clear, Gosia never asked me to fill gaps in documentation, and I never saw or heard of her asking anyone else to do so. If we were unable to make a check because of a need to attend to another resident, it was left blank, but if we had made the check and not been able to record it, we would enter it as soon as possible afterwards.
>
> 6. It is totally untrue that I witnessed Gosia bullying anyone. I witnessed the incident with Daidra and this could not be called bullying. It can be irritating to be reminded all the time about completing care records, but some people need it, and Gosia was just doing her job. My problems were nothing to do with Gosia, and any bullying, in particular of Elizabeth, was by Gigi."

91 We found Mr Connell to be a completely honest witness, doing his best to tell us the truth. He said that the words recorded by Ms Moraru-Manole to have been said by him were in many cases words that he would not have used, such as "aggressing", or "the poor girl" when referring to Ms Webb.

92 In paragraphs 2 and 3 of his witness statement, Mr Connell said this:

> "2. Gosia Szalkowska was my Unit Manager, and I encountered her regularly while I was on the day shift, and also on the night shift during the morning handover to the day shift. I had a very good relationship with Gosia. She was very supportive to me when I was having a difficult time, and told the Home Manager that I was a good carer and should be given a chance. She saved my job. I never heard bad things about Gosia. Caring for dementia sufferers is demanding, and everyone gets stressed from time to time, including Gosia, but she was always willing to make time to listen

and find a way round people's problems. Gosia was a good manager and had high standards.

3. On 23 October 2018 I handed in my resignation because Gigi, a nursing assistant on the day shift, had been spreading false rumours about me, and I had had enough. I sent a letter to Gosia thanking her for the support and opportunities she had provided for me. In the end I withdrew my resignation because of problems and delays in processing my new job offer."

93 That letter was in the bundle, at page 284. It was dated 23 October 2018 and was in these terms (and these terms only), followed by a signature:

> "Dear Gosia
>
> I would like to inform you that I am resigning from my position as Care Assitant in Johnson House for HCOne, effective 24/10/2018 and give my 1 months notice
>
> Thank you very much for the opportunities for professional and personal development that you have provided to me during the last Year and 3 months, I have enjoyed working for Bupa and HCOne and appreciate the support provided me during my time with the company."

94 We accepted all of Mr Connell's evidence, including when it conflicted with that of Ms Moraru-Manole. We did so in part because it was consistent with his resignation letter at page 284, and in part because we simply preferred his evidence to that of Ms Moraru-Manole.

The investigation report of Ms Moraru-Manole

95 After the end of the interview of the claimant carried out by Ms Moraru-Manole and noted by Mr Clet (the finishing time of which was not stated in the notes at pages 198-207) on 4 December 2018, but still on that day, Ms Moraru-Manole completed the document at pages 208-215 which was stated to be an "Investigation report". The allegation investigated was stated to be "of falsifying documents, preferential treatment towards staff and residents, bullying". The latter word had not so far been in the documents sent to the claimant by Ms Moraru-Manole. It was, however, in the letter which she sent on the following day, 5 December 2018, of which there was a copy at pages 216-217, requiring the claimant to attend a disciplinary hearing on 13 December 2018 and enclosing the investigation report at pages 208-213 and (see the final sentence of paragraph 97 below) digital versions of the interview notes at pages 126-141 and 146-196. No mention was made in the letter at pages 216-217 of any note of the interview of the claimant, and we heard no evidence in that regard, so it is not clear whether or not the document at pages 198-207 was in existence before, or at, the disciplinary hearing of 13 December 2018.

The disciplinary hearing of 13 December 2018

96 The claimant attended the hearing. It was conducted by Mr Miskelly. The claimant was accompanied by a representative from the Royal College of Nursing, Ms Hayley Woods. Notes of the hearing were made, apparently by Ms Maureen Murphy. They were not verbatim; indeed, they were in some respects a little cryptic. They were written wholly in typed capital letters, and where we have set out relevant extracts from them below, we have put them into ordinary text. The notes were at pages 218-221. The claimant put before Mr Miskelly a series of documents that were wholly positive about her management of staff and the care of the residents in Johnson House under her management. Those documents included one written by the claimant herself at pages 68-69 and its enclosures at pages 70-98.

97 The notes on pages 218-221 contained a number of highly material (mostly bullet) points on page 218. Those bullet points showed that the claimant raised as her first concern the fact that Ms Moraru-Manole had not had a note-taker present at the interviews which she had recorded herself and on which she relied as justifying the proposal to dismiss the claimant, and the fact that the statements were not signed. We heard from Ms Moraru-Manole that she had enclosed with her investigation report copies of the interview notes that she had created in digital form only, i.e. not with any signatures on them.

98 The passage at the bottom of page 218 showed that the claimant raised the fact that she had sent the letter of 20 August 2018 whose text we have set out in paragraph 21 above. The passage was in these terms:

> "**Gosia** – summarised letter on 20/08/18 – letter sent to Diana raising serious concerns about staff shortages- did not receive any reply.
>
> - staff not supported felt overwhelmed
> - informed Quality Manager
> - inspection on the 7/10/18 – no notice given only Johnson inspected
> - on 25/10/18 supposed swap with Marsden for a month only lasted a day as other unit manager wasn't coping at Johnson due to a number of different factors.
> - on 26/10/18 – unit manager swap back"

99 The notes then showed that the claimant was "escorted to her car". That was, we were told by Mr Miskelly, because the claimant was so upset at that point that she had to have a break and went outside to her car, with someone accompanying her because she was so upset.

100 The next material entry was in these terms:

> "Johnson house has received numerous compliments from residents' families.
>
> **Declan** interrupts to inform Gosia we are dealing with the complaint nothing else."

101 When he was asked why that happened, Mr Miskelly said that it was because compliments from residents' families were not relevant. He accepted that the claimant had put before him five folders of documents, which included those which were in the bundle at pages 68-98. He also said that he regarded all of the positive comments in the documents in the claimant's folder as being irrelevant.

102 Mr Miskelly also said to us, but they were not recorded in the notes of the hearing, or anywhere else, these things.

102.1 His decision was not the final decision on whether or not the claimant was dismissed. He had sent to Ms Finlay his findings on each allegation, and he had not kept a copy of what he had sent to her. He had recommended that the claimant be dismissed, but it was her decision that the claimant should be dismissed.

102.2 He understood that staff had come forward with allegations of bullying once the claimant had been suspended. He understood that from Ms Moraru-Manole.

102.3 He therefore concluded that the claimant had been bullying staff for the past seven years and that it had been kept hidden by her.

103 The hearing notes recorded at page 219 that the claimant had said that a statement from her deputy, Beth, was missing from the interview notes which she had been sent by Ms Moraru-Manole. The notes recorded on page 219 that Mr Miskelly had "[popped] downstairs to find missing statement".

104 The notes did not record what the claimant told us had happened at that point, and which Mr Miskelly in large part, if not completely, accepted had happened. That was that the claimant, Mr Miskelly and Ms Woods went downstairs to the Home's office. Mr Miskelly did not permit the claimant to see the notes that were in the file, and whether or not they were signed. Instead, he permitted Ms Woods to do so. Ms Woods told the claimant that only some of the interview notes were signed.

105 We did not have before us a copy of an interview note of Beth, but given the content of the document at page 76, which was sent to the lady who was at that time the manager of the Home, if Beth had been interviewed by Ms Moraru-Manole, then she (Beth) would probably have said things that were wholly supportive of the claimant.

106 There was no evidence before us to show that any member of staff had come forward voluntarily to allege bullying by the claimant after the claimant had been suspended. All of the 12 interview notes that were before us showed that Ms Moraru-Manole had called the interviewees to see her and that she had put specific allegations to them.

107 The claimant's dismissal was effected by a letter dated 13 December 2018 in the same terms as (but not, for the reasons stated below in this paragraph, a photocopy of) the document at pages 224-225. While the dismissal letter was dated 13 December 2018, it was received by the claimant only on 21 December 2018. The reasons given for the claimant's dismissal were stated in the letter somewhat oddly as being for "allegations" of the four things referred to in paragraph 95 above, but slightly altered, namely (1) "preferential treatment towards individual employees" (2) "encouraging employees to falsify care records", (3) "preferential treatment toward relatives" and (4) "bullying employees". The document at pages 224-225 was not signed at its end, although there were spaces for the insertion of a signature and a date. In paragraph 67 of her witness statement, the claimant said this (which was not challenged and which we accepted was true):

> "On 21 December I received a letter, dated 13 December but signed 18 December, which verified all four allegations without justification or explanation, simply stating that I was unable to offer a reasonable explanation, which was manifestly untrue and unfair. My exemplary record was ignored. I was dismissed without notice. The letter did not specify the date of termination, but I understand that this was the date I was first able to read the letter, i.e. 21 December."

108 The letter at pages 224-225 stated that the note-taker was indeed Ms Maureen Murphy. It included this passage on page 224:

> "During the meeting you stated that you denied all allegations and that the statements were not signed.
> Declan Miskelly stated that these were copies of the originals and that he could verify the originals were signed.
> Your Union Representative also verified the signed originals"

109 Bearing in mind the fact that the letter at pages 224-225 was for the most part written in the first person singular (for example it started: "I write to confirm the outcome of the disciplinary hearing held with you on 13.12.2018"), we noted that the words "Declan Miskelly stated that these were copies of the originals and that he could verify the originals were signed" would not have been included if the letter had in fact been written by Mr Miskelly. It was, however, sent in his name, although the copy that was before us was not signed, so we could not see whether or not he had signed it. In any event, Mr Miskelly's witness statement included these paragraphs:

"7 The claimant criticised the investigatory interviews where the manager conducted the meeting and took the notes. She said that there should have been an independent note taker and the interviewee should have signed the notes of each interview.

8 I agreed that there should have been someone else to take notes but I was satisfied that the notes were accurate once I saw the signed versions."

110 We record here for the avoidance of doubt that the typed document at pages 222-223 was written by the claimant, and was stated in handwriting at its top to have been "presented" by her at the disciplinary hearing of 13 December 2018, but since it referred to the notes of the hearing as not being accurate, it must have been written by her after that hearing. However, it was clear that it was put before Ms Scott who, as we say above, heard the claimant's appeal against her dismissal.

The claimant's grievance of 18 December 2018

111 On 18 December 2018, the claimant sent a letter (page 227) to the respondent's head office, in the following terms:

"Dear Sir or Madam,

I wish to file a grievance against Diana Moraru-Manole, Home Manager at St Christopher's Care Home, Hatfield.

I am the Unit Manager of Johnson House at St Christopher's, which is a high dependency unit specialising in dementia care. I have worked at St Christopher's for 7 years, and for four years as Unit Manager.

In the four months since her appointment as Home Manager, Diana has disrupted working relationships throughout the home, exploiting and manipulating staff, so that it is no longer a comfortable place to work.

When she resigned from her position as Deputy Unit Manager and Clinical Services Manager, in April this year, because of problems with her performance, she told people that when she achieved her NVQ5 she would return as Home Manager and would show people their place and punish them for their attitude towards her.

In just over 4 months since her appointment, she has done just that. She started by insisting that I should swap roles with her previous Unit Manager,

to punish both of us. This was disastrous and had to be reversed the following day.

Diana has failed to communicate effectively with staff at all levels, leaving some people in despair when she failed to tell them about the results of an inspection she carried out in my unit.

She has manufactured and fabricated allegations against me, suspending me without proper cause, and has completely mishandled a disciplinary investigation, ignoring all the usual practices and safeguards.

I shall expand on these points later, but I attach a copy of the points I raised at the beginning of a disciplinary hearing."

112 The latter document was probably an earlier version of the document at pages 222-223, but we did not have a copy of the actual enclosure.

The claimant's appeal against her dismissal

113 The claimant appealed against her dismissal on 21 December 2018. She did so on the day she received the letter stating that she was dismissed. The appeal was sent to Ms Moraru-Manole by email, with a request to forward it to Ms Finlay. The email was at page 228. At page 229 there was a letter stated to have been written by Mr Miskelly (but not signed by hand), dated 27 December 2018 and in these terms:

'Disciplinary Meeting held in St. Christopher' Care Home Hatfield. 13.12.2018.

Reply to point raised in the appeal letter :

"Mr. Miskelly asked the note taker to stop as she could not keep up with the discussion".

I did ask the note taker to stop as the discussion was going off the disciplinary matters that were on the agenda.

Ms Szalkowska nor her union representative did not the challenge my request.
Signed

Declan Miskelly.

Home Manager."

114 The claimant on the same day (27 December 2018) sent the email at pages 232-233 and the letter at page 234, referring to an email that she had received on 24

December 2018. The claimant wrote in the letter that the email of 24 December was:

> "to confirm that I appealed to head Office.
>
> It was also said that my appeal has been escalated to Mrs. Helen Finlay, Area Director, who will appoint someone to listen to my appeal.
>
> I don't feel that this would be a fair approach as Mrs. Helen Finlay knows that I have been victimised by the home manager.
>
> On 13.12.18 Mr. Miskelly held the disciplinary meeting. He said that he doesn't know Diana Moraru-Manole. He is based at the same place as Mrs. Helen Finlay in Stevenage Woodlands View.
>
> ...
>
> I would like to request the appointment of a neutral person with no prior knowledge of the circumstances."

115 On 10 January 2019, Ms Angie Jacques, the respondent's Regional HR Manager, sent the claimant the letter at pages 235-236, inviting her to attend an appeal hearing on 17 January 2019, and stating the respondent's understanding of the claimant's appeal grounds, namely:

> "• You stated the disciplinary hearing held on the 13 December 2018 lacked procedural fairness.
>
> • There was evidence that was not considered during the disciplinary hearing.
>
> • The hearing notes were not an accurate representation of the hearing. The note taker stopped taking notes during the hearing.
>
> • The witness statements within the investigation pack were not signed."

116 The hearing date was put back to 18 January 2019. The night before, Ms Woods sent Ms Jacques the email at page 237, enclosing the letter dated 20 August 2018 which we have set out in paragraph 21 above and the grievance part of which we have set out in paragraph 111 above. Also, the claimant sent Ms Jacques the email at page 241, enclosing the three-page document at pages 242-244 entitled "Appeal against dismissal". All of it was relevant. It included the following passage at pages 242-243:

> "**The investigation**

I was first informed of this when I was suspended on 5 November, when I was given a letter containing two allegations: “Preferential treatment towards individual employee” and “Encouraging employee to falsify records”. There has never been any mention of where these allegations came from, and I believe she initiated them.

The investigation was flawed from the outset. It was stated that 12 people were interviewed, including someone who had not worked in my House for 18 months. However, 14 people from my House were not interviewed. The obvious explanation is that this selection was made by DMM on the basis of who might be prepared to say anything about me and who might be susceptible to her inducements.

The first interviewee (Regina Dancel) on 6 November was told that the reason for interview was “allegation of bullying and falsifying documents” – which was not what I was told a day earlier.

All the interviews were carried out by DMM acting alone without a note taker or witness. She asked the questions, she noted down what the interviewees allegedly said, and she decided what to put into the interview record. No contemporaneous notes have been produced, and I doubt that they exist.

The interview notes are just not credible. They demonstrate a serious breach of procedure and of the ACAS Code of Practice, which suggests that they were manufactured by DMM as a vindictive measure against me. The interview notes were not signed by the interviewees.

The notes are completely inadequate for the stated duration of the interviews. The interviews were stated to have lasted 30 – 90 minutes but there were typically 10 questions or fewer recorded, and about 30 lines of responses (in large type) – often 300 words or less in total – which would have taken only a few minutes. Either the notes were the result of creative writing, or they were extremely selective.

The questions asked were blatantly leading questions, and there was suspiciously similar wording between recorded replies. The recorded replies were astonishingly verbatim, which is remarkably difficult to record, especially if one person acting alone is both asking the questions, recording the answers, and thinking of the next question.

What was allegedly said in these interviews conflicts markedly with evidence I submitted in the disciplinary hearing (which was ignored) about my support for staff and concern for standards.

There are other glaring inconsistencies: in two instances - Tyler Gurley / Michael Connell on 13/11 and Noreen Kahari / Anca Vladu on 16/11 - two interviews apparently took place at the same time!

> DMM produced an Investigation report based on those notes, which was completely inadequate for circumstances that could, and did, lead to dismissal."

117 We regarded that passage as a wholly accurate and apt criticism of the supposed interview notes.

118 There were minutes of the appeal meeting of 18 January 2019. They were at pages 248-254. They were signed by Ms Scott and the minute-taker (Ms Carol Theron, an Administrator based at the Home). They included the following passages, in which references to "AS" are to Ms Scott and references to "GS" are to the claimant.

119 On page 251 there was this exchange noted:

> "AS- Has now established that all statements are now signed.
> GS - Questioned this and AS again repeated that yes, all statements were now signed."

120 On page 252 there was this passage:

> AS - At this point AS referred to the meeting as being extremely long, but wanted every opportunity of hearing everything that GS wanted to say.
> AS - In the report given by GS there is a referral to the travesty of Declan Miskelly's disciplinary meeting as being unfair and queried this.
> GS - He refused access to see the statements made by staff some of which at that stage were not signed. She felt that he was not an independent chairman, and minutes were only done after the meeting, not during as the minute taking was slow.
> AS - Declan said that minute taking stopped because the person taking minutes could not keep up."

121 EJ Hyams asked Ms Scott why she said the words in that final entry when Mr Miskelly had written the letter whose text we have set out in paragraph 113 above, and she said (as recorded by EJ Hyams) this:

> "I understood from Mr Miskelly that the notekeeper could not keep up. I do not recall how he told me that but I can see by my response in the meeting that that was information that I had been given.
>
> I asked him and he said that the things being said by the claimant were not relevant. I did not ask him what they were.
>
> I was keen to conduct the appeal as a complete rehearing. I was there to listen in full."

122 There was, in fact, a second entry on the same page of the notes, further down the page, in these terms:

> "AS – Went back to the disciplinary meeting and the fact that Declan Miskelly had halted the meeting due to the note taker falling behind."

123 On page 253, there was this passage:

> "AS - Referred to another member of staff who resigned. Tyler Gurley, as well as Jonathan Hunt.
> GS – Jonathon Hunt was encouraged by Mary Quinn, the then interim Home Manager to change from being a carer to Activities due to health constraints and also to be on Francis House. This GS felt, was sad as she wanted him to stay in Johnson House.
> AS – Further staff were mentioned. Joseph - GS answered that he went to the Sanctuary Home
> AS – Also Michael Connell, and GS showed and evidenced a letter from him."

124 There was also this passage on page 253:

> "GS – Handed AS two documents to read.
> AS – Why is Declan Miskelly objected to by GS as investigating officer?
> GS – He is not independent.
> AS – He is independent in terms of his professional responses.
> GS – No
> AS – Wanted to make a point here of the Reg. code NMC make is clear to staff to use whistle blow line.
> You did not use this whistle blow yourself in terms of what you could report.
> GS – Reported to DM and NumerClet, the deputy and Quality Manager.
> AS – Again asked why did you not whistle blow.
> GS – Don't know why.
> AS – Why did you not submit this as part of the appeal?
> GS – Not sure why."

125 On 22 January 2019, the claimant sent the letter at pages 261-262 to Ms Scott. At the bottom of the first page and the top of the second page, she wrote this:

> "You also undertook to interview the 14 staff of Johnson House who were not originally interviewed by Diana Moraru Manole. I would like to suggest that this is done in the presence of an HR manager and that it is made clear to all interviewees that you are simply concerned to establish the truth about what happened in Johnson House during the last 6 months, and there will be no recriminations whatever they say about their management.
>
> I would like also ... to suggest that you re-interviewed those people who were interviewed by DMM, again to establish and confirm that truth about past

events, and to ascertain whether they wish to confirm the statements that were published in their names, or if they wish to amend or enlarge on them."

126 On 28 January 2019, Ms Scott sent the clamant the email at page 263. It included this passage:

> "Please also find attached the 12 statements with signatures as agreed. These statements have not been corrected by me, but reviewed and signed once the contents agreed by each person giving the statement, noted with their signature."

127 We were confused by that passage, and on several occasions sought to understand why it was written, bearing in mind that (as we record in paragraph 88 above) there were only six signed interview notes and six which were unsigned, in the bundle. On Thursday 28 January 2021, Mr McGlashen confirmed that all of the signed interview records were in the bundle, and that there were only six statements which had a signature on them.

128 On 5 February 2019, the claimant sent Ms Scott the letter at page 264, enclosing the documents at pages 265-286. We have already referred (in paragraph 93 above) to the letter at page 284 from Mr Connell. The enclosed documents included in addition three documents stated to have been written by Ms Winter. At page 283 there was the email that we have set out in paragraph 46 above. At page 271 there was a document entitled "Diana Winter - Statement for solicitor" and dated 14 January 2019. It started in this way:

> "My name is Diane Winter I spoke with a solicitor today who is representing my previous employers Unit Manager.
>
> I was asked a few questions and answered them truthfully.
>
> 1. No I was never asked or encouraged to falsify documentation.
>
> 2. No I was never bullied by Gosia or witnessed her shouting at staff.
> 3. I worked on Johnson House for 2 years.
>
> 4. Some staff including Sobha would refuse to carry out tasks that Gosia asked her to do eg. if she was working on floor she would remind whomever was working that a resident needs to go to the hairdressers and Sobha would say no I am too busy.
>
> 5. Gosia would like residents to be up if possible and would address any concerns with regards to skin conditions or general health of the residents.
>
> 6. Gosia had very good relationships with all the residents families and would treat them with the up most [i.e. the utmost] respect."

129 The third document stated to have been written by Ms Winter was the email at page 286 sent to the same "See Hear Speak Up" email address as that to which Ms Winter had sent the email at page 283 which we have set out in paragraph 46 above. The email at page 286 started:

> "Since that last email ... 5 people have resigned including myself. There have been more incidents involving the manager Diana.
>
> At a meeting she denied saying and doing what she said.
>
> She has bullied my unit manager moved her to another unit and the nurse she swapped her with could not cope with dementia so they was swapped back.
>
> A night staff resigned and following his resignation told us he has left he's had enough of the company cut backs with resident care and the management Diana but Diana immediately went to my unit manager Gosia and blamed her."

130 Ms Scott did not seek to contact Ms Winter, whose email address was apparent from at least the first of the two emails that Ms Winter had sent to the respondent's whistleblowing email address. Instead, on 5 February 2019 Ms Scott interviewed 13 people who had not been interviewed by Ms Moraru-Manole. There was at those interviews a note-taker. The notes were at pages 287-309. None of the interviewees were asked direct questions about the claimant or her management of Johnson House. Only this was said to them as being the purpose of the meeting:

> "Invited to this meeting to help AS understand something that has happened and needs to speak to staff to get a clearer understanding. She wants to make sure that the decision, when made, is going to have the most input from staff to give a clear view of what she needs to know to proceed in the best way possible."

131 Only nine of the interviewees worked, or had worked, at Johnson House: the other interviewees were managers of other units at the Home. The notes showed that (as was evident from the evidence of Mr Connell, given to us in person as recorded above) there were tensions between the day and the night staff of Johnson House. There were the following statements made by staff who had worked at Johnson House that were capable of being regarded as supporting one or more of the allegations of wrongdoing by the claimant.

131.1 On page 289, Ms Jane Diejomaoh was recorded to have said this (and only this; i.e. no follow-up question such as what documents she was referring to, in what way she was asked to complete them, by whom, and on what basis, was shown to have been asked):

"• Also confirmed that this documentation happens throughout the shift, but that sometimes, very few times, this was not done by the day shift.
• Uncomfortable about being asked to complete documents left undone by day shift."

131.2 At the top of page 294, Mr Andrew Bailey was recorded to have said this (but also not followed up in any way):

"• Admits to sometimes forgetting to fill in paperwork, but has come back after the shift to do this.
• Feels uncomfortable about completing any paperwork that was not his work for someone else.
• Admits to having done it but sadly and very rarely."

131.3 Similarly, there was this noted on page 304 as having been said by Mr Jonathan Hunt (but also not followed up in any way):

"• Never found any paperwork completed in advance, though admitted that he was asked to sign something when he hadn't done the job."

132 As against those things, there were many positive things recorded in the interview notes as having been said by staff who currently worked or had worked at Johnson House about the claimant and her management. We noted the following things (several of which were relevant to the allegation that the claimant had caused the resignations of certain staff).

132.1 On page 289, Ms Diejomaoh was recorded to have said this:

"Nice team on Johnson, but works only Friday and Saturday nights."

132.2 On pages 293-294, Mr Bailey is recorded to have said these things:

"• Feels that without a unit manager things are up in the air at present.
• Stability is affected without a unit manager driving the processes.
…
• Had no problems with unit manager, except that she panicked when there were inspections and visits from management.
…

• Felt well supported by the unit manager and present home manager."

132.3 On page 295, Ms Rebe Mahoney was recorded to have said these things:

"• Agrees that the job has two aspects, the care aspect and the paperwork aspect which she finds hard to keep up.
• Mentions that work is sometimes good and sometimes bad.
• Feels confident to look after residents and do it well.
• When relatives complain this contributes to a bad day and feels picked on sometimes by other carers.
• Feels unsupported around all the paperwork that needs completing and needs help doing so.
• She tries to keep up the paperwork, but sometimes there is a gap, will not complete paperwork in advance.
• Not been asked to sign anything that was not her work."

132.4 On page 296, Ms Elizabeth Chidwawaya was recorded to have said these things:

"• Felt supported by the unit manager and thought she ran the unit well, standards were high, but acknowledged that she thought that the unit manager was under pressure.
• The team she worked in worked well and had no issues.
• Noticed a deterioration in standards since no unit manager in place
• The introduction of pink folders created tensions, but once implemented worked well though some staff members were not happy with all the paperwork that needed to be completed.
• Staff meetings caused conflict especially between day and night staff and accusations that some staff were not doing their bit.
• Felt able to speak to unit manager with any problems.
• Dementia nursing more complex than general nursing."

132.5 At page 302 there was this note of what was said by Ms Alexandra Prokop (who was evidently still working for the respondent on 5 February 2019):

"• Mentioned that she had a problem with senior care assistant (Regina Dancel) having favourites and made her feel inadequate.
• Paperwork is a problem for her, but found that the unit manager was clear about her objectives of the residents must be clean and paperwork must be done, checked and signed.
• Found daytime work very stressful and that one was either in or out of favour.
• Not much contact with unit manager as all her tasks were managed by RD.
• Paperwork was done as and when and at times she was guilty of omitting something but realised that no gaps were allowed. This was usually addressed after the unit manager had left for the day after 17h00."

132.6 At page 304, Mr Hunt was recorded to have said this:

> ‘• Due to some health problems, left caring for a spell and did activities, but is back doing caring and in Johnson house.
> • Been in Johnson 9 years and finds it stressful because now doing a lot more than was done before. Referred to fire marshal and escorting, but as no one wanted to do this job, it was pushed onto him
> • As paperwork became more and the care side less, fault was found and others took over the paperwork by saying “don’t tell me how to do my job.”
> • Used to have all the files in the lounge and the carers were filling in the paperwork in their spare time and as and when they did the task.’

132.7 At pages 306-307, Ms Virginia Buchanan, who was recorded to be a hostess in Marsden House but to have worked (it was not stated when) in Johnson House, was recorded to have said this:

> “• Chose to be a hostess because it gave her a Monday to Friday job.
> • Found Johnson a very hostile place and not the friendliest crowd
> • Spoke about incidents witnessed in Johnson which made her tearful
> • Reported it, but no action taken so did not report again.
> • Was asked to fill in fluid and food charts when she was not feeding but she refused.
> • Feels that residents in Johnson are not washed enough
> • Spoke about too many chiefs and not enough Indians in Johnson
> • Feels that rough treatment is sometimes used against residents.
> • Felt that the senior health assistant Regina Dancel was too powerful and that she and the unit manager bounced off each other and not in a good way.
> • Felt sad to be reporting this and that all her efforts to report her concerns in the past had not been heeded.”

132.8 At pages 308-309, Mr Peter Ashietey was recorded to have said this:

> ‘• Spoke about filling in an incident report and going back to complete if something was left out.
> • Deputy had cautioned him about filling in paperwork in advance.
> • He attended staff meetings and supervision done by unit manager
> • Has learned from some mistakes in the past around alerting management in the case of an emergency, which was averted.

- Has had issues with the unit manager demanding too much which he challenged and pushed back and the situation ended in apologies.
- Feels that the unit manager was strict and friendly, but that she tried to keep everyone happy and also her staff. He felt she had their interests at heart.
- Has challenged his fellow colleagues when he felt that the care was not the kindest, was encouraged to report this also to management in future or to whistle blow or "speak up".'

133 The only other person who had worked at Johnson whom Ms Scott had interviewed was Ms Gauden. The notes of that interview were at pages 287-288 and were, as far as we could see, neutral. However, as we say above, Ms Gauden gave evidence to us. In her witness statement, she said this:

"1. I started work as a Health Care Assistant at St Christopher's Care Home in April 2018, and have worked in Johnson House ever since. I started on the day shift and later transferred to the night shift.

2. My Unit Manager was Gosia Szalkowska. The unit always ran smoothly, Gosia was very efficient and if something needed doing she would make sure it was done promptly. She was very serious about the safety of residents and would check on them regularly, and if anything didn't look right she would sort it. She often checked the care records during her shifts and would remind us to make sure we did everything properly and recorded it correctly.

3. I found Gosia to be approachable and easy to get on with. She was someone you could talk to about any problems. When I had a couple of issues with my mental health she was sympathetic and supportive and helped me by changing my rota or adjusting my hours.

4. As far as I know everyone else found her equally supportive, and I never heard a bad word spoken against her. She could occasionally get stressed, as we all did, but managing a large dementia unit is a big responsibility and difficult situations arise from time to time.

5. I never saw or heard of Gosia bullying anyone or treating anyone unfairly. As a manager she would correct people if necessary if they made mistakes or didn't maintain the expected standard of care. When the nurse in charge of the night shift (Dadirai) failed more than once to do what she was supposed to do during her shift, Gosia was understandably irritated and would give her a stern reminder, as it affected the overall standard of care and her tasks would have to be picked up by the day shift, which was not fair on them and made their day more difficult. However, there is no way that this could be described as bullying.

6. I never saw any of my colleagues on the night shift filling in gaps in care records, and I was never asked or encouraged to fill in any gaps. If I found a gap I would leave it as it was not my work, and would report it the next day. However, I was aware that Gigi, the nursing assistant on the day shift, would go through all the care records towards the end of the day shift, around 7.30 pm, and I saw her asking people to fill in any gaps she found. I don't believe Gosia knew this was happening - she sometimes worked until 8.00 pm but was always in the office at that time preparing for the handover to the night shift. I believe that when allegations were made against Gosia, Gigi threw Gosia under a bus and blamed her, but these were in fact the things that Gigi used to do.

7. I never saw any favouritism by Gosia towards any member of staff".

134 Ms Scott dismissed the claimant's appeal in the letter dated 15 February 2019 at pages 314-316. It was headed **"RE: OUTCOME GRIEVANCE APPEAL HEARING**". Ms Scott said that that was just an administrative error. However, the letter referred in the third paragraph to Ms Scott as having "fully investigated your grievance". The body of the second page of the letter bears repeating in full. It was in these terms:

> "During your appeal hearing you suggested that the allegation of falsifying records was instigated by the Home Manager. This is not the case but through an audit undertaken by external professionals and our Area Quality Director not as you said, by loana.
>
> Through interviewing a selection of staff there were anecdotal accounts of some belief of preferential treatment, however, I could not substantiate or prove otherwise.
>
> You point out that of those interviewed, your view is that they were selected by loana on the grounds that she knew that they would discredit you. Acknowledging this point, I have interviewed a further thirteen team members. I identified a continued theme of acknowledgment that at times records were completed outside of safe practices and procedures.
>
> The Disciplinary Hearing Manager did not interview additional staff. As an Appeal Hearing Manager I have undertaken this with rigor at your express request.
>
> You stated that loana conducted the interviews without a note taker who would also act as witness. I have satisfied myself that the notes taken have been signed by those interviewed, and have been read and signed as factually accurate. I cannot agree, therefore, that these are without credit nor that there is serious breach of ACAS practices. There is no evidence that the interview notes have been manufactured as you stated. I acknowledge your

> point that the times recorded were inaccurate. This was an administrative error and I am satisfied that these interviews took place.
>
> I accept the interview questions were not as open as I would have liked to see but the interviewees had the opportunity to respond in either a positive or negative manner and to express further views in response. I therefore reject this as grounds for appeal."

135 On the third page of the letter, there was this paragraph:

> "It is relevant to state that as a professional nurse where you have significant concerns you are required within your code of practice to raise and escalate these concerns. These opportunities were awarded to you both internally and externally through whistleblowing procedures."

136 Immediately following that paragraph, there was this paragraph:

> "In conclusion and having considered all of the information provided to me, the outcome of your appeal is that your appeal is not upheld. Please note that this decision constitutes the final stage of the Company's Grievance Procedure."

137 When we read the letter at pages 314-316, we were puzzled by what was said there about the notes of the persons whom Ms Moraru-Manole had interviewed all being signed, not least because Ms Scott had said this in paragraph 63 of her witness statement:

> "Of the interviewees, some had left, and we were unable to ask them to sign their statements. However, they shared the themes of bullying and filling in gaps in documents mentioned in the other statements. I found that there was a culture on Johnson of backfilling documents."

138 However, Ms Scott had also said this in paragraph 39 of her witness statement:

> "On the accuracy of the notes of Ms Moraru-Manole's interviews, I was satisfied that the notes taken have been signed by those interviewed. There was no evidence that the interview notes had been manufactured although, I acknowledged that some of the times recorded were inaccurate. This was an administrative error, and I was satisfied that the interviews took place,"

139 That paragraph ended, as shown, with a comma, not a full stop. However, there was nothing in the following paragraphs that showed what, if anything, might have followed, so we assumed that the comma was meant to be a full stop. The next paragraph was in these terms:

> "40 I accepted that the interview questions were not as open as I would have liked to see but the interviewees had the opportunity to respond in either a positive or negative manner and to express further views in response."

140 We struggled to see what Ms Scott meant by that paragraph. EJ Hyams asked her why she had interviewed 13 more people but not gone and spoken to any of the persons whom Ms Moraru-Manole had interviewed after suspending the claimant, and on whose interview notes Ms Moraru-Manole had relied in proposing the claimant's dismissal and Mr Miskelly had relied in deciding to dismiss the claimant. Ms Scott's response was that she had not done that because she did not want to interfere with those interviewees' evidence.

141 We saw that Ms Scott had written this in paragraph 38 of her witness statement:

> "From my additional interviews, I identified a continued theme of acknowledgement that at times records were completed outside of safe practices and procedures."

The possibility of a person other than Ms Scott hearing the claimant's appeal against her dismissal

142 Ms Moraru-Manole told us in answer to a question asked by EJ Hyams that Ms Scott was one of six Managing Directors, so that there were five other people employed at Ms Scott's level who could have heard the claimant's appeal.

Ms Scott's perception of the claimant during the appeal hearing and how it affected her conclusion on the claimant's appeal

143 Ms Scott said this in paragraph 65 of her witness statement:

> "I also considered how the claimant presented herself at the appeal and took the opportunity to judge her character. I found her very strident and very abrasive. I considered that sometimes people may present differently at a formal meeting, but I couldn't ignore what I had seen."

144 We did not see the claimant to be in any way "strident and ... abrasive" when she gave evidence to us. She was measured and in no way strident or abrasive throughout the hearing. Rather, at various points she apologised when she did not need to, for example for something that had happened in relation to the technology used for the hearing via CVP.

Ms Scott's evidence about the impact on her of the claimant's letter of 20 August 2018 at pages 239-240

145 Ms Scott said this in paragraph 68 of her witness statement:

> "I considered the letter of 20th August 2018. It is not unusual for the manager of a unit to question staffing levels. What struck me was the claimant's insistence that it was the manager targeting her. I had instructed Area Directors to speak to Home managers about staffing levels and to reduce it in line with the Company's usual practice."

Mr Miskelly's evidence about that letter

146 In oral evidence, Mr Miskelly at first could not remember seeing that letter. Then, having re-read it, he did recall seeing it. He at first said that it was just an opinion, and that there was "an unspoken rule that all unit managers never have enough staff; so this is an opinion of someone." He said that there was "a format that you follow to back up what you say; you cannot just say that you are short staffed." He went on to say that a unit manager would have to demonstrate that there had been for example a preventable fall by a resident as a result of short-staffing before the manager could say that more staff were required for safety purposes. He acknowledged that the CQC judges homes not just by their capacity to avoid such a fall but also by reference to the extent to which residents are stimulated, and that that was a legitimate concern to raise in relation to staffing levels.

147 Mr Miskelly then accepted, on reflection, that a relevant factor to consider in deciding whether the claimant should be dismissed was whether the fact that the claimant had given the letter at pages 239-240 to Ms Moraru-Manole had influenced the latter's decision to propose the claimant's dismissal. However, he then went on to say that he had as a manager had "a lot of those letters", implying that it was not relevant. Nevertheless, he accepted that if he had received the letter at pages 239-240 then he would have investigated it. He also said that he had never worked for BUPA and that the dependency model that the respondent used allowed for fewer staff than the BUPA model allowed for. He also accepted that many care home owners say that local authority funding for care home residents is unrealistically low.

Our conclusions on the real reason for the claimant's dismissal and the real reasons why Ms Moraru-Manole proposed the claimant's dismissal, and related matters

148 Each of the following conclusions on the facts (whether or not it is expressly stated to be a conclusion or just a statement of what occurred) and each of the following statements of a view which we arrived at, is a finding of fact made by us on the balance of probabilities.

149 The initial sequence of events was this.

149.1 The claimant gave Ms Moraru-Manole the letter of 20 August 2018 at pages 239-240 only five days after Ms Moraru-Manole had imposed a change in the staffing of (among other units) Johnson House.

149.2 That change was imposed because of a decision made by Ms Scott.

149.3 By giving Ms Moraru-Manole that letter, the claimant complied with the respondent's whistleblowing procedure, as can be seen from paragraph 24 above. The only possible justification for concluding that she had not done so was the fact that it might be said that "the management [was] involved" so that "it would be inappropriate to raise it directly with them". In fact, it was not submitted on behalf of the respondent that that was so here, but in any event, in our view the situation was not one outside the norm, so that claimant complied with the procedure by raising the matter with "her immediate manager". In doing so, of course, she complied with the requirement of section 43C of the ERA 1996, and in part for that reason, but also in any event, it would be odd (or perhaps it would be better to say, unreasonable) for an employer to say that raising a complaint about a manager's instruction with the manager was "inappropriate".

149.4 Ms Moraru-Manole discussed the claimant's letter of 20 August 2018 with Ms Finlay, but Ms Moraru-Manole did not respond to the claimant about the content of the letter in any way. Nor did Ms Moraru-Manole follow the steps required to be taken by the respondent's whistleblowing procedure, as set out in paragraph 25 above. Nor did any other person on behalf of the respondent.

149.5 Ms Moraru-Manole then, because the claimant had given her that letter, jumped at what she saw as an opportunity to justify the taking of disciplinary action against the claimant given to her by what she thought she could rely on as a result of what Ms Gigi Dancel told her on 2 October 2018 as evidenced by the notes at pages 103-104 to which we refer in paragraphs 29-32 above.

149.6 That was an opportunity, as Ms Moraru-Manole saw it, to criticise the claimant on the basis that (1) there had been the falsification of the records of DH, and (2) Gigi was running Johnson House.

149.7 On 4 October 2018, Mr Betts carried out an internal inspection. The only thing that he said that Ms Moraru-Manole could seize on as a justification for criticising the claimant was the entry on page 106 set out in paragraph 33 above. That criticism was not on its face sufficient justification to take disciplinary action against the claimant.

149.8 The next day, 5 October 2018, when the CCG and the local authority's representatives came to the Home to meet Ms Moraru-Manole, they "challenged" the 'fluid balance chart' of "One resident" who was "very slight": see the entry on page 114, set out in paragraph 37 above. The "Visiting team" therefore "challenged the accuracy of the fluid chart and how this was achieved." That, we concluded, gave Ms Moraru-Manole

what she saw as a golden opportunity to say something which would justify disciplining and if possible dismissing the claimant. She therefore said the next words in the quotation set out in paragraph 37 above, namely:

> "The home manager advised that a STN had escalated to the home manager that daily records are not reflective of care delivered and stated that staff are falsifying records."

149.9 That laid what Ms Moraru-Manole thought was a good foundation for getting rid of the claimant. However, immediately after the inspection had ended, Ms Moraru-Manole interviewed Ms Iovu and Ms Vladu as recorded in the note at pages 353-357 which we refer to in paragraphs 14 and 43 above, and, as those notes show and as Ms Moraru-Manole's oral evidence to which we refer in paragraph 44 above showed, the allegation of a falsification of the fluid balance chart of resident DH was not well-founded.

150 We pause to say that the reasons why we came to the conclusion that Ms Moraru-Manole had by 5 October 2018 decided that the claimant had to be dismissed because she (the claimant) had given Ms Moraru-Manole the letter of 20 August 2018 at pages 239-240 were these.

150.1 The complete failure by Ms Moraru-Manole even to acknowledge the letter of 20 August 2018 showed in our view that it was unwelcome to her.

150.2 The fact that she discussed it with Ms Finlay and that Ms Finlay did not discuss it with the claimant suggested that the letter was unwelcome to Ms Finlay. Certainly, Ms Moraru-Manole was, we concluded, focused on achieving the goals that Ms Finlay had set her, which included getting the costs of running the Home down. The main way to do that was to reduce the number of staff at the Home.

150.3 The failure by anyone on the part of the respondent to acknowledge the letter and to follow the respondent's own whistleblowing procedure showed that either (1) the respondent's management above Ms Finlay wanted it to be suppressed, or (2) it was suppressed by Ms Moraru-Manole and Ms Finlay, unless it was thought by any of those people that the letter of 20 August 2018 was not a protected disclosure within the meaning of section 43A of the ERA 1996.

150.4 The fact that Ms Moraru-Manole was very quick (i.e. within at most 6 weeks and one day of receiving the letter of 20 August 2018) to grasp what she thought was a reason to make very serious criticisms of the claimant, as recorded in the notes at pages 103-104 and discussed in paragraphs 149.5 and 149.6 above, supported the proposition that she

had by then decided that the claimant had to leave the respondent's employment.

150.5 The fact that Ms Moraru-Manole then stated in terms that "*daily records are not reflective of care delivered and ... that staff are falsifying records*" as described in paragraph 149.8 above was indicative of two possibilities. They were that either Ms Moraru-Manole was panicking, or she had already decided to allege that the claimant was guilty of gross misconduct.

150.6 We did not accept that Ms Moraru-Manole said those words because she was seeking to be honest and open. We did not believe her when she said that. That was for the following reasons.

150.6.1 At that point, she had only a flimsy basis for the assertion in question, and the next words, namely "*The Home Manager and Area Quality Director undertook an audit to validate the actions on the home improvement plan and identified a similar concern*" were, for the reasons we state in paragraphs 39 and 40 above, not supported evidentially, including by what Ms Moraru-Manole had put in her witness statement.

150.6.2 In addition, we would not expect a care home manager to "confess" to wrongdoing of the sort that Ms Moraru-Manole said had occurred, namely the falsification of records, without having carried out a thorough investigation. That was because it would be (1) premature to acknowledge the alleged fault, (2) contrary to the interests of the owner of the home to do so, and (3) unfair to any member of staff who might be regarded as being responsible for the fault. Rather, we would have expected a care home manager in the position of Ms Moraru-Manole who was acting in good faith to say that she would look into the matter urgently but carefully, and no more than that.

150.7 We also did not accept that Ms Moraru-Manole was panicking when the drop-in visit of 5 October 2018 occurred. Ms Moraru-Manole struck us as being unlikely to panic, but in any event, we concluded that her real reason for saying the damning things recorded at the bottom of page 114 was that she had already by then decided that the claimant was going to be dismissed.

151 We now return to our findings of fact about the sequence of events. Undeterred by finding that there was no objective justification for taking action against the claimant because of the fluid balance chart of resident DH, Ms Moraru-Manole sought to find evidence to justify the claimant's dismissal, by going to Johnson House on Sunday 7 October 2018 to find such evidence. As we say in paragraphs 46 and 50-52 above, we concluded that Ms Moraru-Manole stated to the staff there at that time that they were liars and that their record keeping was fake.

152 That allegation was not justified by any concrete evidence, and Ms Moraru-Manole knew it. She knew that it was a false allegation because,

152.1 as we record in paragraphs 43 and 44 above, only two days before, Ms Moraru-Manole been shown by what Ms Vladu and Ms Iovu said and by what she herself saw, that the fluid balance chart of DH was accurate, and

152.2 there was nothing in the records which Ms Moraru-Manole found which supported the allegation.

153 We came to the conclusion that there was nothing in the records that Ms Moraru-Manole saw on 7 October 2018 to support the allegation of falsification because (1) as stated in paragraph 54 above, we accepted the truth of paragraph 8 of Ms Winter's witness statement, which we have set out in paragraph 53 above, and (2) if there had been anything in the records that Ms Moraru-Manole saw on 7 October 2018 to support the allegation of falsification then she would have copied it. As we say in paragraph 35 above, no records of any resident at Johnson House which might have been falsified were put before us, and we concluded that that was because there were no such records which, properly scrutinised, could reasonably have been said to have been falsified. In this regard we record that in our view if one member of a care team at the request of another recorded that something had been done, such as that a drink had been given to a resident, then that was likely at least in many circumstances to be an accurate record even though the maker of the record had not given the resident the drink. Similarly, if two persons give a bath to a resident, then it would a nonsense to suggest that they both need (in order to avoid it being said that the record is false) to signify in writing that they have done so: one would expect the record made by one of them to the effect that both of them had given the bath, to be sufficient. The key in this area is, in our view, accountability and traceability: there needs to be an accurate audit trail or record of what was done for or to a resident. It would be misleading of a person to say that a drink had been given by the record-maker if that was not the case, but the record-maker could in our view properly record that the drink had been given or the thing had been done if he or she saw that occur. Alternatively, at least in some (if not all) circumstances, the record could be made at the request of the person who had given the drink or done the thing in question, with the name of the person making the request shown next to the record. That is because that person would be the one to whom any subsequent investigator would turn in the first instance to ask what had happened.

154 The fact that Ms Moraru-Manole called the staff of Johnson House liars to their faces when there was no objective justification for doing so was a further sign that she had made up her mind that the claimant had to be dismissed. So was the fact that Ms Moraru-Manole called the records that the staff made "fake".

155 The fact that Ms Moraru-Manole did not disclose the record of her interview of Ms Iovu and Ms Vladu, at pages 353-357, until after the hearing before us had begun, was evidence from which we could justifiably draw the inference that (1) she was aware that it undermined her asserted justification for concluding that the claimant had encouraged the falsification of records, and (2) she did not want that to be seen. We drew that inference.

156 The fact that Ms Moraru-Manole implied in paragraphs 31 and 32 of her witness statement (which we have set out in paragraph 55 above) that she had an individual supervision meeting with the claimant during which she singled the claimant out for specific instruction on the need to maintain records accurately was, for the reasons stated in paragraphs 56-58 above, misleading, and Ms Moraru-Manole knew that. Certainly, there was nothing more that occurred after 5 October 2018 (when, as the notes at pages 353-357 and Ms Moraru-Manole's oral evidence recorded in paragraph 44 above showed, Ms Moraru-Manole found that she could not justify the assertion that the fluid balance chart of resident DH had been in any way falsified) and before the meeting of 24 October 2018 to which we refer in paragraph 59 above, to justify suspending the claimant.

157 The fact that Ms Moraru-Manole did not say to the claimant at that meeting which employees had resigned saying that they had done so because of the claimant's management of them, was in our view the result of the fact that Ms Moraru-Manole knew that she could not justify the assertion that one or more employees had done that. In coming to that conclusion, we took into account the fact that there were before us

157.1 no letters of resignation, and

157.2 no other kinds of communication, or record of any oral statement in for example an exit interview,

from any employee at any time up to and including 24 October 2018 stating that the employee had resigned because of the conduct of the claimant.

158 We also took into account the fact that Ms Scott referred in the appeal hearing to the four employees whose names are set out in paragraph 62 above but that

158.1 Mr Hunt's reason for leaving his post at Johnson House was stated (as recorded in paragraph 132.6 above) by him to have been "some health problems",

158.2 Mr Connell's reasons for resignation had (see paragraphs 89-94 above) nothing to do with the claimant, towards whom he had only positive feelings, and

158.3 even Ms Moraru-Manole's note of what Mr Connell said to her showed (see paragraph 89 above) that he did not feel that he himself had been

> treated "differently". Although the use of that word was odd in the circumstances, it could have been interpreted only as Mr Connell saying that he was not mistreated in any way by the claimant.

159 In any event, at least two of the four employees whom Ms Scott implied had resigned because of the claimant had not in fact done so.

160 In addition, the names of the employees that Mr McGlashen gave us in the email which we set out in paragraph 61 above, in addition to including that of Mr Connell included that of Ms Prokop, who was (as can be seen from what was say in paragraph 132.5 above) evidently still working for the respondent on 5 February 2019, and said to Ms Scott things which were in some ways positive about the claimant and otherwise not such as to justify the assertion that she (Ms Prokop) resigned because of the claimant's conduct towards her.

161 Included in the list of names given by Mr McGlashen set out in paragraph 61 above was also the name of Ms Kahari, but the document which Ms Moraru-Manole said was a record of her interview of Ms Kahari (at pages 173-179) was not signed by Ms Kahari. The list included also the name of Ms Gurley, but she was, according to the claimant, still employed by the respondent at the time of the hearing before us, but in any event the document which Ms Moraru-Manole said was a note of her interview of Ms Gurley (at pages 146-151) was not signed by Ms Gurley. While that note did refer to Ms Gurley as having resigned, the reasons given were not directly attributable to the claimant:

> "I resigned because of uncomfortable atmosphere from Johnson house, but also the payment Is another factor. I applied for a carer position In Sanctuary and they are paying £9.5 /hr."

162 That "uncomfortable atmosphere from" (not "at" or "in", we saw) Johnson House could well have resulted from the tension between the day staff and the night staff, which was one of the factors behind Mr Connell's initial intention to leave the respondent's employment. In any event, the facts that (1) there had been no independent note-taker at that interview, (2) the interviewee was not given an opportunity to agree or correct the notes, and (3) the notes were not signed, was in our view highly suspicious given that Ms Moraru-Manole had taken those steps in relation to her interview of the claimant (as we record in paragraph 80 above).

163 Similarly, Ms Moraru-Manole's note of her interview of Ms Terera at pages 163-167 was not signed by Ms Terera. If it was accurate, it showed that Ms Terera was at that time (16 November 2018) still working at Johnson House, and there was no indication in the note that she was going to cease to do so.

164 For all of those reasons, we concluded that Ms Moraru-Manole called the claimant to the meeting of 24 October 2018 to which we refer in paragraph 59 above because she was still looking for a way to justify dismissing her. Certainly, in our view by that time there was nothing which justified objectively the unusual step of

swapping the claimant and Ms dela Torre as the managers of Johnson House and Marsden House on 25 October 2018. As we point out at the end of paragraph 73 above, the fact that Ms Moraru-Manole and/or one or more other members of the respondent's managerial staff proposed that swap was a strong indication that it was recognised by her (or them) that there was at that time insufficient evidence to justify suspending the claimant and/or taking disciplinary action against her. We ourselves could not recall having had to deal professionally or as a representative with, and could not remember having heard about, a situation in which an employer had swapped managers to see whether one of them was causing problems as a manager of staff. In addition, we could see that it was in the circumstances objectively likely to cause significant difficulties to the residents of at least Johnson House to have as its manager someone who was not familiar with managing the provision of care to residents with advanced dementia. We therefore had great difficulty understanding why the swap was implemented. It might have been done as a result of ineptitude, but Ms Scott struck us as being far from inept. One possible conclusion was that Ms Moraru-Manole knew that making the claimant move to be the manager of Marsden House at short notice would make the claimant so uncomfortable in her work that she might leave the respondent's employment. Another possible reason was that Ms Moraru-Manole was hoping that the claimant would make a mistake in an unfamiliar environment, so that Ms Moraru-Manole could then justify taking disciplinary action against the claimant.

165 In any event, Ms Moraru-Manole then, knowing that there was insufficient evidence to suspend, let alone dismiss, the claimant, suspended her, using two reasons for doing so, both of which were (see paragraph 75 above) vague and almost impossible to respond to. Certainly, at that point the only documentary evidence that might objectively be thought to support the proposition that the claimant was guilty of either of those things was the note at pages 103-104 (the material part of which is set out in paragraph 31 above), and that was shown by (1) the notes at pages 353-357, the material part of which we have set out in paragraph 43 above, and (2) the oral evidence of Ms Moraru-Manole to which we refer in paragraph 44 above, to be in its most potentially damning respect to be unreliable.

166 Ms Moraru-Manole suspended the claimant with (we concluded from the evidence of Ms Moraru-Manole to which we refer in paragraph 77 above) the knowledge and approval of Ms Scott. Ms Scott in fact at that time knew that Ms Moraru-Manole was of the view that the claimant should be dismissed as she knew (as we record in paragraph 69 above) of the swap of the claimant and Ms dela Torre as managers and (we inferred) the reasons for it.

167 Ms Moraru-Manole then sought evidence to justify dismissing the claimant. She made the notes of the interviews of the 12 staff whom she interviewed in that regard herself so that she could include in them untrue statements. We came to that conclusion (1) because of the contrast recorded in paragraphs 78 and 80 above between the interviews of those 12 members of staff and that of the

claimant, and (2) because we accepted Mr Connell's evidence (which we record in paragraphs 89-92 and 94 above) that Ms Moraru-Manole had included in the supposed note of her interview of him things which were damning of the claimant but which he had not said to her.

168 Ms Moraru-Manole then relied on those interview notes to justify the proposal to dismiss the claimant. She then (as we record in paragraph 102.2 above) told Mr Miskelly that staff had come forward after the claimant had been suspended and said that they had been bullied by her (the claimant), when that was not true, in that no member of staff had come forward to do that.

169 Mr Miskelly was then persuaded by that statement to disregard all of the positive evidence of the claimant in her defence, on the basis that the claimant was a late-discovered bully. He did not speak to any of the 12 interviewees on whose supposed evidence Ms Moraru-Manole had relied in proposing the claimant's dismissal because he did not believe he needed to do so. We could not understand how any investigator seeking to ascertain the truth could have failed to do so unless he or she believed what he or she had been told. We were inclined to conclude that Mr Miskelly had been duped by the claimant, but we found what he said in paragraphs 7 and 8 of his witness statement, which we have set out in paragraph 109 above, to be inconsistent with that proposition, in that they showed that he was himself knowingly (or at best from the respondent's point of view, negligently) telling an untruth. Thus, it was at least possible that he had given effect to Ms Moraru-Manole's proposal that the claimant be dismissed knowing that there was a real possibility that Ms Moraru-Manole had recorded witnesses to have said things that they had not in fact said. However, he might well in the alternative have simply approved those paragraphs in his witness statement having for that purpose relied on what was in the letter at page 224 as set out in paragraph 108 above (which it was his evidence, which we accepted in this regard, was not written by him).

170 In any event, Mr Miskelly did not make the final decision that the claimant was to be dismissed. That decision was (on his evidence, which we accepted in this regard) made by Ms Finlay.

171 Ms Scott's consideration of the claimant's appeal against her dismissal was conducted with a view to dismissing it. We came to that conclusion in part because of the untruths that she told, as we record in paragraphs 119-122, 126 and 127 above. We also came to that conclusion because we could not understand Ms Scott's rationale for not interfering with the evidence of the 12 persons whom Ms Moraru-Manole had interviewed without a note-taker present as we describe above (and we record her evidence in that regard in paragraph 140 above) unless she did not want to disturb that evidence because she did not want to overturn Mr Miskelly's (or at least the prior) decision that the claimant should be dismissed. In addition, we had difficulty understanding how Ms Scott came to the conclusion stated in paragraph 38 of her witness statement, which we have set out in paragraph 141 above, namely that

> "From my additional interviews, I identified a continued theme of acknowledgement that at times records were completed outside of safe practices and procedures."

172 We thought that there was much more in those interview notes (of which we have set out material parts in paragraphs 131 and 132 above) that supported the claimant's case than whatever there was in the notes which could, if it had been the subject of probing, reasonably have been taken to have undermined it. The fact that Ms Scott did not probe (as was shown by those notes and the fact that Ms Scott at no time asked for documentary evidence of any actual falsification of records) was in our view a further sign that she had not wanted to thwart Ms Moraru-Manole's desire (which was of course evident) that the claimant be dismissed.

173 We then considered whether Ms Scott was also motivated by the fact that the claimant had put her letter of 20 August 2018 at pages 239-240 before Ms Moraru-Manole and therefore the respondent. In doing so, we stepped back and considered what evidence there was in that regard. In addition to the factors to which we refer in the two preceding paragraphs above, we took into account the following factors.

174 We considered that the words in Ms Scott's outcome letter at pages 314-316 which are set out at the end of paragraph 134 above (*"I accept the interview questions were not as open as I would have liked to see but the interviewees had the opportunity to respond in either a positive or negative manner and to express further views in response. I therefore reject this as grounds for appeal.")* suggested that Ms Scott either did not write the letter, or that her grasp of the facts was weak.

175 We also considered that the words in Ms Scott's outcome letter that we have set out in paragraph 135 above ("*It is relevant to state that as a professional nurse where you have significant concerns you are required within your code of practice to raise and escalate these concerns. These opportunities were awarded to you both internally and externally through whistleblowing procedures*.") to be bizarre given that (as we record in paragraph 149.3 above) the claimant had at least arguably, if not in fact, followed the respondent's whistleblowing procedure, and (as we record in paragraph 149.4 above) it was the respondent that had (without any doubt at all) failed to follow it when it received the letter of 20 August 2018 at pages 239-240 set out in paragraph 21 above.

176 We bore in mind the fact that Ms Scott had herself (see paragraph 145 above) caused the reduction in staff to which the claimant objected. We also bore in mind Ms Scott's evidence to which we refer in paragraphs 143-144 above about the extent to which she took into account the claimant's demeanour at the appeal hearing. We thought that her taking into account her perception of the claimant's demeanour showed either a significant lack of insight into the effect on a

professional person of being dismissed in circumstances which might very well lead to the death of that person's career, or that Ms Scott had simply swallowed hook, line and sinker the bait that Ms Moraru-Manole had put before her.

177 Having taken all of the above factors into account, we came to the conclusion that Ms Scott in dismissing the claimant's appeal was motivated, at least in part, by the fact that the claimant had objected, in her letter of 20 August 2018, to the reduction in staff which had been effected at Ms Scott's direction.

The relevant law

The law of unfair dismissal

The reason for the dismissal

178 In a claim of unfair dismissal within the meaning of section 98 of the ERA 1996, it is for the employer to prove ("show") the reason, or the principal reason, for the dismissal. That is the result of section 98(1)(a). In order to be a fair reason, the reason must be one which falls within section 98(2) (which include "conduct" and "capability") or is some other substantial reason within the meaning of section 98(1)(b). What is the "reason" for the dismissal is the subject of some helpful case law.

179 It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

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

180 Paragraph DI[821] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") helpfully (and in our view accurately; if we refer below to any other passage in *Harvey*, we do so on the basis that we agree with it as a description of the applicable case law) states the manner in which those words have been approved and applied in subsequent case law:

> "These words, widely cited in case law ever since, were approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 3 All ER 40 and again in *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in *Abernethy* was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor

> or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

181 In paragraph DI[824] of *Harvey*, this is said:

> "[I]n cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed for some extraneous reason such as out of pique or antagonism, it is for the employer to rebut this showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so. Evidence that others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is open to the tribunal to find the dismissal unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even although the misconduct would have justified the dismissal had it been the principal reason: *ASLEF v Brady* [2006] IRLR 576, EAT."

182 Similarly, in paragraph Q[722] of *Harvey*, this is said:

> "The reason must be that of 'the employer'; in the case of a corporate employer that will usually mean the reason motivating the dismissing manager but if that manager (acting in good faith) is in fact manipulated by another manager who acts for another reason (which may well be unfair) that second manager's reason can be attributed to 'the employer', at least if that manager is higher in the organisation's hierarchy than the claimant: *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55, [2020] IRLR 129, [2020] ICR 731 (a whistleblowing dismissal case, but the principle is applicable across unfair dismissal law). In *Uddin v London Borough of Ealing* [2020] IRLR 332, EAT, *Jhuti* was extended to allow an ET to take into account that second manager's knowledge of facts, not just his or her motivation."

<u>The fairness of the dismissal</u>

183 Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

The range of reasonable responses of a reasonable employer test

184 Section 98 of the ERA 1996 has been the subject of much case law, the effect of which can be summarised by saying that the key question when the fairness of a dismissal is in issue is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed. However, particular considerations arise in relation to the different reasons falling within subsections (1) and (2).

Conduct dismissals

185 In a case where the employer relies on conduct as the reason for the employee's dismissal, the following questions arise:

185.1 Has the employer satisfied the tribunal on the balance of probabilities that the reason for which the employee was dismissed was indeed the employee's "conduct"?

185.2 Did the employer, before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to conduct? The best authority in that regard is the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111.

185.3 The following statement of the applicable principles in *British Home Stores v Burchell* [1978] IRLR 379 (but bearing in mind the fact that the test at every stage is whether what was done or omitted was within the range of reasonable responses of a reasonable employer) also applies:

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

185.4 The final question which then falls to be answered is whether the dismissal for the conduct for which the employee was in fact dismissed was outside the range of reasonable responses of a reasonable employer. Normally, that question arises only when the preceding questions have been answered in the employer's favour.

The importance of a proper investigation

186 In paragraph DI[1482] of *Harvey*, this is said:

> "The investigative process is important for three reasons in particular:
>
> – it enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;
>
> – if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and
>
> – even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.
>
> The ACAS Code emphasises the importance of an investigation to establish the facts ... . Even putting the Code to one side, there is a whole series of cases emphasising the significance of the need for proper procedural inquiries. As to the need for the employer to acquaint himself with all relevant facts, as Viscount Dilhorne said in *W Devis & Sons Ltd v Atkins* [1977] IRLR 314, [1977] ICR 662, HL, the employer cannot be said to have acted reasonably if he reached his conclusion 'in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient'. The same sentiment was expressed slightly differently by Stephenson LJ in *W Weddel & Co Ltd v Tepper* [1980] IRLR 96 at 101:
>
> > '… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the *Burchell* case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably'.'

The range of reasonable responses of a reasonable employer test applied to conduct dismissals

187 The severity of the consequences to an employee of dismissal are a relevant factor. So is the employee's length of service. So is his or her past record as an employee of the employer (whether good or bad). Those things are stated helpfully in the following passage from paragraph DI[1535.01] of *Harvey*:

> "In para 3 of the ACAS Code ... it is stated that: 'Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.' See also the ACAS Guide ... . There are a whole range of potential factors which might make a dismissal unfair. ... In misconduct cases they include especially the employee's length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the EAT in the early case of *Trusthouse Forte (Catering) Ltd v Adonis* [1984] IRLR 382 as being proper factors for a tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions. Moreover, it was later accepted by the Court of Appeal that the severity of the consequences to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: *Roldan v Royal Salford NHS Foundation Trust* [2010] EWCA Civ 522, [2010] IRLR 721 (dismissal likely to lead to revocation of work permit and deportation). While this latter point has obvious sense behind it (particularly where, for example, some form of professional status is in grave jeopardy), it was suggested subsequently in *Monji v Boots Management Services Ltd* UKEAT/0292/13 (20 March 2014, unreported) that some care may be needed in its application; the basic principle was not doubted, but three caveats were mentioned:
>
> (1) this is an area where the EAT must be particularly careful not to substitute its own view on the facts for that of the tribunal;
>
> (2) it may be that the *Roldan* principle may be most applicable to facts such as those in that case itself, namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to 'unravel' as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employer in the light of the severe effects of dismissal on that employee;
>
> (3) the question is whether the tribunal has in fact applied the *Roldan* approach, not just whether they have done so expressly, though the EAT did add that in such a case a tribunal is advised to make it clear in their judgment that this has been part of their reasoning."

188 Expanding on those principles, Elias LJ in *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138, [2012] IRLR 402, said this:

> "**25**
> **The relevant law**
>
> The basic legal principles are not in dispute. Ever since the seminal case of *British Home Stores v Burchell* [1978] IRLR 379 (as modified to the extent that the burden of proof has since been amended by legislation) it has been recognised that it is for the employer to satisfy the tribunal that he dismissed for a potentially fair reason. Thereafter, the tribunal has to determine whether the employer acted reasonably in treating that reason as sufficient to dismiss the employee. It is accepted by the trust that the following self-direction given by the tribunal accurately reflects the law:
>
> > 'It is for us to consider whether the employer had an honest belief in the misconduct alleged and that that belief was based upon reasonable grounds after having carried out sufficient investigation. It is not for us to determine on the evidence that we have heard whether we believe the misconduct had occurred. The tribunal views the matter through the eyes of a reasonable employer. Provided that the actions of this employer fall within a range of responses by a reasonable employer, the tribunal cannot interfere. It is also an exercise which is carried out when considering the penalty that follows from the employer's belief. It may be that the tribunal would have imposed a different penalty but the sole question is whether the penalty applied by this employer was such that no reasonable employer would have applied such a penalty.'
>
> **26**
> The tribunal reminded itself on numerous occasions throughout its decision that it must not substitute its own view for that of the employer.
>
> **27**
> Moreover, as I observed in the Court of Appeal in *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721 paragraph 13, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as is the case here, the employee's reputation or ability to work in his or her chosen field of employment is likely to be affected by a finding of misconduct. The court was approving a passage to that effect in *A v B* [2003] IRLR 405.
>
> **28**
> Of course, the mere fact that there has been an appropriate self-direction will not preclude an appellate court from finding that there has been an error of law if it is satisfied that the tribunal has, in fact, failed to act in accordance with that self-direction. As Lord Justice Mummery observed in *Brent London Borough Council v Fuller* [2011] IRLR 414 at paragraph 30:

> '.... There are occasions when a correct self-direction of law is stated by the tribunal but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has, in fact, correctly applied the law which it has said is applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques, over-analysing of the reasoning process; being hyper-critical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.'

However, it should not readily be assumed that a tribunal has failed to follow its own directions. There must be a proper basis for an appellate court to conclude that the tribunal has failed to follow its own self-direction; see *Roldan*, paragraph 51.

Protection against detrimental treatment, and dismissal, for "Whistleblowing"

189 In order to succeed in claiming detrimental treatment for whistleblowing, an employee must show that he or she made a disclosure falling within section 43A of the ERA 1996. That means a disclosure falling within section 43B of that Act that is made in accordance with sections 43C-43H of that Act. A disclosure made by an employee directly to his or her employer falls within section 43C. Section 43B provides so far as relevant:

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

190 In a claim made under section 47B of the ERA 1996 of detrimental treatment for making a protected disclosure within the meaning of section 43A of that Act, which is made under section 48 of that Act, it is for the employer to prove the reason for the conduct which it is claimed was detrimental. That is the effect of section 48(2), which provides that "it is for the employer to show the ground on which any act, or deliberate failure to act, was done".

191 Where an employee is dismissed for whistleblowing, i.e. the making of such a disclosure, the dismissal will be automatically unfair within the meaning of section 103A of the ERA 1996 "if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

192 Section 47B(2) of the ERA 1996 provides:

> "(2) ... This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X)."

193 Thus where an employee who was dismissed claims both that he or she was treated detrimentally for making a protected disclosure and that the reason or principal reason for the dismissal was the making of that disclosure, it is necessary to distinguish between detrimental conduct which is properly to be regarded as being part of the "dismissal" and conduct which precedes the dismissal. That question is best analysed in the light of *Melia v Magna Kansei Limited* [2005] EWCA Civ 1547, [2006] ICR 410), read together with the decisions of the House of Lords in *Johnson v Unisys Ltd* [2003] UKHL 13, [2003] 1 AC 518 and *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503. The discussion in paragraphs DII[466.04]-[466.07] of *Harvey* shows that the question can in some circumstances be a difficult one to answer. That discussion refers to the judgment of Underhill LJ in the Court of Appeal in *Royal Mail Group Ltd v Jhuti,* the Supreme Court decision in which ([2019] UKSC 55; [2020] ICR 731) was of critical importance here. We have set out the effect of that decision in paragraph 182 above.

Our conclusions on the claimant's claims

194 In the light of our above findings of fact, we came to the following conclusions on the claimant's claims.

Unfair dismissal

The reason for the dismissal

195 Having concluded that Mr Miskelly did not in fact decide whether or not the claimant should be dismissed, but, rather, that Ms Finlay did so, we concluded that the respondent had failed to show the reason for the claimant's dismissal. If only for that reason, the claimant's dismissal was unfair. However, even if Mr Miskelly had been the actual decision-maker, then we would have found his decision that the claimant should be dismissed to have been flawed, for the reasons stated in paragraphs 199-202 below.

196 We also, and separately, concluded for the reasons stated in paragraphs 164-169 above that the real reason for the claimant's dismissal was Ms Moraru-Manole's desire (arrived at in bad faith) to see the claimant dismissed.

197 Ms Scott's decision to dismiss the claimant's appeal against her dismissal was made not because Ms Scott believed that the claimant had done those things which Ms Moraru-Manole said she (the claimant) had done, but because Ms Scott wanted to support Ms Moraru-Manole's position and because Ms Scott wanted

the claimant dismissed as the claimant was a thorn in the side of the respondent for opposing the diminution in the number of staff at Johnson House, that diminution having been effected as a result of a decision made by Ms Scott. We came to that conclusion having taken into account the facts and matters to which we refer in paragraphs 118-132, 134-144 and 171-177 above.

198 Thus, for all of those reasons, the respondent did not satisfy us on the balance of probabilities that the claimant was dismissed for a reason falling within section 98(1) and (2) of the ERA 1996. If only for that reason, the claim of unfair dismissal succeeded. However, there were other reasons why that dismissal was unfair, and we now turn to them.

The reasonableness of the investigation carried out by Mr Miskelly

199 We concluded that while Mr Miskelly's principal reason for dismissing the claimant was her conduct in the form of bullying of her staff and encouraging the falsification of records, he arrived at the conclusion that she had done those things without carrying out an investigation which it was within the range of reasonable responses of a reasonable employer to carry out in the following circumstances.

199.1 Ms Moraru-Manole failed to use an independent note-taker when she interviewed the 12 members of staff on whose purported evidence she relied in proposing the claimant's dismissal.

199.2 Ms Moraru-Manole failed to obtain signatures from half of the alleged interviewees, and she did not state in the notes that if the interviewee disagreed with them then the interviewee could propose a correction of the notes.

199.3 In contrast, Ms Moraru-Manole used a note-taker when interviewing the claimant, and gave the claimant an opportunity to propose a correction of the notes of the interview.

200 In those circumstances alone, in our view it was outside the range of reasonable responses of a reasonable employer to fail to speak to at least one of the 12 persons whom Ms Moraru-Manole had interviewed, to see whether or not they agreed with the note that Ms Moraru-Manole said she had made of the interview.

201 However, in the circumstance that the claimant was alleging that she had been dismissed for whistleblowing to Ms Moraru-Manole, it was all the more incumbent on the person deciding whether the claimant should be dismissed to interview at least one of the persons whose alleged evidence Ms Moraru-Manole had recorded in the interview notes of the 12 persons in question.

202 Similarly, but also cumulatively, given the fact that the claimant's profession of a qualified nurse was likely to be gravely damaged if not destroyed by a dismissal for the reasons proposed by Ms Moraru-Manole, applying *Roldan* and *Crawford*,

it was necessary, if a reasonable investigation were to take place, to interview at least one of the 12 persons in question, to see whether or not they said that the content of the alleged note of that person's interview was accurate.

Ms Scott's investigation

203 For the avoidance of doubt, the failure by Ms Scott to interview at least one of the 12 persons whom Ms Moraru-Manole said that she had interviewed and on whose interview responses Ms Moraru-Manole had proposed the claimant's dismissal, meant that Ms Scott's investigation was not one which it was within the range of reasonable responses of a reasonable employer to conduct.

Were there reasonable grounds for Mr Miskelly's conclusion that the claimant had committed the misconduct for which he decided that she should be dismissed?

204 In addition, even if Mr Miskelly was the person who took the decision to dismiss the claimant, in our view there were not reasonable grounds for his decision that the claimant was guilty of the misconduct which Ms Moraru-Manole alleged, in the circumstance that Mr Miskelly arrived at that decision after taking into account

204.1 what Ms Moraru-Manole had told him, as recorded in paragraph 102.2 above; and

204.2 his understanding (recorded in his decision letter and referred to in paragraphs 108-109 above) that all of the interview notes were signed by the interviewees.

205 The first of those factors was not borne out by any objective evidence, for the reason that we state in paragraph 168 above. The second factor was contrary to the factual situation as we found it to be as recorded in paragraphs 88 and 127 above.

The claim of whistleblowing detriment

206 For the reasons stated in paragraphs 148-168 above, we concluded that Ms Moraru-Manole treated the claimant detrimentally by a series of acts from 2 October 2018 onwards, as described in those paragraphs. That detrimental treatment was the result of the fact that the claimant had given Ms Moraru-Manole the letter dated 20 August 2018 at pages 239-240 that we have set out in paragraph 21 above.

207 We concluded also that that letter was indeed a disclosure within the meaning of section 43B, in that in our judgment the claimant reasonably believed that she was making a disclosure which (1) it was in the public interest to make and (2) tended to show that the health or safety of one or more residents (and, in fact, staff) at Johnson House was being or was likely to be endangered by the imposition of the reduction in staff imposed by reason of the decision of Ms Scott.

208 While it is not strictly necessary to do so, we add here that if the letter of 20 August 2018 at pages 239-240 was not in fact seen by the respondent as a public interest disclosure, then the respondent would have been likely to engage with the claimant in regard to the matter. The complete failure by the respondent to respond to the letter was a sign that the respondent recognised that the concern was legitimate in the circumstance that the reduction in staff was imposed after there had for (it appeared) a number of years been at Johnson House the number of staff which was on 15 August 2018 reduced, in the circumstance that (as Mr Miskelly's evidence showed) there had for years been much incentive to reduce that number. In coming to that conclusion, we took into account the evidence of Mr Miskelly that we record in paragraph 147 above, that if he had received the letter at pages 239-240 then he would have investigated it.

209 In any event, for the reasons given in paragraphs 206 and 207 above, the claim of detrimental treatment within the meaning of section 47B of the ERA 1996 succeeded. We concluded that that detrimental treatment

209.1 started on 2 October 2018 with the act referred to in paragraph 149.5 above and continued up to the events described in paragraph 168 above, and

209.2 constituted a series of similar acts within the meaning of section 48(3)(a) of the ERA 1996.

The claim of unfair dismissal within the meaning of section 103A of the ERA 1996

210 Applying the decision of the Supreme Court in *Royal Mail v Jhuti*, we concluded that the reason, or principal reason, why the claimant was dismissed was Ms Moraru-Manole's determination that she be dismissed, which determination was, for the reasons we state in paragraphs 148-168 above, because the claimant had given Ms Moraru-Manole the letter at pages 239-240 which we have set out in paragraph 21 above.

211 Given

211.1 that conclusion,

211.2 our conclusion stated in paragraph 207 above that that letter was a disclosure within the meaning of section 43A of the ERA 1996 above, and

211.3 our conclusion stated in paragraph 197 above,

we came to the conclusion that the reason, or principal reason, why the claimant was dismissed that she had made that disclosure. Thus, the claim of unfair dismissal within the meaning of section 103A of the ERA 1996 succeeded.

The claim of wrongful dismissal

212 We heard only hearsay evidence from Ms Moraru-Manole about the things relied on by the respondent as justifying the claimant's summary dismissal. It was the respondent's case that the claimant was guilty of a breach of the implied term of trust and confidence, through (see paragraph 107 above)

212.1 bullying staff;

212.2 encouraging employees to falsify care records;

212.3 preferential treatment towards individual employees; and

212.4 preferential treatment towards relatives.

213 The first of those allegations was very general. At best there was an allegation of speaking harshly in public to Ms Terera at handovers in the morning but the only persons who gave direct evidence about that handover (in addition to the claimant herself) were

213.1 Mr Connell, and in his view (see paragraph 90 above) what the claimant did towards Ms Terera was not bullying; and

213.2 Ms Gauden whose evidence on this is in paragraph 5 of her witness statement, which is set out in paragraph 133 above.

214 In addition, both of those witnesses gave positive evidence about the claimant's management of them.

215 The allegation of encouraging staff to falsify residents' records was also vague: it was almost impossible for the claimant to respond to it in the absence of one or more concrete examples of care records that were in fact falsified and evidence that that falsification was the result of encouragement by the claimant of such falsification. We had no reliable evidence before us of that.

216 In addition, we had little evidence, let alone reliable evidence, of preferential treatment of individual employees or relatives.

217 Certainly, we concluded that the respondent had not put before us sufficient or cogent evidence of wrongdoing by the claimant for us to be able to conclude on the balance of probabilities that the claimant was guilty of a breach of the implied term of trust and confidence by doing one or more things that, taken either singly or together, constituted conduct which was without reasonable and proper cause and was likely seriously to damage, or to destroy, the relationship of trust and confidence that exists, or should exist, between employer and employee.

218 Accordingly, the claim of wrongful dismissal succeeded. The claimant was entitled to contractual notice pay, which the respondent wrongly failed to pay her.

Remedy hearing

219 At the conclusion of the hearing on Friday 29 January 2021, we agreed a provisional date for a remedy hearing. That was 20 April 2021. That date is now a firm date, and the hearing will resume on that day to determine the remedies which the claimant should receive for the breaches or her legal rights which we have as stated above found the respondent committed.

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Employment Judge Hyams

Date: 25 February 2021

JUDGMENT SENT TO THE PARTIES ON

18th March 2021
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THY

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FOR THE TRIBUNAL OFFICE