THE EMPLOYMENT TRIBUNALS

Claimant: **ZZ**

Respondent: **YY**

Interested party: **VV Council**

Held at: **North East region**

On: **19 – 28 October 2020 and**
(in chambers) 29-30 October, 4 and 10 December 2020

Before: **Employment Judge Aspden**
Ms E Wiles
Mr S Hunter

Appearances

For the Claimant: AA
For the Respondent: Mr Howson, consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's complaints that the respondent contravened section 47B of the Employment Rights Act 1996 by subjecting him to detriments on the ground that he made a protected disclosure are not well founded and are dismissed.
2. The claimant's complaint that the respondent contravened the Employment Rights Act 1996 by unfairly dismissing him is not well founded and is dismissed.
3. The claimant's complaints made under the Equality Act 2010 are not well founded and are dismissed.
4. The written itemised pay statements provided to the claimant by the respondent in and after April 2019 complied with the requirements of section 8 of the Employment Rights Act 1996.

5. The claimant's complaint that the respondent made unauthorised deductions from wages in respect of unpaid holiday pay is dismissed, having been withdrawn by the claimant.

REASONS

The claims and issues

1. By a claim form filed on 2 October 2018 (Claim Number 2503212/2018) the claimant advanced claims to the Tribunal against the respondent and others alleging that, contrary to section 47B of the Employment Rights Act 1996, he had been subjected to detriment by being suspended on the ground that he made protected disclosures and that he was owed arrears of pay and holiday pay. In March 2019, following a preliminary hearing, Employment Judge Shepherd determined that the claimant's employer at all material times was the respondent. The claims against the other respondents were subsequently dismissed, although the council was permitted to remain involved as an interested party.

2. Employment Judge Shepherd directed the claimant to set out, in chronological order, details of each alleged protected disclosure relied upon, setting out what was said, to whom, where it was said, whether there were any witnesses and how it is contended that each allegation is a protected disclosure and what detriment is alleged. That information was provided by the claimant in the form of a table which was included at pages 69-76 of the bundle of documents for this hearing.

3. By a second claim form filed in April 2019, the claimant made a complaint under TUPE which is no longer pursued. By a third claim form filed in September 2019 (Claim Number 2502369/2019) the claimant complained that he had been unfairly (constructively) dismissed, was owed wages and holiday pay and had been subjected to discrimination/harassment related to sexual orientation.

4. The respondent denies all liability to the claimant.

5. The claims in respect of wages and holiday pay made in the first set of proceedings were considered at a two-day hearing in October 2019 before Employment Judge Shore. EJ Shore also considered a complaint in relation to rest breaks. At the hearing, the parties agreed to settle the claim that there had been an unlawful deduction from wages and, by consent, the respondent was ordered to pay the claimant £174.84 in full and final settlement of that claim. In a reserved judgment, EJ Shore decided that the claims in relation to holiday pay and rest breaks were not made out.

6. There followed a preliminary hearing before Employment Judge Johnson in January 2020. Judge Johnson spent some considerable time with the parties identifying exactly what are the claims being pursued by the claimant. The claims being made were identified as follows:

6.1. A complaint that the claimant was subjected to the following detriments on the grounds that he made protected disclosures:-

(i) his suspension on 21st June 2018;

(ii) the length of that suspension from 21st June 2018 to 5th September 2019 when he resigned;

(ii) the respondent's attempts or proposals to dismiss the claimant at meetings in September 2018, March 2019 and September 2019;

(iv) the claimant's pay being reduced during the period of the suspension;

(v) the respondent giving confidential information about the claimant to members of the public.

6.2. A complaint of unfair constructive dismissal.
6.3. A complaint of unlawful discrimination on the grounds of sexual orientation.
6.4. A complaint of unauthorised deductions from wages in respect of unpaid holiday pay.

7. In addition, the claimant was permitted to amend his claim to include an allegation that the respondent failed to provide him with itemised pay statements (contrary to Section 8 of the Employment Rights Act 1996).

8. The claimant withdrew his claim in respect of holiday pay at the outset of this hearing. We have, therefore, dismissed that claim.

9. In respect of the complaint that the claimant was subjected to detriments on the ground that he made protected disclosures, contrary to section 47B of the Employment Rights Act 1996, it appears that Employment Judge Johnson accepted that the claimant's third claim form filed in September 2019 contained such a complaint given that some of the complaints post-date the original claim form. Alternatively, it may be that the claimant was given permission to amend his claim at some point before or at that hearing and we have not been provided with a copy of the relevant Order. Whichever it is, there has been no suggestion by the respondent that those complaints have not actually been made by the claimant and are not properly before this Tribunal.

10. The claimant provided further particulars of the allegation that the respondent gave confidential information about the claimant to members of the public at paragraph 10 of a document dated 17 February 2020. The claimant confirmed in that document that the allegation was that the respondent gave confidential information about him to a KK when he spoke to him in June 2018 and November 2018. He also suggested that the respondent had shared information with another individual, HH and with the Human Resource manager at the company at which the respondent worked.

11. At this hearing AA confirmed that the protected disclosures the claimant alleges he made are those set out in table form at pages 69 – 76 of the bundle, subject to one correction. The correction is that the alleged disclosure made on 9 May 2018 and

described as follows 'AA on behalf of [the claimant] and QQ made a telephone call to … council first contact to make a disclosure and safeguarding concern about QQ and his care staff', referred to as PID17 in the claimant's statement, was a disclosure made to the Council rather than to AA.

12. When Mr Howson was cross examining the claimant, an issue arose as to whether the claimant was now seeking to allege that he had been subjected to detriment because he had made protected disclosures to AA that were not particularised in the table. AA initially suggested that he was. However, we reminded AA that that the claimant had been ordered to provide details of each of the protected disclosures setting out what was said, to whom, where it was said, whether there were any witnesses and how it is contended that each allegation is a protected disclosure. Nowhere in that table prepared by the claimant in purported compliance with that Order did the claimant say that he disclosed information to AA nor what that information that was or when he disclosed it. AA acknowledged that was the case and that the claimant did not provide evidence in his witness statement of any protected disclosures allegedly made to AA. That being the case, AA confirmed that it was not the claimant's case that he had been subjected to detriments for making protected disclosures to AA.

13. In respect of the complaint of unfair dismissal, Employment Judge Johnson established that the claimant alleges that he resigned in response to a fundamental breach of contract by his employer. The claimant alleges a breach of the implied term of trust and confidence, which must exist between employer and employee. AA confirmed at the case management hearing before EJ Johnson that the claimant relies upon the following acts or omissions as amounting individual breaches of the implied term of trust and confidence:

    (i) the respondent's failure to deal with the claimant's grievance in a fair and reasonable manner throughout the grievance process;
    (ii) the respondent disclosing to PP on or about July 2019 the contents of confidential settlement negotiations between the claimant and the respondent;
    (iii) inviting the claimant to a disciplinary meeting/hearing in March/April 2019;
    (iv) inviting the claimant to a disciplinary hearing/meeting in May 2019;
    (v) inviting the claimant to a disciplinary hearing/meeting in September 2019 (the "last straw").

14. Employment Judge Johnson directed the claimant to provide further particulars of the allegation that the respondent disclosed to PP the contents of confidential settlement negotiations, which he did in the document dated 17 February 2020 referred to above.

15. At this hearing Mr Howson confirmed that, if the Tribunal were to accept the claimants case that he was (constructively) dismissed, the respondent would not be contending that the dismissal was fair (but would contend, in relation to remedy, that the claimant would have been fairly dismissed in any event).

16. Employment Judge Johnson noted that the allegations of sexual orientation discrimination were inadequately pleaded and directed the claimant to provide further information. This the claimant did by way of a document dated 17 February

2020. In that document the claimant identified three alleged acts that were said to be harassment related to sexual orientation or, alternatively, direct sexual orientation discrimination, namely:

16.1. A conversation between XX and AA (with the Claimant allegedly present and hearing the conversation) on 31st January 2018. Specifically, it is alleged that XX was 'mocking' another member of staff and his 'partner' for the death of their ferret.

16.2. A conversation between the respondent's sister and AA (with the Claimant allegedly present and hearing the conversation) on 13th May 2018. Specifically, it is alleged that, with the knowledge of the respondent, the respondent's sister made lewd comments to AA, cast aspersions about his relationship with other men, the claimant and another member of staff, made inappropriate hand movements and touched AA.

16.3. The respondent (or XX in the course of her employment) informing a particular member of Council staff, his solicitor (Nigel Broadbent) and a consultant from Peninsula (Vicky Hart) that the Claimant and AA were "partners" (which led to the Claimant and AA being referred to as "partners" by those individuals).

17. The respondent accepts that XX is employed by the respondent. AA confirmed that it was the claimant's case that the comments allegedly made by XX on 31 January 2018 were made in the course of her employment.

18. We asked AA on what basis it was being argued that the respondent was liable for the alleged conduct of his sister. AA said he appreciates that the respondent cannot be liable for what his sister says but he was present and the unwanted conduct relied upon is the respondent's inaction. Mr Howson pointed out that that was not the claim that had been made by the claimant. We explained to AA that if it was suggested that the respondent's inaction was, itself, unwanted conduct related to sexual orientation that had the purpose or effect proscribed by section 26, that was a not the complaint that had been set out in the further particulars in response to Employment Judge Johnson's Orders. The complaint made in the particulars was that it was the respondent's sister's conduct that was related to sexual orientation.

19. EJ Johnson set out a list of the issues to be determined at this hearing. We refined that list of issues at this hearing. The issues that it was agreed fell to be determined are annexed to this judgment.

20. In his closing submissions, Mr Howson made certain concessions in relation to some of the alleged protected disclosures and, therefore, we have not had to determine each of the issues in the table in relation to all of the alleged protected disclosures.

21. For his part, AA's oral closing submissions were relatively brief. That was because he had prepared a lengthy set of written submissions. AA referred to a large number of authorities in his written submissions. Helpfully, he provided us with a copy of each of those authorities.

22. In his written submissions, AA alleges that the respondent breached the claimant's contract of employment by suspending the claimant and, in September 2019, by

placing the claimant on garden leave. In the case management hearing before EJ Johnson in January 2020, AA did not identify these acts as matters on which the claimant relied in establishing that he was constructively dismissed. The following passage appears in EJ Johnson's record of that hearing:

> *'I today made it clear to all three representatives that I would today deal with all the outstanding applications and then set out in clear and unequivocal terms exactly what are the claims being pursued by the claimant, against whom those claims are pursued and what are the issues (the questions which the employment tribunal will have to decide). This case cries out for robust case management. I made it clear to the parties and their representatives that the orders which I make today must be complied with by their due dates and that the tribunal would not look kindly upon any further conduct which would obfuscate the claims and issues, or which may further delay bringing these matters to a final hearing.'*

23. In a further case management hearing before EJ Johnson in April 2020, which was arranged after AA made an application to amend the claimant's claim. In dismissing the application to amend the claim, EJ Johnson said this about the January hearing:

> *'8. The hearing on 19th January began at 11.00am and ended at 3.30pm, according to my records. During that hearing, there were several breaks for AA to obtain instructions from the claimant, including over the lunchtime period. I distinctly recall making it perfectly clear to the parties and their representatives that the hearing on 19th January was to be utilised to make sure that all of the claims to be pursued were properly set out, that any further information relating to those claims would be identified and the issues (the questions which the employment tribunal would have to decide arising from those claims) would then be properly identified. I personally have a clear and distinct recollection of the conduct of that hearing and I am satisfied that all three representatives were fully aware of what was going on and that everything recorded in the case management summary was specifically agreed by those present on behalf of their clients.*
>
> *…*
>
> *11 I repeat what is set out above – at the hearing on 19th January the claimant was given a full and fair opportunity to consider which claims he wished to pursue in the employment tribunal. Those claims are properly identified and fully recorded (including the application to amend so as to include the fifth claim of failure to provide itemised pay statements). I this morning reminded AA that there have been 4 previous preliminary hearings at which the claimant could have applied to amend his claim to include additional allegations. Indeed, that is what he did at the hearing on 29th January. There has been a fully contested hearing before Employment Judge Shore which dealt with allegations brought by the claimant under the Working Time Regulations 1998. At none of those hearing did the claimant apply to amend his claim to include further allegations.*
>
> *12 Despite the assurances given by everyone at the hearing on 29th January, within twenty-four hours AA on behalf of the claimant was applying to add further matters to the agreed list of issues. A further application was made by him by*

letter dated 6th February 2020. By letter dated 17th February, the claimant then filed what was purported to be the further information which he had been ordered to provide at the hearing on 29th January.'

24. We can see that the claimant did refer to his suspension and placing him on garden leave in his claim form. By failing to mention them in the January 2020 case management hearing AA gave the impression that the claimant was no longer relying on those matters as causing or contributing to a repudiatory breach of contract which entitled him to resign. Nevertheless, Mr Howson did not flag this as an issue after receiving AA's written submissions. Therefore, we have addressed those matters in our deliberations.

Relevant legal framework

Detriment for making a protected disclosure

25. The Employment Rights Act 1996 gives workers the right not to be subjected to detriment for making what are commonly referred to as whistleblowing disclosures. The right is set out at section 47B, which says this:

47B Protected disclosures.

A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority,
on the ground that W has made a protected disclosure.

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

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

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
(a) from doing that thing, or
(b) from doing anything of that description.

Meaning of 'protected disclosure'

26. In order for a whistleblowing disclosure to be considered as a protected disclosure, three requirements need to be satisfied (ERA 1996 s 43A). Firstly, there needs to be a 'disclosure' within the meaning of the Act. Secondly, that disclosure must be a

'qualifying disclosure', and thirdly it must be made by the worker in a manner that accords with the scheme set out at ERA 1996 ss 43C–43H.

27. In this regard, the following provisions of the 1996 Act are relevant:

> "43A Meaning of "protected disclosure".
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> 43B Disclosures qualifying for protection.
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

28. As to what amounts to a "disclosure of information", the Court of Appeal held in Kilraine v Wandsworth London Borough Council [2018] ICR 1850, that in order for a statement to be a qualifying disclosure for the purposes of section 43B(1), it must have a sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a)–(f) of that subsection; the concept of "information" is capable of covering statements which might also be characterised as allegations, although not every statement involving an allegation would constitute "information" and amount to a "qualifying disclosure" within section 43B(1).

29. In the context of section 43B(1)(b), the EAT has held that the term 'likely' requires more than a possibility or a risk that the employer might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation: Kraus v Penna plc [2004] IRLR 260, EAT.

30. Provided the whistleblower's belief that a criminal offence has been committed, is being committed or is likely to be committed is objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute: Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] IRLR 346. The same must be true of a belief that a person has failed, is failing or is likely to fail to comply with any legal obligation

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

31. The words “in the public interest” in s 43B(1) were considered by the Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837. The leading judgment of Underhill LJ made it clear that the question for the tribunal is whether the worker believed, at the time he or she was making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The judgment also held that, while the worker must have a genuine and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it.

32. In order to qualify for protection, the disclosure must be to an appropriate person. The claimant’s case is that each of the disclosures which led to him being subjected to detriment fell within one or other of the following categories: disclosure to the employer under section 43C(1)(a); disclosure to a responsible person under section 43C(1)(b); disclosure to "other persons" under section 43G; disclosure of ‘exceptionally serious failure’ under section 43H.

33. The effect of section 43C is that any qualifying disclosure made to the employer will be a protected disclosure. Section 43C(2) provides that a worker is treated as making a qualifying disclosure to his employer where the worker makes a qualifying disclosure to someone else in accordance with a procedure whose use by the worker is authorised by his employer.

34. As the Court of Appeal said in, Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] ICR 1226, ‘The threshold justifying a disclosure becomes more rigorous where the worker is raising his concerns or allegations beyond the employer.

    Section 43C(1)(b) provides as follows:
    (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—
    (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
    (i) the conduct of a person other than his employer, or
    (ii) any other matter for which a person other than his employer has legal responsibility,
    to that other person.

35. Section 43G provides as follows:

    "(1) A qualifying disclosure is made in accordance with this section if—
    (a) ...
    (b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
    (c) he does not make the disclosure for purposes of personal gain,
    (d) any of the conditions in subsection (2) is met, and
    (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer …,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer,
(c) that the worker has previously made a disclosure of substantially the same information—
(i) to his employer, or
(ii) ….
(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer."

36. Addressing this provision, the Court of Appeal said in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] ICR 1226 made the following observations:

> ‘The structure of the legislation is that disclosure to "other bodies" should be a last resort and only justified where disclosures to the employer or a regulated body would, in the circumstances, not be adequate or appropriate. The justifiable reasons for not raising the concerns with the employer or a prescribed body (where there is an appropriate one) are that the worker reasonably believes that the employer will victimise him if he takes that step; or that there is no prescribed body and he believes that evidence of the alleged wrongdoing will be destroyed. He is also relieved from the need to disclose the information to his employer if he has already disclosed it either to the employer or a regulated body. The section does not say in terms that he can only legitimately disclose to another body if the employer or the prescribed body has failed properly to deal with the original disclosure, but if the employer has dealt with it, or can reasonably be expected to do so, that will be highly relevant to the question whether the disclosure is reasonable. It is one of the factors which subsection (3) expressly requires a tribunal to take into account when considering the reasonableness question. It will often be unreasonable to make the disclosure to a third party in those circumstances.
>
> The test whether the disclosure is reasonable is an important control mechanism in relation to disclosures falling within section 43G. In answering that question, a

tribunal must have regard to all the circumstances; the specific considerations identified in subsection (3) are not exhaustive.'

37. The 1996 Act also provides that disclosures of exceptionally serious failures are protected if they are made in the circumstances set out in Section 43H. section 43H provides as follows:

(1) A qualifying disclosure is made in accordance with this section if—

…

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

38. The editor of Harvey on Industrial relations and Employment Law notes that these is no definition of 'exceptionally serious' but that the implication is that the matter must be so serious that the public interest in its disclosure is of overriding importance.

39. AA also refers in his submissions to sections 43D and 43J of the 1996 Act, which provide as follows:

43D Disclosure to legal adviser

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

43J Contractual duties of confidentiality

(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not)…

Detriment

40. In order to bring a claim under section 47B, the worker must have been subjected to a detriment by an act or a deliberate failure to act.

41. The concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and the Court of Appeal in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] ICR 1226 confirmed that it has the same meaning in whistle-blowing cases.

42. A detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the

circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had thereby been disadvantaged in the circumstances in which he had thereafter to work. However, as was made clear in Shamoon, an "unjustified sense of grievance cannot amount to 'detriment'".

Reason for detrimental treatment

43. Section 47B requires that the act, or deliberate failure to act, is "on the ground that" the worker has made the protected disclosure. That requires the Tribunal to ask itself why the alleged discriminator acted as they did: what, consciously or unconsciously, was their reason?

44. In Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372, the Court of Appeal held that the test for detriments short of a dismissal is whether “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

45. The burden of showing the reason is on the employer: section ERA 1996 s 48(2). If the Tribunal rejects the employer’s explanation for the detrimental treatment under consideration, it may draw an adverse inference and find liability but is not legally bound to do so: see Serco Ltd v Dahou [2015] IRLR 30, EAT and [2017] IRLR 81, CA. In the Court of Appeal, Laws LJ said: “As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an employer's failure to show what the reason for the dismissal was does not entail the conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases. Simler J did not hold that it would never follow from a respondent's failure to show his reasons that the employee's case was right.”

46. In Martin v Devonshires Solicitors [2011] ICR 352, [2011] EqLR 108 the EAT held that an employer will not be liable if it can show that the reason for its act or omission was not the protected act as such, but rather one or more features and/or consequences of it which were properly and genuinely separable from it. In that case the EAT upheld the decision of the employment tribunal that the reason for the employee's dismissal was not the fact that she had made a complaint but the fact that she had refused to acknowledge the falsity of it and the likelihood of the recurrence of her mental illness (which had caused her to make the complaint). The EAT gave the example of an employer dismissing because an employee had made a complaint of discrimination in such a manner, eg accompanied by threats of violence, that the manner in which the complaint had been made was properly and genuinely separable from the complaint itself.

47. In Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773, the EAT stressed the dangers of employers evading the protection given by the statute to employees by the device of saying it was only the employee's methods it was objecting to. It was said in that judgment that such a distinction would only operate in 'exceptional' cases. Subsequently, however, in Panayiotou v Kernaghan [2014] IRLR 500, EAT, Lewis J disagreed with Woodhouse, saying that in his opinion 'there is no

additional requirement that the case be exceptional'. Lewis J summarised the law as follows:

> ''There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed.''

48. In considering whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, the tribunal must bear in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph 22 of the decision in Martin v Devonshires Solicitors [2011] ICR 352 that:

> 'Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to “ordinary” unreasonable behaviour as that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.'

Equality Act

Harassment

49. It is unlawful for an employer to harass an employee: Equality Act 2010 section 40.

50. Under section 26(1) of the Equality Act 2010, unlawful harassment occurs where the following conditions are satisfied:
(a) an employer engages in unwanted conduct related to a protected characteristic, which includes sexual orientation;
(b) the conduct has the purpose or effect of violating the employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

51. For these purposes, sexual orientation is a protected characteristic. ‘Sexual orientation’ is defined in section 12 as ‘a person's sexual orientation towards—(a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex.

52. Where the conduct in question is meted out by reason of sexual orientation, it does not matter that, as a matter of fact (rather than, eg, perception) the victim is not of that orientation: see the case of English v Thomas Sanderson Blinds [2008] EWCA Civ 1421, [2009] IRLR 206.

53. It is clear that, for a claim of harassment against an employer to be made out under section 26(1), the claimant's employer must have engaged in unwanted conduct related to the relevant protected characteristic, sexual orientation in this case.

54. For these purposes, section 109 of the Equality Act 2010 provides that the acts of the employer's other employees are treated as acts of the employer provided they are done in the course of employment; similarly, an employer is responsible for acts that are done for them, with their authority, by an agent. This is the case even if the employer neither knows nor approves of the acts in question.

55. The Equality Act 2010 does not, however, make employers vicariously liable for the acts of other third parties. This was made clear by the Court of Appeal in the case of UNITE the Union v Nailard [2018] EWCA Civ 1203, [2018] IRLR 730 (upholding the judgment of the EAT at [2016] IRLR 906). The decision is summarised in the headnote to the IRLR report as follows:

> 'It is highly significant that when the Government did in fact introduce provision for third party liability in 2008, and when Parliament continued it in 2010, it was done explicitly. Further, the mere use of the formula 'related to' is insufficient to convey an intention that employers who are themselves innocent of any discriminatory motivation should be liable for the discriminatory acts of third parties, even if they could have prevented them. The 'associative' effect of the phrase 'related to' is more naturally applied only to the case where the discriminatory conduct is the employer's own. There are clearly good policy arguments for imposing liability in such a case, but negligent failure to prevent another's discriminatory acts is a very different kind of animal from liability for one's own: it requires careful definition and could be expected to be covered by explicit provision. Also, it would be an uneasy situation if such liability were incurred not only by the employer but also by any individual employee who might be implicated in the failure to afford adequate protection. It follows that the repeal by the Enterprise and Regulatory Reform Act 2013 of sub-sections (2)–(4) of s 40 (which explicitly put liability on an employer for failing to prevent third party harassment) means that the 2010 Act, for better or for worse, no longer contains any provision making employers liable for failing to protect employees against third party harassment as such, though they may of course remain liable if the proscribed factor forms part of the motivation for their inaction. The availability of third party liability is a matter for Parliament, and the policy decision effected by the 2013 Act must be respected.'

56. AA relies on the decision of the EAT in Sheffield City Council v Norouzi [2011] IRLR 897. If AA is suggesting that this case is authority for the proposition that the Equality Act must be interpreted purposively to impose liability on employers for the discriminatory actions of third parties, we reject that submission. Such an

interpretation would run counter to the Court of Appeal's decision in Nailard, as was held by the EAT in Bessong v Pennine Care NHS Foundation Trust [2020] IRLR 4.

57. Section 26(4) of the Equality Act 2010 provides that, in deciding whether conduct has the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee, each of the following must be taken into account—
    (a) the perception of the employee;
    (b) the other circumstances of the case; and
    (c) whether it is reasonable for the conduct to have that effect.

58. Where a Claimant contends that the employer's conduct has had the effect of creating the proscribed environment, they must actually have felt or perceived that their dignity was violated or an intimidating, hostile, degrading, humiliating or offensive environment was created for them: Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT. Even if the claimant did, subjectively, feel or perceive that the employer's conduct had that effect, a claim of harassment will not be made out if it is not reasonable for the conduct to have the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee: Ahmed v Cardinal Hume Academies (29 March 2019, unreported).

59. Whilst a one-off incident may amount to harassment, a Tribunal must bear in mind when applying the test that an 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration: Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT. The fact that a Claimant is slightly upset or mildly offended by the conduct may not be enough to bring about a violation of dignity or an offensive environment and the Court of Appeal has warned tribunals against cheapening the significance of the words of the Act as they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: Land Registry v Grant [2011] ICR 1390, CA. As noted by the EAT in Richmond Pharmacology v Dhaliwal, 'while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

60. AA appears to suggest in his written submissions that it is 'illegal' for an employer merely to imply that someone is homosexual. If that is his submission, we reject it. The questions in every case are whether there was unwanted conduct related to sexual orientation and, if so, whether that conduct had the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Direct discrimination

61. It is unlawful for an employer to discriminate against an employee in the way it affords him or her access, or by not affording him or her access, to opportunities for transfer or for receiving any other benefit facility or service, by dismissing him or her

or by subjecting him or her to any other detriment: section 39(2) of the Equality Act 2010.

62. Conduct which amounts to harassment, as defined in section 26 of the Equality Act, does not constitute a detriment for the purposes of section 39: Equality Act 2010 s212(1). Subject to that provision, for the purposes of section 39, a detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

63. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of sexual orientation than it treats or would treat others.

64. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

Burden of proof

65. The burden of proof in relation to allegations of discrimination and harassment and is dealt with in section 136 of the 2010 Act, which sets out a two-stage process.

66. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

67. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

68. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:
    68.1. ‘It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that ‘he or she would not have fitted in.’
    68.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

68.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

68.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

69. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Unfair dismissal

70. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed.

Dismissal

71. A claim of unfair dismissal cannot succeed unless there has been a dismissal as defined by section 95 of the Employment Rights Act 1996. It is for the claimant to prove, on the balance of probabilities (ie that it is more likely than not), that he has been dismissed within the meaning of that provision.

72. In this case, the claimant claims he was dismissed within the meaning of section 95(1)(c), which provides that termination of a contract of employment by the employee constitutes a dismissal if he was entitled to so terminate because of the employer's conduct. In colloquial terms, the claimant says he was constructively dismissed.

73. For a claimant to establish that there has been a constructive dismissal, he must prove that:
    a) there was a breach of contract by the employer;
    b) the breach was repudiatory i.e. sufficiently serious to justify the employee resigning;
    c) he resigned in response to the breach and not for some other unconnected reason; and
    d) he had not already affirmed the contract before electing to leave.

<u>Repudiatory breach of contract</u>

74. Its established law that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or serious damage the relationship of confidence and trust between employer and employee: Woods v W M Car Services

(Peterborough) Ltd [1981] ICR 666, EAT; Lewis v Motorworld Garages Ltd [1986] ICR 157, CA; Mahmud v Bank of Credit and Commerce International SA (often cited as Malik v BCCI) [1997] ICR 606, HL.

75. The test is not whether the employer's actions fell outside the range of reasonable actions open to a reasonable employer: Buckland v Bournemouth University [2010] IRLR 445, CA. However, case-law shows that the conduct does need to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence (see Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT). This was emphasised by the Court of Appeal in the case of Tullett Prebon Plc & ors v BGC Brokers & ors [2011] EWCA Civ 131; [2011] IRLR 420. There, the Court of Appeal cited the case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 and stressed that the question is whether, looking at all the circumstances objectively, from the perspective of the reasonable person in the position of the innocent party, the conduct amounts to the employer abandoning and altogether refusing to perform the contract.' The High Court in the Tullett case held (in a judgment subsequently upheld by the Court of Appeal) that 'conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough'; Tullett Prebon v BGC [2010] IRLR 648, QB.

76. When assessing whether conduct was likely to destroy or seriously damage the trust and confidence, it is immaterial that the employer did not in fact intend its conduct to have that effect: Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT. Similarly, there will be no breach of the implied term simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held (Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The question is whether, viewed objectively, the conduct is calculated or likely to destroy or seriously damage the trust and confidence. The employee's subjective response may, however, be of some evidential value in assessing the gravity of the employer's conduct (see the Tullett Prebon case above in the High Court).

77. One aspect of the duty of trust and confidence is a duty on employers 'reasonably and promptly [to] afford a reasonable opportunity to their employees to obtain redress of any grievance they may have': W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

78. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually would not constitute a breach of the term (United Bank Ltd v Akhtar [1989] IRLR 507). In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA, Glidewell LJ said: '… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?'

79. In Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series, the cumulative effect of which was to amount to the breach. Those acts need not all be of the same

character but the 'last straw' must contribute something to that breach. Viewed in isolation, it need not be unreasonable or blameworthy conduct but the Court of Appeal noted in Omilaju that will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test.

80. AA, in his written submissions, appears to suggest that unless an employer has an express contractual right to suspend an employee, any suspension, even a suspension on full pay, will necessarily be a repudiatory breach of contract. He also appears to suggest that placing an employee on garden leave on full pay will necessarily be a repudiatory breach of contract unless an employer has an express contractual right to take such action. He cites the cases of *D&J McKenzie Ltd v Smith* [1976] and *Hanley v Pease & Partners Ltd* [1915] 1 KB 698 as authority for that proposition. However, those cases were not concerned with suspensions on full pay. Smith concerned the issue of laying off employees without pay and Hanley was a case in which the employer suspended the employee without pay for a day as a penalty for absenting himself from work, on a prior occasion, without his employer's permission. Whilst those authorities may have some bearing in the case of an employee suspended from work without pay whilst an employer investigates a disciplinary issue and to an employee placed on garden leave without pay, they are not concerned with suspensions with pay.

81. In determining whether a suspension with pay, whether by way of garden leave or for other reasons, constitutes a breach of contract, a Tribunal must first consider what the terms of the contract provide. The question is whether the terms of the contract, properly construed, expressly or impliedly oblige the employer to permit the employee to do the work he is engaged to do or whether the obligation is confined to payment of the remuneration agreed: Hill (William) Organisation Ltd v Tucker [1998] IRLR 313. In the latter situation, subject to the implied term of trust and confidence, the employer is entitled to send his employee home, whether by way of suspension or on garden leave, notwithstanding the absence of an express or implied power to do. That is because there is no contractual obligation to prevent him. If, however, the terms of the contract do oblige the employer to permit the employee to work, it will be a breach of contract to exclude the employee from work unless the right to work is qualified by an express or implied term that permits suspension in the circumstances at hand.

82. Even if there is an express or implied contract term permitting suspension, suspending an employee from work may constitute a breach of the implied term of trust and confidence. As Lady Justice Hale, as she then was, pointed out in Gogay v Hertfordshire County Council, even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. Although employers often claim that suspension is a neutral act, case-law recognises that it is not. As was said it the case of Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, [2012] EWCA Civ 138, employees who are suspended pending a disciplinary investigation 'will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least because the suspension appears to add credence to them.'

83. Whether or not a suspension breaches the implied term of trust and confidence will depend on whether the employer had reasonable and proper cause to suspend an employee: London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322, [2019] IRLR 560. AA cites the decision of Foskett J in the High Court in Agoreyo in support of the claimant's case, referring specifically to the fact that Foskett J overturned the decision of the county court judge that the suspension in that case was a fundamental breach of the claimant's contract. However, what AA does not mention, perhaps because he did not know, is that on further appeal, the Court of Appeal reinstated the decision of the lower court and, in doing so, held that there is no requirement that a suspension must be justified by necessity.

Acceptance of repudiation

84. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in question. Sometimes an employee has more than one reason for leaving a job and in such cases the question is whether the breach of contract played a part in the claimant's decision to leave ie was one of the factors relied upon: Nottingham County Council v Meikle [2005] ICR 1.

Affirmation

85. It is a general principle of common law that even if a party has committed a repudiatory breach of contract, the innocent party will lose the right to accept the breach and treat herself as discharged from the contract if she has elected to affirm the contract.

86. WE Cox Toner (International) Ltd v Crook [1981] IRLR 443 is the leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract. In that case, Browne-Wilkinson P said:

> "13 …. If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v Robles [1969] 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not

prejudice his right subsequently to accept the repudiation: Farnworth Finance Facilities Ltd v Attryde [1970] 1 WLR 1053."

87. Affirmation can be express or implied. In Western Excavating v Sharp [1978] ICR 221 Lord Denning said that 'the employee must make up his mind soon after the conduct of which he complains for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'. As was made clear in the case of WE Cox Toner (International) Ltd, however, this does not mean that the passage of time in and of itself is sufficient for the employee to lose any right to resign. The issue is one of conduct and not of time. As the Employment Appeal Tribunal said in Chindove v William Morrisons Supermarket Plc UKEAT/0201/13/BA: 'the principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue.' However, delay in resigning can be evidence of affirmation. As it was put in the Chindove case 'if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so.'

88. Whereas at common law the giving of any notice to terminate the contract would amount to affirmation of it, under s.95(1)(c) of the Employment Rights Act 1996, the fact of giving notice does not by itself constitute affirmation. However, where an employee gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. It is a question of fact and degree whether in such circumstances his conduct is consistent only with affirmation of the contract and, therefore, properly to be regarded as affirmation of the contract: Cockram v Air Products plc [2014] IRLR 672, EAT.

89. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833, the Court of Appeal made it clear that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series. This means that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter.

90. Giving the judgment of the Court of Appeal in Kaur, Underhill LJ said:

> 'In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous

affirmation) (5) Did the employee resign in response (or partly in response) to that breach?'

Fairness of dismissal

91. If the Tribunal finds a claimant has been dismissed, the next issue to consider is whether the dismissal was fair. In a case of constructive dismissal that entails considering the reason for the treatment that led the claimant to resign, whether there was a potentially fair reason for that treatment and, if so, whether the dismissal was, in all the circumstances, reasonable or unreasonable, having regard to that reason. There is, however, no need for us to consider those issues in this case because Mr Howson conceded that if we find the claimant to have been constructively dismissed then the dismissal was unfair.

Itemised Pay Statements

92. The Employment Rights Act 1996 contains the following provisions about itemised pay statements:

8 Itemised pay statement

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—
(a) the gross amount of the wages or salary,
(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,
(c) the net amount of wages or salary payable, …
(d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment[, and
(e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—
(i) a single aggregate figure, or
(ii) separate figures for different types of work or different rates of pay.

11 References to employment tribunals

(1) Where an employer does not give a worker a statement as required by section … 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where—
(a) a … pay statement … purporting to comply with section 8 … has been given to a worker, and

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,
either the employer or the worker may require the question to be referred to and determined by an employment tribunal.

(3) For the purposes of this section—
…
(b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in any such particulars.
(4) An employment tribunal shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made—
(a) before the end of the period of three months beginning with the date on which the employment ceased, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.
…
(6) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) also applies for the purposes of subsection (4)(a).]

12 Determination of references
(3) Where on a reference under section 11 an employment tribunal finds—
(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or
(b) that a pay statement … does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,
the tribunal shall make a declaration to that effect.

Evidence and findings of fact

93. We heard evidence from the claimant and, in support of his case:
    93.1. AA
    93.2. the claimant's brother
    93.3. JJ, a paid carer for QQ;
    93.4. KK, the paid carer for an adult who is friends with QQ;
    93.5. WitnessB, a club steward who is a friend of the claimant and AA and knows QQ;
    93.6. WitnessC, the licensee of a bar.

94. We also took into account the contents of written statements from a number of other individuals whom the claimant had intended to call as witnesses but whose attendance was not required after Mr Howson confirmed that their evidence would not be challenged.

95. We heard evidence from the respondent and, in support, XX and the respondent's sister. The respondent had obtained a witness order compelling HH to attend this

hearing. In breach of that order, he did not attend. He did not contact the Tribunal or the respondent to explain his non-attendance.

96. We also heard evidence from MM from the council.

97. Elements of this case were dependent on evidence based on people's recollection of events that happened many months (and in some respects, years) ago. In assessing that evidence we bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case, Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties, including employees and family members. It was said in that case: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' It is worth observing from the outset that simply because we did not accept one or other witness' version of events in relation to a particular issue did not necessarily mean we considered that witness to be dishonest.

98. The following relevant findings of fact were made by Employment Judge Shepherd at a preliminary hearing on 29 March 2019 in case number 2503212/2018:

98.1. The claimant was employed by the respondent to provide care for QQ, who is the respondent's son. QQ has cerebral palsy, hydrocephalus and a visual impairment and requires 24 hour care. He lacked the mental capacity to enter into a contract of employment.

98.2. The council provided a care and support package for QQ. The council appointed the respondent as the suitable person to manage QQ' personal budget. The council's Personalisation Support Team provided a payroll and employment support and advice service to the respondent.

98.3. The claimant was initially employed by an agency, following an interview with the respondent and XX. He worked for the health care agency from 2010 until 26 April 2011. On 26 April 2011 the claimant commenced employment with the respondent. He signed a statement of main terms and conditions of employment on 30 November 2012. The claimant signed an updated contract with a statement of main terms and conditions of employment on 26 February 2014. Further statements of main terms and conditions of employment were signed by the claimant and the respondent on 2 February 2016 and 22 February 2017.

98.4. The respondent is married to XX, who is QQ' mother. XX was also employed to provide assistance to QQ and was involved with administrative matters on a day-to-day basis.

99. Throughout the period with which we are concerned the respondent had a full-time job that was unconnected with his employment of the claimant.

100. The claimant's written terms and conditions of employment set out his hours of work as a total of 123 hours and 10 nights, working alternate weeks comprising 22.5 hours plus 4 nights and then 39 hours plus one night. Those hours were subject to the employer's right to change the hours of work as required. The terms provided for the claimant to be paid £7.75 per hour and £81 per waking night. The terms and conditions contained a section on grievances which set out how any grievance should be dealt with and was in line with the ACAS Code of Practice. The terms also stated that all information regarding the employer, the employer's family and the employer's domestic or personal circumstances is strictly confidential and may not be discussed with a third party without the employer's specific permission or in an emergency situation.

<u>Claimant's comments about employer liability insurance</u>

101. The claimant alleges that in 2015 and again in 2016 he told the respondent that the respondent needed to have employer's liability insurance and to display it. For his part, the claimant gave a relatively detailed account in his witness statement of when and how the conversations took place. In his witness statement the respondent denied these events, although he accepted that at one point, probably before January 2016, the claimant had asked if he had employer's liability insurance. On cross examination the respondent accepted that the claimant had probably asked this when AA had been preparing a tax return for him, which, on the claimant's account was in January 2015. This lends support to the claimant's account of events, which was that AA, whilst compiling a tax return for the respondent in January 2015, told the respondent he could include the cost of employers' liability insurance as an expense, that the respondent said that he did not have any and it was part of his home insurance and that the claimant then said that this was wrong, that he had a duty of care to have it for the staff and that he needed to put it on a notice board like they did in the pub the claimant used to work at, and that the respondent needed to sort it out. The claimant said in his statement that the issue of insurance came up again in January 2016 in a similar context and on that occasion the respondent said that XX had told him that the Council sort out the insurance and everybody was covered, whereupon the claimant said to the respondent that he still needed to put the certificate on the wall like they did in the pub he used to work in, in response to which the respondent said that XX wouldn't allow things to be put on the wall because it was QQ's home. On the claimant's own evidence nothing more was said about this by the respondent.

102. On balance, we prefer the evidence of the claimant on this point and find that the claimant did say to the respondent, in January 2015, that it was wrong that he did not have employer's liability insurance, that he had a duty of care to have it for the staff, that he needed to put it on a notice board, and that the respondent needed to sort it out. We also find that in 2016 the claimant raised again the need for

employer's liability insurance and said that the respondent needed to 'put in on a notice board.'

Claimant's comments about DBS checks and colleague's driving licence in 2016

103. By July 2016 the claimant had started working as a healthcare assistance in a hospice. This was in addition to, and independent of, his role as a carer for QQ. For his job at the hospice, the claimant was required to have an Enhanced Disclosure Barring Service ('DBS') check.

104. The claimant's claim, as particularised in the schedule of disclosures, is that, in July 2016 he told the respondent and XX that all new staff needed a DBS check and 'told [XX] how can JJ drive with an expired licence?' The claimant elaborated on this in his witness statement, saying that, as the work he was doing was similar to his job in the hospice and knowing one of QQ's new carers had a driving conviction, he asked the respondent and XX why it was that they did not need to have DBS checks for their work for QQ. The claimant said in his witness statement that the respondent and XX both said that the council said a DBS check was not needed, that he then made enquiries at the hospice and was told that a DBS check would definitely be needed, that he relayed this to the respondent and XX, that XX said that she would contact the council and arrange it, that she did so, and that the new carer left suddenly shortly afterwards. Neither the respondent nor XX addressed this issue in their witness statements. The claimant's evidence on this point was not challenged on cross-examination by Mr Howson. In the circumstances, we accept the claimant's account on this issue and make the following findings of fact: in July 2016 the claimant asked the respondent and XX why it was that they did not need to have DBS checks for their work for QQ; the respondent and XX said that the council said a DBS check was not needed; the claimant then made enquiries at the hospice and was told that a DBS check would definitely be needed; the claimant relayed this to the respondent and XX; XX said that she would contact the council and arrange it; she did so; DBS checks on staff were arranged and the new carer left shortly afterwards.

105. With regard to the alleged comment about JJ's driving licence, the claimant said in his witness statement that he made this comment when it was discovered during a meeting with the Personalisation Officer from the council that JJ's licence had expired; the claimant's evidence was that he said to XX 'how can he drive his own car and QQ's van if he doesn't have a driving licence that is valid, surely that would be the same as when I got convicted for driving without a licence as well years ago?' and that XX said that she would speak to the respondent about it when they got home. On cross-examination, XX acknowledged that there had been a meeting with the Personalisation Officer around this time as she was dealing with the DBS checks and at that meeting it was discovered that JJ's licence had expired, whereupon JJ said he had already spoken to the driving agency, that a new licence was in the post and that he had been told he could still drive. On cross-examination, JJ confirmed that he had told XX that he had sent off for a new licence and that he believed he could drive legally. He said he could not recall whether he had spoken to someone at the DVLA but assumed he had done so. XX acknowledged in cross examination that the claimant had, at some point, asked how JJ could drive if he did not have a licence and said that she told him what JJ had said. In light of the evidence of the

witnesses, we find that the claimant said to XX, about JJ 'how can he drive his own car and QQ's van if he doesn't have a driving licence that is valid, surely that would be the same as when I got convicted for driving without a licence as well years ago?', that XX replied that JJ had applied for a new licence and had been told he could still drive, and that she did so because this is what she had been told by JJ himself.

Claimant's comments about daily care record in 2017

106. The claimant's claim, as particularised in the schedule of disclosures, is that in January 2017, he said to the respondent and XX that the workplace needs a Daily Care Record for QQ's day to day activities, food and drink intake etc, and that he also stated that the workplace should have fire extinguishers and an accident book and a first aid box as required by law. In his witness statement the claimant explained that, in his other job, they used daily sheets to record activities that clients had done, which included food intake and toileting, and that because of this and some training he had just completed at that time, he believed that the same type of sheets should be completed for QQ and he was concerned that, without them, QQ and his carers were not being properly protected against things that might have happened at work. The claimant said he spoke at length to the respondent and XX about the sheets and said he would be happy to use his computer to design one, that they were initially reluctant to use them as they said they were unnecessary but that they relented and said he could introduce them. The claimant said in his statement that he also told the respondent and XX that the workplace should have a fire extinguisher and accident book and first aid box; his evidence was that he thought it would be a legal requirement to have them. The claimant's evidence was that the respondent and XX said these items were not needed because it was QQ's home and that the claimant should stop making a fuss and nuisance about things.

107. The respondent denied that the claimant said these things: he said they already had all of the items referred to at QQ's flat so there would have been no reason for the claimant to raise the issue. On cross-examination, the respondent appeared to accept that the claimant did introduce a Daily Care Record, although he maintained that there was already a similar document in use beforehand. The impression we gained from the answers the respondent gave in cross examination is that his recollection of events dating back this far was rather limited. That may be because he had another full-time job, which left him little time to focus on his responsibilities as an employer in relation to his son's carers and matters such as these, if raised by the claimant, may not have been something that he dwelled upon. The impression we had of the claimant is that, perhaps because he now had first-hand experience of how other employers in the care sector operated, he was becoming increasingly concerned that the respondent was not dealing with issues in the workplace as proactively as the claimant felt he should.

108. On balance we prefer the claimant's evidence on this issue. We are satisfied that the claimant did introduce a daily care record for QQ and that, in doing so, it is likely that he told the respondent and XX that such a record was needed. Looking at all the evidence in the round, we also find that the claimant said the workplace should have fire extinguishers and an accident book and a first aid box.

Alleged disclosure about pay in January 2018

109. The claimant's claim, as particularised in the schedule of disclosures, is that in on 19 January 2018 the claimant told XX that he had not been paid what he was owed for Bank Holidays for the Christmas and New Year period. The respondent and XX denied this in their witness statements, saying wages were dealt with by the council and that if the claimant had any concerns about his pay then he would have raised them with the council rather than with XX. On cross-examination, however, both the respondent and XX accepted that sometimes, when the claimant had queries about his wages, the council would refer the claimant back to them if, for example, the alleged error appeared to concern the content of a timesheet submitted to the council. In his closing submissions Mr Howson conceded that the claimant had in fact, on 19 January 2018, told XX that he had not been paid what he was owed for Bank Holidays for the Christmas and New Year period.

Alleged disclosure about on 26 January 2018

110. On 26 January 2018, QQ had some dental work done in hospital under general anaesthetic. The claimant, the respondent and XX went to the hospital with QQ. Later that day, they all returned to the home of the respondent and XX. Soon after returning home, XX received a phone-call. The claimant was present with her when she took the call. The caller told XX that the results of a blood test showed QQ's iron level was extremely low and he would need to return to the hospital for a blood transfusion. XX' account of the remainder of the telephone conversation differs from that of the claimant.

110.1. XX says this: she explained to the caller, who was from the GP's surgery, that QQ had cerebral palsy and had just returned home from the hospital after having a general anaesthetic to remove teeth and asked if it would it be advisable to take him straight back to hospital; the caller said she would need to check with a senior Doctor and put the call on hold; when she returned she informed XX that the senior doctor had advised them not to take QQ back that evening, to keep a close eye on him over the weekend and bring him to the surgery first thing Monday morning; a double appointment was then made for 8.30am on Monday 29 January 2018.

110.2. The claimant did not set out his account of the telephone conversation in his witness statement. Rather, he referred to his grounds of complaint, in which he said that the phone-call was from the hospital rather than the claimant's GP surgery, that he could hear a conversation about QQ's blood test results, that he could hear XX making comments such as 'we have only just got him home and he's tired so we will bring him in on Monday', and that he could 'sense urgency in the caller's voice.' In the grounds of complaint he said that after the call ended he said to XX 'QQ needs to go back to hospital now' but that XX decided that she would take QQ to his GP surgery the following Monday as soon as it opened. On cross-examination, the claimant accepted that XX had, as she said in her witness statement, explained to the caller that QQ had cerebral palsy and had just returned home from the hospital after having a general anaesthetic to remove teeth and asked whether it would be advisable to take him straight back

to hospital. The claimant also accepted, on cross examination, that the caller said she would need to check with a senior Doctor and put XX on hold. Where his account differs from that of XX is that he said that then the caller returned she did not advise XX not to take QQ straight back to hospital and to keep an eye on him over the weekend; rather, according to the claimant, his recollection was that QQ 'needed to go back.' The claimant claimed that he could hear the conversation even though the speakerphone was not being used. When asked what XX said then, the claimant said she said 'he has just got home, he has cerebral palsy, he's asleep' and that the caller then said 'he may need a blood transfusion.' When asked if matters were left like that, the claimant said 'pretty much, as he didn't go.' The claimant accepted that QQ went to the GP appointment the following Monday morning and nobody criticised the respondent or XX for not taking him back to hospital on the previous Friday night. He also accepted that he himself had not raised with the claimant's GP at that appointment any concerns he had about the fact that QQ had not been taken back to hospital the previous Friday; the claimant said he had not raised his concerns then because 'it was getting dealt with.'

111. We find XX's account of this event far more compelling than that of the claimant. She gave an account of the telephone call that was detailed, straightforward and credible. In contrast, the claimant's account of what was said developed as he was being cross-examined. Furthermore, on cross-examination, the claimant appeared to suggest that he could hear everything that was said by the caller, but that is not what appears from his grounds of complaint. XX' account that she was advised, after she asked the question, not to take the claimant straight back to hospital but to attend the GP surgery on the following Monday morning is supported by the fact that she did take QQ to the GP first thing on the Monday morning and, at that appointment, no criticism was made of the fact that she had not taken QQ back to the hospital on the Friday. Had XX acted against advice, as suggested by the claimant, that is unlikely to have passed without comment at the GP surgery. Furthermore, we find it unlikely that XX would have put her son's health at risk by acting contrary to medical advice if that advice had, indeed, been that he needed a blood transfusion straight away.

112. We find the following: XX received a phone-call from QQ's GP surgery shortly after they had returned from the hospital; the claimant was present and heard elements of the conversation but did not hear everything the caller said; at the start of the conversation, the caller said QQ needed to go back to hospital for a blood transfusion; the caller's initial expectation, whether expressed or not, was that QQ would be taken to hospital that evening; XX questioned whether it was advisable to take QQ straight back, explaining that he had cerebral palsy and had just returned home from the hospital after having a general anaesthetic and was tired; the caller said she would need to check with a senior Doctor and put the call on hold; when she returned she informed XX that the senior doctor had advised not to take QQ back to hospital that evening, to keep a close eye on him over the weekend and bring him to the surgery first thing Monday morning; a double appointment was then made for 8.30am on Monday 29 January 2018.

113. The claimant's case is that, after the telephone conversation, he said to XX that QQ needed to go back to hospital there and then. In his closing submissions, Mr Howson conceded that the claimant said this.

114. On the morning of 29 January, the respondent, XX and the claimant took QQ to the appointment with his doctor. The doctor explained that QQ needed an iron infusion and not a blood transfusion and arrangements were made for QQ to go into hospital later that day for that procedure. The respondent, XX and the claimant took QQ to the hospital later in the day for his iron transfusion. AA was waiting for them at the hospital, telling the respondent and XX that the claimant had invited him 'for support'.

Alleged harassment on 31 January 2018

115. On 31 January 2018 the claimant, the respondent, XX and AA all attended hospital again with QQ. The claimant alleges that, whilst all of them except QQ were in the waiting room, XX was 'mocking' one of the other carers and his partner 'for the death of their ferret and for him refusing to give QQ non-prescription paracetamol designed for children.' He alleges that XX, in effect, 'outed' his colleague as homosexual by referring to his (presumably male) partner. We make the following observations about the evidence we heard on this matter:

115.1. In his witness statement, the claimant said he was 'offended because the derogatory and patronising way that XX was saying 'partner' was as though [the staff member] was less of a man than [the respondent] because he had a male partner' and that the respondent and XX were 'creating a hostile environment because I knew they were gossiping about somebody's private life.' In cross examination the claimant suggested that if the staff member's partner had been female, XX would have referred to her by name rather than using the word 'partner'.

115.2. In his witness statement, AA gave a different account of what XX said on that day. He made no reference to XX talking about the staff member's partner and their ferret but alleged that XX told him that she was not keen on the other staff member being gay and looking after QQ 'in-case he fancied QQ' and that she asked AA probing questions about 'being gay'.

115.3. None of AA's evidence on this issue was corroborated by the claimant in his evidence in chief or in his particulars of harassment: the claimant made no reference at all to XX having said anything of the sort. On cross-examination, however, the claimant said XX had said what AA alleged in his statement. When asked why he had not mentioned that before he replied 'you'd have to ask him that.' He went on to agree that the extent of the harassment that he was alleging occurred on this occasion was XX referring to his colleague and his partner.

115.4. XX and the respondent both acknowledged that they knew the staff member in question to be homosexual and that there had been a discussion about the staff member's ferret having died but said nobody mocked anybody and that the claimant was not present when this matter came up. On cross examination XX said that the issue came up during a conversation about the staff member not being willing to give QQ junior paracetamol, when she said 'I think he is a bit upset because his ferret died'. She confirmed that, in the context of that discussion, she used the word 'partner' when referring to the staff member's partner; she said she did not refer to the staff member's partner by

name because she did not know their name and that she did not say the word 'partner' with malice. XX denied discussing the staff member's sexuality.

116. Although we accept that the claimant probably was present at the time of this conversation, in other respects we found the evidence of the claimant and AA to be unreliable. If XX had said what AA alleged she said it is, to say the least, surprising that the claimant made no mention of it in his own witness statement or when setting out the particulars of his complaint in response to the Order of EJ Johnson. The claimant could not explain this omission from his witness evidence. Similarly, if XX' tone of voice when using the word 'partner' had appeared in any way inappropriate to AA, it is surprising that he did not say so in his witness statement. We prefer the evidence of XX on this issue. We find that that, during a conversation about one of the carers not being willing to give QQ junior paracetamol, XX said 'I think he is a bit upset because his ferret died'. XX went on to make some other comment about that matter in which she referred to the ferret belonging to the carer and his partner and, from the context of which it was apparent that the carer's partner was male (presumably because XX used male pronouns when referring to him). XX did not know the name of the staff member's partner at the time and there was nothing in her tone of voice when she used the word 'partner' that suggested she was using the word in a denigratory way.

<u>Alleged disclosures about CardEx and medication in or around February 2018</u>

117. In early February 2018, the claimant introduced a system for recording QQ's daily prescription medication, referred to in these proceedings as a CardEx. The claimant's claim, as particularised in the schedule of disclosures, is that he faced resistance to the new system from the respondent and XX and that he told them it was 'needed so the other carers know what QQ has taken daily.' He also says he 'suggested training for all staff'.

118. The claimant told QQ's grandparents about the new system as QQ frequently spent time in their care. The claimant's claim, as particularised in the schedule of disclosures, is that, in early 2018, he reported to the respondent and XX that QQ's grandparents were not filling in the CardEx. The respondent's evidence was that the claimant did not say anything to him about his parents not filling in the form, although he agreed that his parents did not fill in the form. He recalled his mother being upset because the claimant had said something to her about filling in the form but said the claimant had not said anything to him about it. For her part, XX said that she recalled the claimant criticising the respondent's mother for the way she gave the claimant medication but not for failing to fill in the cardEx form. Looking at the evidence in the round, and bearing in mind that the burden of proving that he made protected disclosures is on the claimant, we are not persuaded that the claimant did, as he alleges, report to the respondent and/or the respondent that QQ's grandparents were not filling in the CardEx. We find that the claimant probably did say something critical to QQ's grandmother about the fact that she and QQ's grandfather were not completing the form, though the claimant did not give any evidence as to what he actually said to her.

<u>Alleged disclosure about colleague smoking in February 2018</u>

119. In early February 2018 the claimant complained to the respondent and XX that another of QQ's carers, JJ, had been smoking in the bedroom in QQ's flat. The claimant's evidence was that he told them that it is not legal to smoke at work and it is dangerous and that it was affecting his health and making QQ feel sick, as well as making QQ's home smell. The respondent accepted in evidence that the claimant had raised the issue of JJ smoking but suggested that the claimant had only said to him that he 'thought' JJ had been smoking. However, he also said in evidence that he spoke to JJ following the claimant's complaint and emphasised that it was unacceptable for him to smoke in the workplace. Had the claimant merely suggested that JJ might have been smoking in the workplace, it is more likely that the respondent would have asked JJ first whether or not he had been smoking. The respondent did not say he did that. In the circumstances, we think it more likely than not that the claimant complained that JJ had been smoking, rather than simply saying that he thought he had been. We also find that the claimant said, at the time, that it was not legal to smoke at work and that it was dangerous, was affecting his health, making QQ feel sick, and making QQ's home smell. We accept that, in response to the claimant's complaint, the respondent spoke to JJ and emphasised that it was unacceptable for him to smoke in the workplace.

<u>Alleged disclosure on 14 February 2018 following hospital visit</u>

120. On 14 February 2018 the claimant, the respondent, XX and AA all attended a hospital appointment with QQ. They all returned home together in QQ's van after the appointment. On the journey back there was a fractious exchange between the claimant and the respondent and XX. The claimant had previously suggested that the respondent and XX should prepare their wills and name him as their Executor. He had also previously suggested that the respondent and XX should have power of attorney over QQ in the event that his condition deteriorated and that he, the claimant, should also be named in the power of attorney. During this journey, the claimant raised these issues again. The Respondent or XX replied that they already had a will in place and the respondent's sister was the executor. The claimant said 'what the f*** does she know about care", to which the respondent said "nothing but she knows about finances" or words to that effect. The claimant then asked "What about me" and the respondent replied 'You're a carer, she's family.'

121. The claimant's claim, as particularised in the schedule of disclosures, is that, on this date, he 'told the respondent and XX that he was seriously concerned with them both for failing to take medical advice seriously' and also that he said to the respondent that he 'can't just sack people/replace people.' In his witness statement, however, he gave no evidence that supported these alleged disclosures, other than referring to the schedule of disclosures. He did refer to paragraphs 21 to 29 of the 'background of claim' submitted with his claim form. However, the only support we can see for the claimant's allegation that he made the alleged protected disclosure on this date appears at paragraph 26, which says 'The claimant shall say that he made it more than obvious that….ignoring medical advice surrounding the procedures of providing laxatives and ignoring blood transfusion requests, he was not happy with and were clearly stated to [XX and the respondent]…' He does not, however, say in that document what he actually said to the respondent and/or XX, if anything, that constituted a disclosure of information in this respect. Nor, in the document enclosed with the claim form did the claimant say that he said to the

respondent that 'he can't just sack or replace people' although he makes it clear that he was unhappy about the respondent' comment referring to the fact that he was not family and believed it was suggested that he may at some point in the future be replaced.

122. Although AA was present at the hospital appointment and on the journey home after that appointment, he did not suggest in his witness statement that the claimant made disclosures as alleged on this date beyond stating that he was a 'witness to events as mentioned by [the claimant] in his background of claim on pages 13 to 51, and 131 to 139.'

123. When questioned by Mr Howson, the claimant said he did not make any disclosures of information on 14 February and had been referring in paragraph 41.2 of his witness statements to disclosures he made later. However, on cross-examination, the respondent accepted that the claimant did say 'you can't just terminate people'.

124. Looking at the evidence in the round, we are not persuaded that the claimant did say to the respondent or XX that he was 'seriously concerned with them both for failing to take medical advice seriously.' In light of the respondent's evidence on cross-examination, however, we find that the claimant did say 'you can't just terminate people', in response to a comment made by the respondent in the context of the conversation about wills to the effect that it would not be appropriate for the claimant to be an executor because the claimant was just an employee and not family and could be replaced.

Alleged disclosure to hospital nurse on 15 February 2018

125. On the following day, 15 February 2018, the claimant and AA returned to the hospital. The claimant's claim, as particularised in the schedule of disclosures, is that he 'raised his disclosure concerns with NHS staff regarding the procedure for QQ's colonoscopy. See paragraph 30 to 32 because [the respondent] and [XX] did not disclose that QQ had not been taking prescription medication.' The claimant did not say in his grounds of claim or in his schedule of protected disclosures what he said to NHS staff but he did provide some information in his witness statement at paragraph 4.13. There, the claimant said he spoke to a nurse involved with the claimant's care and the Ward Manager and told them he 'did not believe that [the respondent and XX] had been entirely honest about QQ's prescription laxatives' and that this meant the dose the doctor had calculated for the Kleen-Prep solution that was to be administered to QQ may be wrong. The claimant's evidence was that the nurse said she would get in touch with XX. In support of this allegation he relies on a text message from XX to the claimant in which she said that the hospital had phoned her and told her to start Laxido (the laxative medication) and stop the iron tablets.

126. The claimant obtained a witness order to compel the nurse's attendance but, in the days before this hearing, she applied for the order to be revoked, producing a witness statement setting out her account of what she could recall of the meeting. The claimant consented to the witness order being revoked. Mr Howson relied on the statement produced by the nurse to challenge the claimant's account; she said

she recalled the claimant going back to the hospital but not what he said other than that the claimant had used the word 'safeguarding' once during the conversation and had talked about QQ's prescription; she did not say she had contacted the respondent or XX to relay the claimant's concerns. Although the claimant said AA was present, he did not address what was said in his evidence.

127. Looking at the evidence in the round, we find as a fact that the claimant spoke to the nurse and told her that he did not believe that the respondent and XX had been entirely honest about QQ's prescription laxatives, that QQ was not always being given his laxatives properly and that the doctor had calculated the dosage for the Kleen-Prep solution without this information. We find that the claimant did so because he was genuinely concerned that there was a risk to the claimant's health. We also find that, following the claimant's visit, the nurse contacted XX to tell her to start Laxido (the laxative medication) and stop the iron tablets. We do not, however, believe that the nurse told XX that the claimant had been back to the hospital or that he had raised concerns. We accept XX' evidence to that effect, which is consistent with the tone of the text she sent to the claimant about starting the laxative medication; she signed the message off with two kisses (xx); had she known the claimant had returned to the hospital, we consider it unlikely that she would have signed off her message in such an ostensibly friendly manner.

Alleged disclosure about smoking on 5 March 2018

128. On 5 March 2018, QQ, the claimant, the respondent and XX attended a review meeting with a Review Officer from the council. The claimant recorded the meeting, without telling the others present.

129. At the end of the meeting the claimant coughed. XX reacted by saying 'you want to stop smoking.' This was clearly meant as a light-hearted comment. The claimant responded by saying 'tell your other employee' and XX replied 'oh yeah'.

Alleged disclosures to review officer

130. Before the Review Officer arrived at the meeting on 5 March, QQ said he wanted to go home and that he wanted the claimant away from him. He went on: 'I don't want [the claimant] here anymore. I don't want any of you four here. I want the contracts ripped up because I am sick of this.' XX replied 'Don't start when the lady comes today because she is from social services. 'Cos if she sees you like this she'll just say right ok then.' The respondent then interjected, saying 'She'll lock you up.' XX then said 'Yeah she will lock you up. She will send you to a home.' QQ replied that that was where he wanted to go because he did not want the claimant. The conversation continued with QQ saying he did want the claimant.

131. At some point in early March, after the meeting on 5 March, the claimant spoke, on the phone, to the Review Officer he had met on 5 March. In his witness statement he said he told the Review Officer about the respondent and XX having said to QQ on 5 March that he would be 'locked up'. He also said in evidence that he told the Review Officer that he wanted to remain anonymous. The claimant's grounds of claim, however, appear to contradict the claimant's account in his witness statement. The claimant said that he spoke to the Review Officer on the telephone and said he wished to make a protected disclosure, whereupon she told him he could not remain

anonymous. The claimant did not say that he disclosed any information to the Review Officer; on the contrary, he said that he felt very confused and that he was 'again unable to speak to anybody' and that he felt let down by the Review Officer. This suggests that, contrary to his witness statement, he was deterred from making any disclosure to the Review Officer.

132. Although the claimant claims AA was also present when he went to the council premises, AA did not mention the alleged conversation with the Review Officer in his evidence.

133. Looking at the evidence in the round, we are not persuaded that the claimant did tell the Review Officer about what the respondent and XX had said to QQ. Rather, we find that the claimant went to the council premises intending to make a disclosure to The Review Officer and, whilst there, spoke to her on the 'phone, but he was deterred when she told him that he could not make a protected disclosure anonymously. Even if we had been persuaded that the claimant had made the alleged disclosure to the Review Officer, there is no evidence that she told the respondent or XX about this conversation and we would not have been persuaded that she did.

Alleged disclosure in mid March 2018

134. The claimant's claim, as particularised in the schedule of disclosures, is that, in mid-March 2018, he had 'concerns surrounding training for all staff members for medication, first aid, manual handling' and raised these with the respondent and XX. We accept that, the claimant had, by this time, been exposed to staff training in his other job and that he had concerns that similar training was not provided for QQ's carers and mentioned this to the respondent and XX. In response, XX sent a text to the claimant saying she was organising training. She said in her message: 'regarding other issues as discussed about manual handling, medicine courses etc, I'll contact Personalisation/Social Worker on Monday to see about arranging courses for everyone xx.' Although the claimant did not say exactly what he said to the respondent and XX, we find it more likely than not that he said words to the effect that those caring for QQ needed to have training in manual handling and use of the hoist and administering medicine.

Alleged disclosures about pay on 16 March and 13 April 2018

135. On 16 March and 13 April 2018 the claimant told XX that he had not been paid what he was owed because the timesheets he had submitted were wrong. In his closing submissions Mr Howson conceded that the claimant raised these issues with XX.

Alleged disclosures by AA to the council on 9 May 2018 and by letter of 18 May 2018

136. On 9 May 2018, AA made a telephone call to the council and spoke to someone about what he described as safeguarding concerns about QQ. The matters raised by AA were recorded on an "alert form", which, in evidence, the claimant described as a "fairly accurate" record up to the point at which it contains an update (which appeared at page 257 of the bundle). The person who completed the form described

having received a call from an "anonymous male caller who stated they are a friend of QQ". We find, based on the contents of that form, that AA told the person he spoke to that: that he believed XX was telling lies about QQ condition; that in February 2018, XX took QQ home from hospital when a consultant had said he might need to stay for blood transfusion; that XX had failed to take QQ to a pre-booked hospital appointment; that XX had resisted QQ having a blood test because of her own fear of needles; that XX had told a consultant that QQ is 'a spastic'; that XX had asked QQ's carers to give him un-prescribed medication (junior paracetamol); that XX was completing timesheets saying she was caring for QQ even when she was not; that QQ often stayed at his grandparents who cannot provide the care he needs; that QQ's parents are controlling and ignore his wishes and feelings. He also insinuated that XX was using his money to buy things for her own home and that the respondent was receiving housing benefit in respect of QQ's flat which he was not entitled to claim.

137. AA telephoned the council again the next day and repeated the allegation that XX was claiming hours for looking after QQ on weekends when QQ was at his grandparents' house and XX was working as a skate instructor. He added that when QQ stays at his grandparents, he has to be carried up to bed and shares a bed with his grandparents. AA made it clear that he did not want the family or QQ to be told of what he had said that he was happy to be contacted by the council and provided his telephone number and name.

138. AA followed up these telephone calls with a seven page letter dated 18 May. Again, he made it clear that he did not give consent for his name or details to be shared with anybody other than with the council's own adult safeguarding team. AA repeated, and elaborated upon, the allegations he had previously made in telephone calls on 9 and 10 May. In relation to QQ's sleeping arrangements AA said "I have issues that on an almost fortnightly basis, QQ sleeps at his grandparents' house and shares a bed with them. QQ has told me this and I find it odd that at aged 80, his grandparents would share a bed with a 30-year-old man. Age to an aside, within QQ's home he has equipment and a specialist bed to assist with his disability. This equipment is not in place at his grandparents, so either it isn't needed at his own home-or should be in place at his grandparents." In addition, AA included photographs of diary entry sheets that he said had been taken by the claimant and which he alleged showed that XX did not have QQ in her care at times when she was paid as his carer. He also alleged that XX and the respondent were mistreating QQ in other ways and made complaints about alleged 'unfair workplace practices', including in relation to the way duties were shared out amongst paid carers and the calculation of holiday entitlements.

139. The claimant's case, as set out in his schedule of alleged protected disclosures, is that AA made these phone-calls and sent the letter of 18 May on the claimant's behalf: in his grounds of complaint the claimant implies that AA made disclosures to the council as the claimant's agent. The weight of evidence does not, however, support the claimant's position. In particular we note the following:

139.1. Although the claimant referred to his grounds of complaint in his witness statement (in which he refers to disclosures being made through the 'agency' of AA), he did not say in evidence that AA was acting on his (ie the claimant's)

behalf when he disclosed information to the council. The claimant's evidence was that AA told the claimant what he had done and that AA had contacted the council with his knowledge and his 'blessing': he did not say that he instructed or even asked AA to pass information to the council, or that he had conferred on AA some sort of general authority to act on his behalf and AA was acting under the auspices of that authority when he contacted the council. Indeed, the claimant's evidence did not detail the circumstances in which AA came to disclose information to the council.

139.2. Although AA raised with the council matters concerning the claimant's own working conditions and the note of his second call to the council records AA saying he had got in touch because the claimant was getting concerned about the running of the care package, there was no evidence that AA told those he spoke to at the council that he was making disclosures or passing on information at the claimant's request.

139.3. The evidence points firmly towards AA acting on his own initiative. In the letter he sent to the council on 18 May AA referred to concerns he said he personally had and that he felt 'duty bound to speak out', said 'I have told [the claimant] that I feel I need to speak professionally to QQ's social care team..', and said he was aware that the claimant had spoken to the council on 9 May. In that letter AA alleged not only that the claimant was being treated unfairly in the workplace but that JJ was too, yet there was no suggestion that he was making that allegation on JJ's behalf. On cross-examination, AA said that the main reason he contacted the council was to help QQ; and although he also said the claimant had asked him to help, he did not say what the claimant had asked him to do and did not say the claimant had asked him to contact the council. In a statutory declaration sworn on 13 July 2018 AA said he had chosen to report information to the council 'for reasons of reporting, what is in my opinion, an adult safeguarding concern and also, in my opinion, a fraud…' and that information divulged by QQ's family 'lead me, in my own opinion to suspect adult safeguarding concerns and fraudulent behaviour.'

139.4. Although it was clear from the claimant's evidence under cross-examination that he had provided some information to AA, the claimant has shown a marked reluctance to say precisely what information he passed to AA and has sought to downplay the significance of any role he may have played in providing AA with information that AA later used when contacting the council. In his witness statement the claimant asserted that he had never told AA anything that he did not already know about QQ, although he added that 'when [AA] has asked me something specific, such as my wages or my timesheets and does XX claim wages for a weekend, then I have told him that she does.' Under cross-examination, the claimant admitted that he had taken photographs of entries from QQ's diary sheets and other records and passed copies to AA; the claimant also admitted, under cross-examination, that he told AA about the 'phone-call XX had taken on 26 January in which it was suggested that QQ may be in need of a blood transfusion; he claimed that he passed this information to AA with QQ' consent.

140. Looking at the evidence as a whole, it simply does not support a finding that AA was acting on behalf of the claimant when he spoke to the council on 9 May or when he wrote to the council on 18 May. We find that, at most, AA told the claimant that he was going to contact the council and the claimant may have acquiesced in that course of action. The claimant did not, however, ask or instruct AA to pass on information to the council on his behalf, whether explicitly or implicitly.

Alleged disclosures by the claimant to the council on 9 May 2018

141. It is part of the claimant's claim that on 9 May 2018, after AA had telephoned the council, the claimant himself made a telephone call to the council and made a protected disclosure about QQ's medication, health and wellbeing and fraud. The claimant's account given in evidence was that he used AA's 'phone to make this call because his own was charging but that he gave his own name and address. He did not say in his evidence in chief what information he disclosed during this 'phone-call but we infer from his reference to paragraph 50 of his grounds of claim that he is suggesting that he alleged that XX was claiming wages for time spent caring for QQ when she was not in fact caring for him and that XX and the respondent had refused to take QQ for a blood test on 26 January, against medical advice. In support of this allegation the claimant relied upon the following:

141.1. A call log which showed three 'phone calls were made from AA's phone to the council: two on 9 May and one on 10 May. The claimant's case is that the second call, which lasted just over 17 minutes, was the call he made.

141.2. Witness evidence from his brother, who said he was with the claimant on the day the call was made and recalls the claimant being upset and saying he was going to ring QQ's social worker to report his parents, borrowing AA's phone, going outside for about half an hour, and then being in tears when he returned.

141.3. AA's letter of 18 May, in which he referred to the claimant having called the council.

141.4. The council's record at page 257 of the bundle, which suggests that an 'update' call was received from an anonymous caller 'stating that QQ's mum…is employed by Tees Active on a Friday and Saturday when she is supposedly caring for QQ.'

142. Mr Howson, challenged the claimant's evidence, pointing out that the council's record at page 257 of the bundle implies that the 'update' call was made by AA, not the claimant, and suggesting that it was implausible that the claimant would use AA's phone. Furthermore, whilst that record refers to the caller having said that XX worked elsewhere when she was 'supposed to be caring for QQ', it makes no reference to anything having been said about failing to heed medical advice or the claimant's medication.

143. We have doubts about the reliability of the witness' evidence. Furthermore, the record of the call on page 257 of the bundle appears, on its face, more likely to be a record of AA's call of the following day, rather than a record of any call made by the claimant: that would explain the inclusion of AA's name and the omission of any

reference to medical advice or medication. Nevertheless, the fact that AA referred to the claimant having called the council in his letter of 18 May (a near contemporaneous document) strongly suggests that he did in fact do so. The call log from AA's 'phone also suggests that three separate calls were made to the council. Looking at the evidence in the round, we are satisfied that it is more likely than not that the claimant did telephone the council on 9 May. Although the claimant did not say in his witness statement exactly what he said to the person with whom he spoke, we are satisfied that it is more likely than not that he alleged that XX was claiming wages for time spent caring for QQ when she was not in fact caring for him and that XX and the respondent had refused to take QQ for a blood test on 26 January, against medical advice: these are matters that the claimant referred to in his grounds of claim presented some five months later. We are not, however, persuaded that it is more likely than not that the claimant made any reference to medication in that 'phonecall: had he done so we would have expected that to be mentioned at least in paragraph 50 of the grounds of claim.

Alleged disclosures at a meeting on 10 May 2018

144. On 10 May 2018 the claimant attended a meeting with the respondent, XX, JJ and QQ's Personalisation Officer from the council. The meeting was arranged to discuss what training could be provided for staff and also issues that had been raised about holiday entitlements, terms of employment and job descriptions. It was the claimant's case that he made protected disclosures about training in this meeting. We find that the claimant did raise the need for training in the meeting, referring to the fact that he had had training in his other job on administering medicine and saying 'the training is for, to cover your arse because you have got no staff who are up to date with the training and they are going to point the finger at you.' The respondent told the Personalisation Officer that he thought the claimant had made a good point when he suggested manual handling training. The Personalisation Officer agreed to arrange some training for the carers (although not all of the training that the claimant had suggested may be needed).

145. Later in the meeting XX asked the Personalisation Officer what would happen if the respondent decided he did not want to be the employer anymore. The Personalisation Officer replied that if they could not find anyone else to be the employer then care would be provided via an agency. The respondent then asked what would happen to the claimant and JJ, in response to which the Personalisation Officer said they would either 'TUPE into the agency or they would just be made redundant'. XX replied 'So basically [the respondent] just has to be the employer or we would have to find someone else so that we don't get like this situation where we have got people coming to us basically all the time – I've got this problem with holidays and I've got that problem with so and so and why didn't you tell me this.' Later in the same meeting XX said, in the context of a discussion about something JJ had raised 'it's just a case of all the time, I've had enough I can't be doing with it, I am getting sick to the back teeth now and I am about ready to turn round and say stuff it.' The respondent then said 'The way we feel we might retire them all and bring him home'. XX then said 'I can't be doing with this for much longer.'

Alleged harassment on 13 May 2018

146. On 13 May 2018 the claimant, QQ, the respondent and XX attended an event at a social club together. Also present were AA and the respondent's sister. The claimant was caring for QQ that night. At some point in the evening, the respondent's sister sat next to AA. and spoke to him. AA's evidence was that she touched his legs and arms and said to him things like 'you love [the claimant]' and 'you would be better off with [another carer] because everyone knows he is gay". The respondent's sister said in evidence that she could not recall the details of the conversation but used the word 'flirty' to describe it and said 'there might have been some sexual banter'. She acknowledged she had been drinking that night.

147. The claimant saw that they were speaking together but could not hear what was said, other than hearing his name mentioned. Later that evening AA told the claimant what the respondent's sister had said.

148. In the particulars of his complaint, the claimant alleged that XX and the respondent could hear what was being said and giggled along with it, chipping in with comments such as 'stop it you've had too much to drink'. That was not corroborated by AA in his witness statement: he only referred to this when being cross-examined by Mr Howson. The claimant's own evidence was that he did not hear what was said (other than hearing his name) but learned about it from AA subsequently and that, as he was leaving after his shift, he told the respondent that his sister had been behaving inappropriately. We were referred to an exchange of text messages between AA and XX in which XX appeared to acknowledge that the respondent's sister had had a few drinks. It was suggested that this bore out the claimant's claim that XX and, by extension, the respondent, had heard what the respondent's sister said to AA. We do not agree that that is the inevitable inference that must be drawn from this exchange of texts. The claimant's own case is that he told the respondent that his sister had behaved inappropriately as he was leaving the event and in any event AA alludes to it in the message he sent to XX the following day; that being the case, XX response could equally be interpreted as an acknowledgment of what the claimant and/or AA had said.

149. Looking at the evidence in the round, we accept the evidence of XX and the respondent that they were sitting several feet away from AA, that the music was quite loud and that they did not hear the conversation between the respondent's sister and AA.

<u>Alleged disclosure on 20 May 2018</u>

150. Following the meeting on 10 May, the respondent and XX, with input from the Personalisation Officer, drew up new staff contracts, a staff handbook, job descriptions, and daily task sheets. The claimant, however, felt the allocation of tasks was unfair: he believed he and JJ were being asked to do more household chores than XX.

151. On 20 May 2018 the claimant spoke with the respondent about the new contracts as he was unhappy about a number of things in the contract. During the course of the conversation the respondent said that if the claimant did not want to sign the new contract he could look for a new job or be made redundant and that he was 'getting

sick of the staff and could not manage the package anymore and wanted to TUPE everybody across to an agency.' The claimant told the respondent that he did not want to leave or work for an agency, that the respondent was unable to do that and that if the respondent wanted to do it there would surely need to be a legal process to go through and redundancy pay. The claimant also said he was becoming tired by working more than 48 hours a week without sufficient breaks and change was needed.

Alleged disclosures about pay on 31 May, 8 June and in mid-June 2018

152. On 31 May 2018 the claimant spoke to the respondent and complained again that he was owed wages. In addition, he told the respondent that he thought it was fraud that XX claimed wages when QQ was not with her. He also told the respondent that he would not sign the new contract of employment.

153. In his closing submissions, Mr Howson conceded that, on 8 June 2018 and in mid-June 2018 the claimant complained, on the first occasion, to XX and, on the second occasion, to the council, that there was a shortfall in his pay. Mr Howson also conceded that these were protected disclosures.

Events leading up to the claimant's suspension

154. From 20 June until 4 July 2018, the claimant was on holiday.

155. On the morning of 21 June 2018 a safeguarding officer and QQ's social worker from the council went to speak to QQ about the allegations AA had made. At the time, QQ was at his day centre and XX happened to be present in the same building. Someone from the day centre told XX that some people had come to see QQ and they were in the café with him. XX went to the cafe herself whereupon the social worker said they needed to talk to QQ on his own. After they had spoken with QQ they went to speak to XX. They told her that some serious allegations had been made. When XX asked what they were, she was told that they could not really say because there were so many. When XX pressed them for information, one of the people from the council said "for instance the one I've come to speak to QQ about is sexual abuse." They went on to tell XX that one of the allegations that had been made was about QQ sleeping in his grandparents' bed. We accept that they said "it may not be, but it could be tantamount to sexual abuse." There was no further discussion about the allegations at that point but the safeguarding officer said she would need to speak to XX and would be in touch with her.

156. XX was distraught and went home to speak to the respondent. Later that day the safeguarding officer telephoned the claimant and gave a further information about the allegations that had been made. She told XX that an anonymous caller had said she was withholding medical treatment from her son. XX gave inconsistent evidence as to whether or not the safeguarding officer said that it had been alleged that she was trying to kill her son. Initially, XX said, on cross examination, that she inferred that this is what had been alleged and that this is the impression she had got from what was being said. XX, however, then appeared to change her evidence, saying that the safeguarding officer had in fact said that the allegation was that she was trying to kill her son. We think it unlikely that the safeguarding officer would have

said that there had been an allegation that the claimant was trying to kill her son when there is nothing in the record of the initial conversation with AA to suggest he made an allegation in those terms and nor is that what he said in his letter to the council. However, we accept that XX was under the impression that this is what the anonymous caller had been implying. Despite the change in her evidence, we found XX' evidence on this issue to be generally reliable.

157. During the phone call, the safeguarding officer asked XX a number of questions about the allegations that had been made by AA. Although, we accept, the safeguarding officer did not tell XX that the anonymous call had been made by AA, she did read out some of the allegations that had been made and, from that, it was obvious to XX that the allegations must have been made by AA.

158. The respondent and XX were upset and angry at the allegations that AA had made. That evening, the respondent dialled the claimant's number, which we were told was accidental. The claimant subsequently texted XX asking the respondent had called him and if everything was okay. XX replied by text saying "yeah, just busy with social worker and safeguarding about allegations you both made about us but Kev will sort with you when home.'

159. A 27 June 2018 both the respondent and XX met with the council's safeguarding officer to discuss the allegations that had been made by AA. The allegations made by AA in his letter of 18 May was read out to the respondent and XX and they were asked for their response. Based on the contents of that letter, there was now no doubt in their minds that the letter had been sent by AA. Indeed this was confirmed by the safeguarding officer at the meeting. The respondent and XX were made aware, in this meeting, that the letter contained photographs of care documents and diary entries.

160. XX' evidence was that they were not told, either at the meeting on 27 June or in the conversations on 21 June, that the claimant had, himself, contacted the council. The claimant challenges this. He refers in particular to the following documents, which the claimant contends suggest that the respondent and XX knew that the claimant had himself made allegations to the council:

160.1. The text message XX sent him on 21 June in which she referred to 'allegations you both made about us.'
160.2. A document subsequently signed by the respondent on 3 November 2018 (referred to below), in which the respondent said he suspended the claimant 'due to allegations about myself and my family'.
160.3. The respondent's defence to a county court claim filed by the claimant and AA against the respondent. In his defence the respondent said that he and XX 'surmised that the claimants were the source of the allegations.'
160.4. The fact that a consultant from Peninsula who was later involved in matters, referred in a report dated 26 September 2019 to the claimant having made allegations.

161. We agree that the text message from XX, the document of 3 November and the defence to the county court claim suggests that the respondent and XX believed the claimant had somehow been involved with the allegations that were made to the

council. The evidence of the respondent and XX was that they were not, however, told that the claimant had made any disclosures of information to the council himself. XX' evidence was that, based on what she had been told about the allegations on 21 June, she and the respondent believed at the time she sent the message to the claimant on that date that that the claimant must have passed information on to AA about, for example, the phone call she had received on 26 January saying QQ needed a blood transfusion (which AA was not privy to), QQ's sleeping arrangements at his grandparent's house, and financial information. Her evidence was that this belief was reinforced when they met with the council on 27 June and became aware that AA had obtained copies of photographs of care documents and diary entries: they believed these had been taken by the claimant and given to AA; they were also concerned that the claimant had passed information to AA about QQ's finances and how they were managed. We find the evidence of the respondent and XX on this issue to be persuasive. Contrary to the claimant's submissions, we find that the defence to the county court claim supports the evidence of XX and the respondent, referring as it does to them 'surmising' that the claimants were the source of the allegations. XX' text of 21 June and the respondent statement of 3 November are not inconsistent with their account: it is clear that they believed the claimant had somehow been involved with the allegations that were made to the council by AA; it does not follow that they must have known that the claimant himself had been in contact with the council. As for the Peninsula report, we do not find this a useful indicator of the state of the respondent's or XX' belief in June 2018 as the report was not prepared until over a year later, by which time the claimant had himself alleged, in the course of these proceedings, that he had contacted the council.

162. Looking at the evidence in the round, we find that the respondent and XX were unaware that the claimant had himself telephoned the council on 9 May 2018 until the claimant divulged that information in the course of these proceedings. They did believe, however, that the claimant had been involved with the allegations that were made to the council by AA, including by passing to AA information about the phone call XX had received on 26 January saying QQ needed a blood transfusion, QQ's sleeping arrangements at his grandparent's house, copies of photographs of care documents and diary entries and information about QQ's finances and how they were managed.

163. Following the meeting the respondent sought advice from his insurers. Upon receiving that advice he decided to suspend the claimant and investigate what had occurred.

164. At some point before the claimant returned from his holiday, the respondent was in a bar with QQ when he encountered a KK, with whom he was friendly. QQ said that the claimant had "been sacked". The respondent immediately corrected QQ, saying he had not been sacked. The parties did not agree on when this conversation took place. The claimant's case was that it happened on 22 June 2018 and that this demonstrates that a decision had been made at that time to take disciplinary action against him and to dismiss him. The respondent's case, on the other hand, is that at no point did he or his wife say to QQ that the claimant had been or would be sacked, that the conversation with KK did not take place until after he had taken legal advice

following the meeting with the council's safeguarding officer on 27 June 2018, and that when he corrected QQ he said the claimant had been suspended.

165. The claimant relied, in support of his case, on evidence from KK. We make the following observations about that evidence:

165.1. KK had been approached by the claimant and/or AA in August 2018 to write a statement. On that occasion, KK gave a written statement saying that the conversation took place on a Friday night, that he could not remember which Friday night it was but that he thought it was the first week the claimant was on holiday and that one of QQ's other carers had said the following week that the claimant had a meeting with the respondent and XX about the situation. KK's account of the conversation was that QQ had said that his dad had sacked the claimant but the respondent then said he had not been sacked and that it was 'a long story.'

165.2. Some two months later, KK came to write a second statement in which he now claimed that the conversation took place on the first Friday that the claimant was on holiday, which would be the 22 June 2018. He also changed, slightly, his account of what the respondent had said, saying that he had said it was a long story "but nobody had actually been sacked as of yet."

165.3. It is clear from second statement that the claimant had told KK his version of why he had been suspended. KK said in his statement "at the best of my knowledge [the claimant] has done nothing wrong and all he did was tell the truth. There has to be some way for carers to speak out on any concerns they have without fear of reprisals.… It makes me think if ever I spoke out would the same happened to me…"

165.4. KK did not say how he had managed to recall things in October that, two months earlier, he had said he could not remember.

165.5. It is clear from his statement that the claimant had been discussing his situation with KK and, having heard only one side of the story, KK had decided that the claimant was blameless and that the respondent was treating him unfairly. He was clearly not an impartial witness.

165.6. In light of KK's partiality and the internal inconsistencies in his evidence, we do not consider his evidence on this matter to be reliable.

166. The claimant also relied on evidence from WitnessC, who was the licensee of the bar in which the conversation took place. We make the following observations about her evidence:

166.1. She said she had seen QQ, the respondent and KK talking together very soon after the claimant went on holiday in June. She acknowledged, in cross-examination, however, that it was not unusual for them to be in the bar and to be talking to each other.

166.2. Again, it was clear from her evidence that she was not impartial: she said she believed that the respondent was 'telling lies' about the claimant and AA and that she thought he was 'trying to set them up.' When asked on cross examination what 'lies' she believed were being told, she said she had been told that the respondent had accused the claimant of taking money from QQ.

166.3. WitnessC was not an impartial witness and we do not consider her evidence to be reliable. In any event, we do not consider it to be probative of when the discussion between KK and the respondent took place given that she

did not claim to hear what was said when she saw them and she accepted that it was not unusual for the respondent and KK to chat in the bar.

167. The claimant also relied on evidence from his brother to the effect that, whilst then claimant was on holiday, he was offered a new post as a carer for QQ by an agency he was signed up with and was told that this was because his current carer (the claimant) had been suspended. In his witness statement, the claimant's brother said this had happened 'a few days after he went on holiday.' On cross-examination, however, he said it was just two or three days after the claimant went on holiday. If this were the case, it would have meant the claimant's brother knew about the claimant's suspension for almost two weeks before the claimant himself found out on 4 July. We find it somewhat surprising that, in those circumstances, the claimant's brother would not have tried to get in touch with the claimant before he returned from holiday to let him know what he had learned. The claimant's brother has ties of loyalty to the claimant which, we feel, may have affected his recollection of events on this matter.

168. We accept that on the night of 21 June, when they became aware of AA's allegations, there must have been some considerable discussion between the respondent and XX about what they should do. It is likely that the respondent would have already been thinking seriously about the possibility of taking disciplinary action against the claimant. Based on the evidence we heard, it is clear that the respondent and XX had viewed the claimant almost as a member of the family. They were extremely upset by the allegations that had been made to the council by AA. They believed that the claimant had passed information to AA and must have felt a keen sense of betrayal. However, the respondent must have known from his experience as a manager that there was a need to follow a fair process if disciplinary action was to be taken. The respondent had insurance for legal advice on employment matters and we consider it unlikely that he would have made any decision as to his next steps without first taking legal advice. We also find it more likely than not that, before he decided on any action, the respondent would have wanted to wait until he had had the meeting with the council, on the 28th, so that he could understand what had been said. Furthermore, we do not infer from the fact that QQ said the claimant had been sacked that this is what he had been told by the respondent or XX. No doubt XX and/or the respondent must have said something to their son about the claimant not coming into work. There is no reason to suppose they would have explained the intricacies of the investigation process and it may simply be that QQ jumped to the wrong conclusion. It is also conceivable that QQ may have overheard his parents discussing potential disciplinary action and possible options and outcomes, but we do not infer that the outcome of any possible disciplinary action had been prejudged or that the respondent had already decided that the claimant was to be dismissed. The claimant had been treated as part of the family and they had had a good relationship; furthermore, whatever misgivings they had about the claimant, the respondent and XX knew very well that the claimant had a very good relationship with their son and that he would be affected if the claimant was dismissed. In addition, the evidence we heard suggests that the respondent and XX believed, at the time, that the claimant had been led astray by AA and that their relationship with the claimant could continue if the claimant were to remove himself from AA's influence.

169. Looking at the evidence in the round, we prefer the evidence of the respondent on these issues and find that he did not reach the decision to suspend the claimant until 29 June, after he had met with the council's safeguarding officer and taken advice from his insurers, and that the conversation with KK did not take place until after the respondent had decided to suspend the claimant. We do not believe the respondent had decided to dismiss the claimant without giving him an opportunity to explain what had happened.

170. After deciding to suspend the claimant XX spoke to the manager of the day centre attended by QQ and said the claimant would not be dropping off or picking QQ up at that time as he had been suspended. We accept that it was important that the day care centre know about a change of carer.

<u>The claimant's suspension and beyond</u>

171. The respondent sent the claimant a letter dated 29 June 2018 informing the claimant that he was 'suspended on contractual pay to allow an investigation to take place following the allegation of you taking part in activities which cause us to lose faith in your integrity namely alleged unauthorised disclosure of confidential service user information to a third party (AA).' The letter went on to explain that the suspension was not regarded as disciplinary action and would only continue for so long as it took to complete the investigation. The letter said that disciplinary action may follow if the investigation indicated that there was some substance to the allegation.

172. The claimant sent the respondent a letter dated 8 July 2018 headed 'Suspension 'with pay' from duty.' He addressed the letter to Mr QQ (care of: [the respondent]). The claimant said he would not be accepting telephone calls from the respondent or his representative 'until further notice', saying his trade union had advised him not to accept telephone calls or text messages. He also asked for 'a full copy of the relevant disciplinary and investigatory procedure along with all copies of documents I have signed relating thereto by return of post' and said 'I am exploring a relevant claim… for attempts to make a constructive dismissal.'

173. Two days later, on 10 July, the claimant wrote another letter and posted it to the respondent. In this letter the claimant said he was putting in a formal grievance. He, in effect, said that the respondent had made threats to dismiss him, referring to things allegedly said in February, March, May and June of that year, and that this was 'akin to a breach of trust and implied confidence an employee should have in any employer (or) attempt to make a constructive dismissal'. He also said that the respondent's letter of suspension 'alludes and could be construed as an attempt to make an 'unfair dismissal' as an employee has followed 'whistle blowing' procedures to which you could be deemed to have acted unjustly.' The claimant asked for a 'satisfactory response' within 14 days, as well as a formal apology and 'assurance that this will not happen again' and said if no satisfactory response was received 'I shall be obliged to make representations to ACAS with a view to seeking remedy with an employment tribunal.' He also asked that his union be in attendance at all meetings 'as prescribed in law' and suggested that he thought the respondent was not his employer.

174. On 11 July, the Safeguarding Officer from the Council sent an email saying that a safeguarding enquiry had been completed, that looked into allegations made regarding the respondent's and XX' care of their son and that 'No evidence of abuse was found therefore abuse was not substantiated. It is the conclusion of the safeguarding enquiry that the allegations made were untrue'.

175. We accept the respondent's account that he did not really know what to do with the claimant's grievance at first: although he is the claimant's employer he works full-time elsewhere; he had never dealt with a grievance before and he was also concerned that, as the grievance made allegations against him, it might be thought inappropriate for him to deal with it by himself. He thought at this point it would be best to deal with the claimant's grievances before any possible disciplinary action for breach of confidentiality. So he spoke to the Personalisation Officer at the council and sought help from her. She suggested he contact his insurance HR support provider.

176. The respondent also spoke to a GG, who worked in HR at his employer. He asked her if anybody at the company could help with the grievance. He did not give GG any details of the grievance or who had made its but just asked if somebody could help him. GG asked if he was in a union. He said he was a member of Unite so GG contacted the local on-site union representative HH and introduced the claimant to him.

177. On 13 July, in response to the claimant's suspension, AA made a statutory declaration which was later passed to the respondent. AA said, amongst other things, 'at no point ….has [the claimant] disclosed any confidential service user information to me about QQ, or QQ family members and that any conversations that have been held between myself and [the claimant] are about themes that would be commonly known through having a mutual friendship with both QQ and his wider family… [A]ny information that I have chosen to report … for reasons of reporting what is, in my opinion, an adult safeguarding concern and also, in my opinion, a fraud at the hand of QQ parents, was done with good intention to protect QQ from any harm and the wider taxpaying public from an abuse of a position of trust and misuse of public money.… I can state that the information I reported to the aforementioned Council's departments was with the full request, knowledge and consent of QQ and was also obtained by being present at QQ request at medical appointments and other social events whereby his parents [the respondent] and [XX] and wider family divulged information freely and liberally that lead me, in my own opinion to suspect adult safeguarding concerns and fraudulent behaviour.'

178. The respondent wrote to the claimant inviting him to what he described as an 'investigation meeting to discuss your grievance.' He said the meeting would be on 23 July, that it would be conducted by HH and that a NN would be present to take notes so that they would have an accurate account of the meeting. He said in the letter 'the reason for this meeting is to establish the facts outlined in the alleged grievance and what you would see as a remedy to the matter.'

179. On 17 July the claimant emailed the respondent asking who the people named in his letter were and 'the connection to you and my employment'. He also said 'I will

need to confirm with my union that they will be available for the date you have suggested'.

180. The same day, HH emailed the claimant. He said he had been asked by the respondent's union to chair an investigation into the claimant's grievance; that he had no ties to the union nor the respondent; that he had asked that NN attends as notetaker and that she had no connection with the respondent. He went on to say that he was happy for the claimant to bring his union rep along but that he would expect that they could go ahead with the meeting if the union rep could not attend; he said that there was no statutory right to be accompanied at the meeting because it was simply an 'investigation' meeting for him to understand the claimant's position in greater detail before having an investigation meeting with the respondent. Although HH said NN had no connection to the respondent, this was not correct: she is a long-standing family friend of the respondent and XX. It is not clear whether HH knew that she was a friend of the respondent and XX and, if so, why he said there was no connection. He also said in that email that he had no ties to the union yet GG said in a later letter that he was 'the union representative on site'. In evidence the respondent said he thought he may have been in a different union to HH.

181. The following day, 18 July, the claimant emailed HH saying his union rep was not available on 23 July. He suggested the meeting should take place on 27 July instead. He said his union rep had explained to him that as this was a grievance meeting he had the right to be represented. He also, again, asked for 'a full copy of the grievance procedure of my employer by return of post'. In addition, he asked who had booked the venue for the meeting, which was a council owned property. Finally, the claimant said 'I do raise concern that is to be noted on file that I do believe you were with [the respondent] at my home and that you have known [the respondent] for several years during your joint employment at [the respondent's employer] and subsequent employment ….'

182. HH responded within half an hour by email. He disagreed with the claimant's assertion that he was entitled to be accompanied by his union rep; said he would ask the respondent for a copy of the grievance procedure and pointed the claimant to ACAS guidance in the meantime; said he was happy to hold the meeting at a different venue if the claimant thought the one suggested inappropriate; told the claimant he had not met the respondent yet; and said 'I most certainly have not been to your home as you state below.' He went on to say 'it does concern me somewhat that you state this and I would like to point out I am not under investigation here and would ask that you refrain from following me.'

183. The following day, 19 July 2018, the claimant's union rep emailed HH taking issue with his assertion that the claimant did not have the right to be accompanied and asking HH to explain his relationship to the respondent and how he came to have been appointed to deal with the claimant's grievance.

184. HH replied the next day. He restated his opinion that there was no right to be accompanied at a fact-finding investigation meeting but said he was happy to hold a grievance meeting instead of a fact-finding investigation and reschedule it to Friday 27 July, the date suggested by the claimant. With regard to his relationship with the

respondent, he referred the claimant's union rep to his earlier correspondence with the claimant.

185. Later that morning the claimant's union rep emailed HH again. He said that HH's response about his connection with the respondent did not address the claimant's concerns. He went on to say 'It is not for a union to decide on behalf of an employer who will deal with an employee's grievance; it is for the employer to determine such matters. In view of your statement that you have not met the respondent, I'm bound to ask if the respondent knows you have been appointed and if so, has he agreed to your appointment.' This was a somewhat strange request given that it was the respondent who told the claimant that HH would hear his grievance. It may be that the claimant had not passed that information to his union rep. The claimant's union rep also said 'if you have no relationship with the respondent, contractual or otherwise, by what mechanism is the respondent to control your involvement. I want [the claimant] to be assured you are the most appropriate person to deal with this grievance, that you have the necessary authority to determine an outcome, that you will not breach confidentiality, that you have the appropriate skills and experience et cetera et cetera et cetera.'

186. HH responded to that email later that day explaining his experience of chairing, and providing representation at, investigation, grievance and disciplinary meetings, restating his impartiality, assuring that he would maintain confidentiality and offering to sign a non-disclosure agreement.

187. On the same day, 20 July 2018, the claimant wrote a letter to the respondent in which he said 'I now put you on notice that I am exploring and raising three further grievances in connection with my employment, as follows and that these will need to investigated also'. The three grievances were as follows.

187.1. Firstly, the claimant said a 'pay and conditions grievance' that was ongoing from May 2018 remained unresolved. In that regard he said he was unhappy with 'the new contracted duties that I feel go beyond caring for the service user'; that he was still unhappy with holiday entitlement calculations and felt he was owed money; that 'untruths have been told to me by [the respondent] and [XX] for several years about the rates of pay that are available to not only me, but other staff' and that those rates were being unfairly withheld. The claimant asked for copies of notes and minutes from the meeting that had taken place in May.

187.2. Secondly, the claimant said XX had 'on several occasions told me things that I would consider confidential about other staff members that would lead me to have a negative view of the staff.' He said 'I can also provide evidence that [XX] has, on several occasions told third parties unconnected with my employment details about not only myself, but also other staff members'. He also complained that although XX was not his employer she 'acts in that capacity and you allow this to happen-despite the fact that you have (before witnesses) named me as her supervisor…'.

187.3. Thirdly, the claimant said he was raising a grievance that he respondent had 'ignored my previous concerns and not acted fairly when I have said that you have not processed or held anything to do with personal information

securely or safely during my employment with you and I shall explore this grievance in more detail as it emerges.'

188. The claimant also said 'I'm still owed 14 bank holiday hours from May, at the 'half' rate as you are aware'.

189. The respondent replied telling the claimant that the matters he raised would be discussed by HH at the meeting on 27 July and that the meeting would be at the council owned venue previously referred to. Regarding holiday pay, the respondent said he had contacted the council who had told him the claimant had already been in touch with them and they were in the process of correcting the underpayment

190. Around about this time the respondent offered HH the use of a cabin he has and which the respondent and XX use for holidays.

191. On 27 July the claimant attended the grievance meeting with HH. His union rep was present as was NN. They discussed the claimant's grievances and HH agreed with the claimant that he would speak to others about his grievances. HH did speak to others and then prepared a report which he sent to the claimant and the respondent by email on 8 August. He said the claimant had 10 days to appeal against the outcome should he wish to do so.

192. HH set out certain findings and recommendations in his report, explaining his reasoning. His findings and recommendations included the following:

192.1. With regard to complaints made by the claimant that the respondent had referred to terminating his employment, HH appeared to accept that some comments might have been made about making staff redundant and using agency staff. He said he agreed with concerns that 'these alleged comments are not nice to hear' and recommended that any further discussions regarding TUPE or agency or bringing care back within the family be handled professionally and minutes taken of any meeting.

192.2. With regard to the claimant's complaint that he had been suspended for whistleblowing, HH said that he only had basic details of what the claimant had said he had reported and, on the information he had, he did not think a protected disclosure had been made.

192.3. With regard to the claimant's request that his union and QQ be in attendance at all meetings, HH agreed that the union should be present but explained that he believed the respondent to be the claimant's employer and, therefore, did not agree that QQ should to be present as his care was not being called into question and requiring him to attend could cause him undue stress.

192.4. With regard to the claimant's complaints about the new contracts and duties, HH said he had considered the relevant documents and spoken to staff concerned. He said he agreed that it would be unreasonable to expect the carers to hand wash the van inside and out but that he had established that this was not expected and that the expectation was that the van be taken to a car wash and cleaning paid for with QQ's money. With regard to other tasks, he said everyone had agreed that tasks could be rolled over to the next shift if not completed and that QQ's care and social life was the priority.

192.5. With regard to the claimant's complaints about holiday entitlement, HH agreed that the holiday arrangements were somewhat confusing. He said that the issue needed to be taken up with the council, who were responsible for holiday entitlement and agreed with the claimant that holidays should be aligned to hours or shifts, not a cross-over of both. He also said he had been advised that all holiday pay was up to date and correct.

192.6. With regard to the claimant's complaint about breach of confidentiality, HH's conclusion was that it was appropriate for XX to see confidential staff information given that her role included secretarial duties and there was no evidence put forward to support the claimant's statement that XX had disclosed to the claimant and others confidential staff information. He said he had seen no breaches of confidentiality as part of the investigation. He also said there was no requirement for the respondent to be registered with the Information Commissioner but recommended that he register anyway. HH also recommended that the respondent should circulate a note to all staff explaining how their personal information is held and used and keep paper copies of personal records be held in a locked cabinet.

192.7. Finally, HH said there was a need for the suspension investigation to progress in a timely manner. He recommended a mediation session between the claimant and the respondent once that investigation was concluded.

193. On cross-examination, the claimant was asked whether he disagreed with any of the recommendations made. He said he disagreed with HH's suggestion that holiday pay was up-to-date and correct. On cross examination the claimant initially also said he disagreed with the recommendation as to how holiday entitlement should be calculated by the council. However, when Mr Howson pointed out that HH appeared to be agreeing with the claimant on that element of this grievance, the claimant acknowledged that was the case. It was clear that what the claimant was in fact unhappy about was not the recommendation that had been made but that, in his view, the recommendation had not been actioned. When Mr Howson put it to the claimant that HH's report was balanced and that HH seemed to be on the claimant's side on several aspects of his grievances, the claimant agreed that this was the case but said 'nothing's changed.' The clear impression given by the claimant on cross examination was that he was unhappy with the fact, as he saw it, that the recommendations had not been actioned, not that he disagreed with the recommendations made, other than what HH's said about holiday pay.

194. On 8 August, the day he received the report, the claimant wrote to the respondent acknowledging receipt of it and saying 'I put you on notice that I am going to appeal the findings and I am consulting my union about this.' He asked for all documents that HH had referred to, minutes of any meetings and also witness statements of those spoken to during the investigation. In that email the claimant said I 'request you refrain from continuing your investigation into my suspension until the outcome of my appeal.'

195. The claimant followed this email with a letter dated 13 August, which he sent to the respondent by email and by post and delivered by hand. In that letter the claimant said he could not formulate the grounds of his appeal because he had not been furnished with all documents but that he was 'more than certain at this stage that there are sufficient procedural grounds for my appeal.' He asked for a further

five days to lodge and file his appeal. He also asked that the appeal not be heard by HH and that it 'is heard in line with legislation and guidance and that it is investigated by a person with full impartiality and that is human resources/legally qualified and impartial to my grievance concerns.' In addition he said he was not prepared to attend any further meetings in council owned buildings, saying 'any future meetings will be at a venue that is wholly impartial and independent to all parties.' The claimant also asked in that letter for various documents, including:

195.1. 'All documents that you wish to rely on in connection with your complaint about my conduct…'
195.2. 'A copy of the documents that I have signed in relation to the grievance and investigatory procedures that you rely on for these procedures.'
195.3. The minutes of the meeting with [the council's Personalisation Officer] held on 10 May 2018.
195.4. A copy of records kept for the previous two years 'that shows my working patterns over the 17 week periods, that ensure I am not working more than eight hours in each 24 hour period; etc'.
195.5. 'A copy of my opt out agreement to working longer than the prescribed EU Working Time directive legislation.'
195.6. 'A copy of my health assessment records for the previous 2 years (in line with legislation) that shows when and how you have offered me paid healthcare and who it is you have sent me to, or where I have not gone, my signature to confirm that I have not gone.'

196. The claimant asked for those documents to be 'sent back to me within several hours of receipt as the workforce is not excessive and the workload upon you should not be considered excessive to this request.'

197. We infer that the respondent must have forwarded that letter and/or the 8 August letter to HH because HH emailed the claimant on 13 August saying there would be no extension to the appeal deadline and questioning the need for the documents the claimant had asked for in relation to the grievance.

198. By letter dated 16 August, the claimant set out what he said were his grounds of appeal. The grounds of appeal were as follows:
198.1. The investigation was 'fundamentally flawed due to an ''apparent lack of impartiality from the outset that HH has worked alongside [the respondent]… since April 2002.'
198.2. The investigation was 'fundamentally flawed' because HH had not interviewed 'several witnesses' who could have corroborated his grievance and that those witnesses 'should have been obvious' to HH. The claimant referred to a document which the claimant had provided to HH in support of his grievance.
198.3. The investigation was incomplete because it 'did not explore, nor refer to specific findings in relation to the 10th May 2018'.
198.4. HH had not provided the documentation the claimant had asked for and he was therefore unable to properly formulate his grounds of appeal nor 'retrace the steps in principle to how HH made his findings.'
198.5. HH had threatened not to allow the claimant to be accompanied by his chosen companion.

198.6. The respondent had made no attempt to send him a copy of the grievance procedure that he was expected to follow.

198.7. The claimant had obtained fresh evidence from a former member of QQ' care team which contradicted some of HH's findings.

198.8. The respondent and XX had 'tried to get into the meeting'.

199. The claimant referred in his letter to making a 'claim and application to an Employment Tribunal'. He repeated his objection to attending meetings in council-owned premises and complained about HH's response to his request for documents. In addition, he repeated his request to be provided with copies of certain documents and now made a request that the respondent provide him with 'a copy of your current and previous two years worth of employers liability insurance certificate which the law entitles me to inspect at any point.' The claimant also asked for his suspension to be reviewed, saying 'I have three people that are prepared to make a statement confirming that they know QQ is not fully aware of the situation surrounding my suspension, and that he most certainly wants me to return to work.'

200. Over the next few days the claimant exchanged further emails with HH, culminating in the claimant sending an email to him on 17 August 2018 in which he said 'I now give you final notice that if you attempt to contact me or have any part in my employment, on any level and at any stage, again from now and into the future then you will leave me with no option than to inform the police that you are harassing me.' He went on to say 'If I advise the police of my suspicions then they must investigate and I am beyond doubt that they will find proof that you and [the respondent] already knew each other and that this alleged union that you refer have played no part in the process, as they would have already identified themselves. This is a matter for the police if I choose to speak to them, but I'm certain you will now understand the distress you have caused me.' The respondent emailed the Personalisation Officer at the council on 18 August saying 'this is all getting out of hand'.

201. On 22 August the claimant sent another letter to the respondent. As with previous correspondence, the claimant addressed the letter to Mr QQ (care of: [the respondent]). He said he was raising a new grievance and complained about his suspension, alleging that he had been suspended 'in malice to learning of my whistleblowing disclosures.' He did not say what disclosures he was referring to or when he had made them. He also alleged, again, that HH had made threats that would breach his right to be accompanied and that the grievance process had been flawed because of a pre-existing relationship between the respondent and HH. He repeated his previous grievances and said they were still outstanding. He also said he would no longer accept email communications from the respondent or from XX and that 'the meeting…can only be held in a venue that is not owned by [the] Council.'

202. On the same day, a law firm, Archers law, sent a letter to the respondent saying they had been instructed on behalf of the claimant. They asked for documents the claimant had previously requested. They also referred to a request the claimant had made to speak to JJ. The claimant had previously asked the respondent if he could speak to JJ. the respondent had replied that he could if JJ agreed. the respondent subsequently told the claimant he had spoken to JJ but JJ did not want to speak to

the claimant. Now Archers were suggesting that the claimant be given an opportunity to put together questions for JJ to consider and to respond to in writing.

203. On 24 August, the claimant sent a letter to the respondent which began 'Raising new grievance-Health and Safety Breaches.' In that letter the claimant said he had reviewed three-years' worth of timesheets he had been sent by the Council and that, contrary to declarations signed by the respondent on timesheets about the claimant not working 7 days per week, they showed he had worked, on some occasions, 13 days in a row with 1 day off then 8 days straight after. The claimant referred to the EU Working Time Directive and said there had been a breach of Health and Safety Executive rules and the law and that he had reported this to the council. He said he would be raising the matter at 'my next grievance meeting'. He also said he would be recording the next meeting.

204. The same day the claimant sent a questionnaire for JJ to complete.

205. On 25 August the respondent wrote a letter to the claimant in response to his letter of 16 August 2018, enclosing various documents that had been requested by the claimant. It is clear from that letter that he was treating the claimant's request for information as a data subject access request under data protection legislation. With regard to the claimant's request for information relating to the claimant's conduct and the grounds of suspension, the respondent said this would be provided once the investigations start but that documents relating to the issue were limited because, in line with legal advice, investigations had been paused in order to ensure thorough and fair grievance investigations were completed. The respondent confirmed that the claimant had not signed an opt out agreement under the Working Time Regulations and said he had not been able to obtain training records as they had not been passed to him by the claimant's former employer and that although 'there have been attempts to resolve this' that firm was no longer trading and any data held by it had been destroyed.

206. On 28 August the claimant wrote again to the respondent. He opened that letter by saying 'thank you for [the respondent]'s letter dated 25 August 2018 that weighed 101 grams that was sent on 25 August 2018. The letter contained 17 sheets of A4 paper where 89 black marks to omit names for such details were made. On 17th August 2018 [the respondent] stated that he was going to perform this task which has taken him 8 days to produce. Quite why it took him on average 24 hours over the 8 days period to mark 11 blank spaces is beyond me whilst I'm being paid whilst on suspension at tax payers expense.' In that letter, the claimant criticised the respondent for referring to his employer as 'the company'. He said '[the respondent] is not a company as defined by section 1 of the Companies Act 2006 and it is an offence, as well as misleading to suggest that this is the case.'

207. On 1 September the respondent wrote a letter to the claimant saying 'an impartial Consultant from the HRFace2Face service' would hear his appeal on 7 September 2018. He said the hearing would be audio recorded and a copy of the transcript would be made available to the claimant. the respondent confirmed that the claimant could be accompanied at the meeting by a fellow employee or a Trade Union official.

208. On 3 September the claimant wrote another letter to the respondent in which he made the following points:
   208.1. The claimant opened that letter by saying '…I once again reiterate that [the respondent] is not a person that I recognise as my employer and that the letters sent do not mention QQ's name in any capacity and could, legally, be deemed void and ultra vires.'
   208.2. He said 7 September was not suitable for the appeal meeting as his chosen companion was not available. He suggested that the meeting take place on a different date at nine o'clock at night. He went on to say 'if your chosen investigator is not available at that reasonable time then we should negotiate, as the law suggests, a suitable time in the first instance as opposed to [the respondent], what I shall say, dictating when the meeting shall be.'
   208.3. The claimant went on to say that the chosen venue 'goes against my predefined wishes', that it was not an impartial venue because it was owned by the council and XX worked there, and that he did not want to 'abuse taxpayers money further by using council owned buildings'. The claimant added 'the venue should be wholly unconnected with my employment or [the council] and that request has been made obvious for several weeks.'
   208.4. In addition, the claimant asked for time to explore that HRFace2Face were 'legitimate.' He said 'I must now insist that they write to me directly in the post and that the qualifications of the member of staff they propose to use be made available to me prior to any meeting'. He added 'until such time as I am more certain than not that HRFace2Face Consultants are a bona fide company, etc and that a suitable date when I can attend with my companion has been reached - then I shall not be attending on 7 September 2018 at 1pm and that any attempt to proceed with that meeting my absence shall result in an automatic processing of unfair grievance procedures with ACAS.'
   208.5. Finally, the claimant referred to a letter from the respondent dated 28 September in which the respondent had said that, as the claimant's employer, it was not unreasonable to contact the claimant by methods other than post. The claimant asked the respondent to 'refrain from such assertions', referred to the respondent having previously sent him emails at night 'when I should be resting' and said that 'communication via Royal mail is acceptable only.'

209. On 5 or 6 September the respondent wrote to the claimant saying the grievance appeal meeting would be rescheduled to 17 September 3.30pm at a local business centre. He said no further postponements would be granted and that the HRFace2Face Consultant would provide information about their qualifications at the meeting.

210. On 6 September the claimant sent another letter to the respondent. He said in this letter that he was still awaiting copies of documents he had asked for. He then went on to ask for further documents 'by return of post' including car insurance documents for the previous three years and copies of his timesheets from 3 July 2017 to date. He went on to refer to the Data Protection Act and said 'I'm now put you on notice that I am exploring a breach of my rights to privacy' and that he was withdrawing consent to 'sharing my information with any party that is not connected directly with the processing of payments with regards to my employment'. He said he was disappointed not to have received a response to his letter of 3 September which, he said 'was signed for …at 12.17pm on the 4th September'. The claimant

cannot by this time have received the letter referred to in the previous paragraph: the respondent had sent that letter by post, which was how the claimant had asked him to communicate. On the one hand the claimant was insisting that the respondent should communicate only by post. On the other hand he appears to have been unable or unwilling to appreciate that this would mean that he would not get an instant response to his communication. It appears from the tone and content of the claimant's letters that he expected the respondent to prioritise his communication above all else, despite the fact the claimant must have known that the respondent works full-time in another job.

211. The claimant then sent a letter dated 10 September 2018 to the respondent asking, again, for documents. In that letter the claimant said 'the grievance procedure and disciplinary procedure are still outstanding which will cause huge detriment to any defence or claim that [the respondent] wishes to raise.' The claimant also referred to the fact that the respondent had used the pronoun 'we', in a number of his letters stating 'this grammatical error is very noteworthy as it demonstrates a third party involvement in writing letters as [the respondent] is referring to joint parties rather than the singular. This will be aired at the grievance meeting.'

212. The following day, 11 September, the claimant wrote another letter to the respondent saying he was still waiting for some of the documents he had asked for. It is clear, however, that the respondent had sent the claimant copies of some insurance documents the claimant had requested. The claimant said, 'I note [the respondent]'s comments regarding motor vehicle insurance and I remind you that I had been banned from driving for six months which [the respondent] and [XX] are aware of and that this would [have] prohibited me from being insured to drive QQ's vehicle for a period of five years from when I re-obtained my licence. [The respondent] and [XX] have permitted me to use a vehicle without adequate insurance and I am going to take legal advice on this.' The claimant also referred to his grievance appeal meeting and said that HRFace2Face are not impartial. He added 'I now raise serious detrimental effect to an entire abuse of my contractual and legal rights to a fair, unbiased and impartial platform to air my grievances. ACAS are aware of this situation and will be in touch in due course. I am also exploring legal options to me at this stage with regards to the untruths that [the respondent] has said and the impact this is having on a legal process. This whole process with [HH] and now Peninsula makes a mockery to any respect that I should have been shown.'

213. The claimant enclosed with that letter a copy of an email he said was from someone at Peninsula dated 11 September 2008. It is not clear to us who this email was sent to because the recipient's name has been blanked out but we infer that, as it had come into the claimant's hands the same day, it was either sent to the claimant himself or to AA. The email read 'thank you for your time today as I understand that you are wary of using external support. I want to reiterate that we only advice and support employers and wholly work with you to remedy any issues with your staff or business. Due to us only working with employers we cannot act impartially because there is no other disputant under our support, just you the business owner.… I hope that you can trust my words, I'm not sure what your friend was getting at however if it would make you feel more comfortable I would be more

than happy to talk to them too.' We were not told what had prompted that email but it appears there had been a discussion between somebody and Peninsula on the day the claimant sent his letter of 11 September 2018. The claimant attached this email as, in his words, 'evidence that Peninsula are not impartial.'

214. On 11 September the respondent wrote a letter to the claimant in response to the claimant's earlier letter of 6 September. With regard to the claimant's claims about documents not having been supplied the respondent said 'as mentioned on a number of occasions in numerous documents, the outstanding documents you have requested regrettably cannot be provided. This is an understandable disappointment and I apologise for any inconvenience caused, however, the documents are not available and I politely request that you refrain from requesting documents you know do not exist.' The respondent enclosed with that letter a something he described as a 'subject access request form' and asked that the claimant complete it if he wished to have access to any further documents 'in order to keep a detailed log of the information you are requesting and the reasons why'.

215. On 13 September the claimant applied to the County Court under the Part 8 procedure. On his claim form the claimant said, amongst other things, that he 'makes application for injunction to stop the breaches to his right to a fair, full and impartial grievance platform. The claimant seeks an order within the injunction that the defendant be forbidden… from attempting to continue with the disciplinary procedures against the claimant until such time as the claimant's legal rights, up to and including employment tribunal have been exhausted.' The matter was listed for hearing on 15 November. In his evidence in chief the claimant asserted that he had obtained an injunction: he had not; he had simply applied for one.

216. The claimant served the county court proceedings on the respondent under cover of a letter of 13 September, saying 'you can see that the court has excused my attendance at my grievance appeal meeting on 17 September 2018 and from this there should now be no further attempts to proceed with any disciplinary action against me until such time as the court authorises. From this you can assume that I shall not be attending the meeting on Monday 17th at 3:30pm.' It is not clear to us on what basis the claimant was saying he had been excused by the court from attending a grievance appeal meeting.

217. On 17 September GG wrote a letter regarding how HH became involved in the claimant's grievance procedures. We infer that the respondent asked her to write a letter explaining that issue.

218. In response to a request from the respondent to send a statement setting out his relationship with the respondent before and during the grievance process, HH emailed the respondent 'I have never had any direct contact or indirect contact with yourself prior to being asked to chair the grievance meeting as an impartial entity. For background for you I did have numerous communications with [the claimant] and his union rep on this matter and they both accepted this and agreed to attend the meeting. I must point out that I have never come across someone like [the claimant] before in a process like this and I did have to warn him at one point to remain focused on the grievance and not me as it was clear he was following me and delving deep into all of my social media. At one point he told me that he had seen

my car at your house (I'm not sure how he claims to know what car I drive as it is not on any of my social media) and in answer to this I can also state that my car has never been to your house. So to sum up I can confirm I did not know you in any capacity (work or personal) prior to this process.' He then went on to say 'in summary I would like it noted that [the claimant] is a very disturbed individual in my opinion or someone else is pulling his strings. He was totally different person at the meeting itself. I was shocked to hear that he was going to appeal the outcome as there was nothing really to appeal. That said I did then get numerous emails from him saying I was threatening him by emailing him which again had no substance behind.'

219. On 21 September 2018 someone from the Council sent an email to the respondent in which she said 'I can confirm the following: – QQ's account is managed by [the council] in that we hold the money and pay the wages and bills on QQ's behalf. The allegation of fraud was given appropriate attention. We have a robust accounting system for QQ's monies, all timesheets corresponded to the contract of employment and there was nothing untoward found. Further, the information that was submitted with the complaint which consisted of typed notes of alleged text messages was not conclusive nor did the information provide any evidence for the allegations made. The finance team were happy that there was no substance to the claims and have no concerns.'

220. On 18 September the claimant sent a letter to the respondent (addressed, again, to QQ, care of the respondent) asking to be provided, by return of post, with a copy of his four-weekly timesheets from 3 July 2017 onwards. He said he was making that request 'so that I can continue my audit into timesheets and payslips'. The respondent sent a letter to [the claimant] dated 19 September 2018 enclosing the documents the claimant had requested in his letter of the previous day.

221. On 21 September the respondent wrote to the claimant reminding him that he had instructed the claimant not to contact or to attempt to contact or influence anyone connected with the investigation or discuss the matter with any other employee or any client. The respondent alleged that the claimant had breached that instruction and said 'any further attempts to contact or influence anyone in connection with the ongoing investigations will be treated as a further act of misconduct.' The respondent said the claimant should let him know if there was anyone he felt could provide a witness statement that would help in investigating the allegations and he would arrange for them to be interviewed.

222. The claimant respondent by letter dated 25 September 2018 with a list of people he described as 'witnesses' to whom he wanted to put questions. He set out those questions and the reason he was asking questions. The claimant again challenged the basis of his suspension.

223. On the issue of suspension, the respondent wrote to the claimant on 27 September saying that once the grievance appeal had been heard and an outcome delivered to the claimant, the conduct investigation process would recommence and the evidence the claimant required would be sent to him prior to any potential disciplinary meeting.

224. On 28 September there followed another letter from the claimant to the respondent. In that letter he said 'I today received a copy of my payslip and pay advice. It was again for the fourth time in this tax year incorrect. It is incorrect as with others that have been calculated as part of my unlawful deduction from wages component of my employment tribunal claim that is currently being prepared.' The claimant then set out the reasons he said his payslip was incorrect. He went on to say 'I was fortunate enough to notice this error immediately and have corrected it by speaking face-to-face with [the council's Personalisation Officer] before two wholly independent witnesses, one of whom is a council employee. [The council's Personalisation Officer] confirmed the error was on behalf of [XX], though as can be seen [the respondent] signed the error knowing full well I have not been on holiday I am suspended. I shall say this that this was a deliberate act of unlawful deduction from wages, as per the other four times within this financial year, irrespective, it left me short of pay.… This is a formal grievance that I expect to be resolved and full investigation into how it has been allowed to happen.' The claimant went on to say that he was bringing employment tribunal proceedings.

225. By letter dated 28 September the respondent wrote to the claimant and acknowledged there had been a mistake with XX writing on a timesheet that the claimant had had 10 hours holiday rather than that he had 10 nightshifts. The respondent apologised for the mistake and said that XX also sent apologies. The letter was hand-delivered to the claimant. MM of the Council later wrote to the respondent saying that the pay error was 'ours and not yours'. She said they had paid claimant holiday for the bank holiday (presumably the August bank holiday) instead of nights, but the claimant and AA had been in to the council about it and that the council had resolved the matter straightaway. She said that the payroll declaration made by the respondent and XX had been correct.

226. On 2 October the claimant brought the first of the tribunal claims with which we are concerned.

227. On 13 October 2018, the claimant wrote to the respondent again. In that letter:

227.1. The claimant referred to the fact that the respondent had accused him of failing to abide by instructions not to speak to others about the disciplinary investigation. The claimant accused the respondent of 'speaking to me as though you are a Sergeant in the army or a Judge giving me bail conditions. On the subject of conditions, you keep talking about the terms and conditions of my employment and as mentioned previously not one of my contracts has such terms and conditions in it; and you have already admitted on the 11th September 2018 that there are no disciplinary or grievance procedures that exist - and as I have already said you're making it up as you go along.'

227.2. The claimant referred to the fact that the respondent had said he, the respondent, was the claimant's employer and not QQ. The claimant disagreed and said that that was a matter for the Employment Tribunal judge.

227.3. The claimant then went on to say 'thanks to the Data Protection Act I now have evidence that you and HH on the 24 July 2018 at 9:06 am and 9:57 am had the following chat: 'did you get the dates the cabin?' 'Yes I did thank you kindly'. The claimant said 'I'm afraid to tell you that when you are obviously talking about your cabin (or as you have called it to me 'the shed') with HH in a chat… But just like when you offered JJ and myself time at the cabin that this,

especially for a man who you claim in your witness statement already on file with the court, to be a person you have not crossed paths with and that he says you don't even work at the same place; could be an offence within the Bribery Act 2010. I say this because you have offered, promised, or given an other advantage to HH so that he would be induced to perform my grievance meeting improperly and that you both knew from the outset that he is not impartial in any capacity. I am seeking legal advice surrounding this matter.'

227.4. The claimant said he was going to file a County Court claim against HH and the council's Personalisation Officer because they were having 'chats' about the claimant which 'breach my privacy and also use language as I find offensive such as calling me 'disturbed'.' He went on to comment on some information he had found on the Companies House website.

227.5. The claimant then alleged that he was owed £18,886.09 in respect of 'statutory entitlements such as bank holidays, lieu days and holiday entitlement'.

227.6. The claimant ended the letter saying 'on a final note I asked you not to approach my house previously, and on 29 September 2018 you obviously forgot this and I remind you that if you approach my house again I will contact the police.' This appears to be a reference to the fact that the respondent hand delivered to the claimant the letter of 28 September in which he acknowledged the mistake in the claimant's timesheet and apologised for it.

228. 15 October 2018 the claimant wrote to the respondent again. He thanked the respondent for clarifying the position regarding motor insurance and went on to say 'however, I still would not have been insured to drive the vehicle from the 28 April 2010 for a period of five years; which then transpires to be five years from 15 March 2011.' He set out in a number of bullet points his reasons for saying this. He also reminded the respondent that he had sent him a list of questions that he wanted putting to witnesses. In addition, the claimant implied that he might call the respondent's parents 'to court to be cross-examined under oath before a judge as part of my grievance'.

229. On 15 October the claimant issued proceedings in the County Court against the council's Personalisation Officer, its safeguarding officer and HH alleging breaches of the Data Protection Act. He also accused HH of bribery contrary to the Bribery Act 2010.

230. On 18 October the claimant wrote to the respondent saying he would be attending the workplace on 29 October to collect his belongings. He said 'I give you notice that if it is a problem, or if you believe there will be a breach of the peace, I shall ask the police to attend at the same time as myself.' The respondent replied in a short letter dated 19 October authorising the claimant's attendance to collect his belongings. On 29 October the claimant did attend to collect his belongings and the encounter passed without incident. The claimant wore a body camera that day which he said, in evidence, was 'to protect myself against the respondent or anybody else that may have been in the flat'. Later that day the claimant wrote to the respondent. In that letter he said 'thank you for letting me get my property back, I feel that the situation was handled well from both parties without any comments made from either party.' He also reminded the respondent of the questions he had asked to be put to witnesses and asked for a response within seven working days.

231. Before the hearing of the claimant's application for an injunction took place, the claimant withdrew the County Court proceedings against the respondent.

232. On 30 October the respondent referred to the claimant having 'dropped' his injunction attempt and withdrawn his County Court claims and said, in light of that and the fact that he had heard nothing further about tribunal proceedings, 'it is my intention to continue with the ongoing conduct investigation and potential disciplinary proceedings.' He said he would write to the claimant to reconvene the ongoing investigations if he heard nothing regarding an upcoming Tribunal hearing by within a month. He ended the letter saying 'as I'm sure you will agree, it is in everyone's best interests to resolve all ongoing matters as quickly as possible.'

233. The claimant wrote to the respondent on 2 November in response to his letter. He gave the respondent the claim number for his employment tribunal claim and threatened to make a further application for an injunction if the claimant attempted to 'expedite proceedings against me until such time as the Employment Tribunal.'

234. On 3 November 2018 the claimant wrote another letter to the respondent saying 'it has come to my attention that last night … you approached one of my witnesses in my Employment Tribunal Claim … in an attempt to discredit myself and [AA].' He went on to say 'I give you first and final warning that in legal process it may be an offence to attempt to influence or coerce witnesses and any further attempt will result in me reporting your conduct to the police.'

235. On the same date, 3 November 2018, the respondent signed a document in which he purported to set out his account of an incident that occurred the previous day. We referred to this document above. In that document he said he had visited a pub with his son and 'as I was leaving [KK] pulled me to one side… He then told me that about 2 to 3 weeks ago [the claimant] and [AA] approached him with a witness statement which had been written and completed by them for him to sign to which he read through and crossed out paragraphs which they had wrote and then dismissed it. He told them that after QQ had said [the claimant] had been sacked I had corrected him and said 'no he's only suspended due to gross misconduct'. Until this time I did not know they had approached him as a witness and I explained briefly why [the claimant] had been suspended due to allegations about myself and my family abusing our son QQ which had all been unfounded. KK went on to explain that he did not like AA and he was not a nice person for [the claimant] to be involved with; he also stated he had read AA's history on the Internet. This was the whole conversation and at that point I then left the … club. [The claimant] and AA seem to be writing witness statements for people who do not know me or my family or have anything to do with [the claimant's] employment and asking them to sign them so they can be used in this tribunal. Apparently they have gathered around 20 statements from people not connected to [the claimant's] employment.…'

236. KK also gave evidence about the discussion on 2 November 2018 and WitnessC said she spoke to KK immediately afterwards. We find that, on that day, KK approached the respondent and told him the claimant had asked him to sign witness statements. The respondent explained that the claimant had been suspended and the reasons why. He said unfounded allegations had been made that he and his family were abusing QQ. KK then made the observations outlined above about AA

and the respondent said he had nothing against the claimant and everything would have been okay if the claimant had got rid of AA sooner.

237. The claimant's Tribunal claim form was sent to the respondents and there followed various letters between the parties about the employment tribunal proceedings. The claimant was disputing that the respondent was employer and made it clear that he considered it inappropriate for the respondent to continue with any investigation into his alleged conduct pending the Tribunal's determination of that issue. In January 2019 EJ Shepherd directed that there should be a preliminary hearing to decide that matter.

238. On 11 January 2019 the claimant wrote a letter to the respondent and XX. He alleged in this letter that he had not been paid holiday pay. He also referred to the respondent having on two occasions sent letters in duplicate and asked him not to do that as he said it was causing himself and his grandmother distress.

239. In February 2019 the claimant and AA brought claims in the County Court against the respondent, the council and Peninsula Business Services Ltd. In the claim form the claimant alleged that the defendants had committed 'multiple breaches to the Data Protection Acts; multiple breaches to the Rehabilitation of Offenders Act 1974; offences within the Bribery Act 2010: offences within the Fraud Act 2006: offences within the Misrepresentation Act 1967; offences within the Protection from Harassment Act 1997 and 'offences of negligence for Road Traffic Act 1988 offences and harm to feelings.'

240. Also in February 2019 the claimant and AA brought claims against XX in the County Court. The claim against XX alleged unspecified breaches of the Data Protection Acts; the Fraud Act 2006; the Rehabilitation of Offenders Act 1974; the Misrepresentation Act 1967; the Protection from Harassment Act 1997; the Protection of Freedoms Act 2012 and the Road Traffic Act 1986.'

241. On 16 March the claimant sent a letter to the respondent regarding holiday pay. He added that he did not consent to the respondent sharing his details, including hours and salary, with the council and said 'I once again raise a Data Protection Act complaint that you have been doing this without my consent during my entire employment.' The claimant also asked the respondent to review his suspension.

242. In a letter dated 19 March to the claimant, the respondent addressed the data protection issue, explaining that he needed to provide details of the claimant's hours and pay to the Council so that the claimant could be paid and that, as processing that data was needed so that he could perform the claimant's contract the claimant's consent was not needed. Nevertheless, he said that it may be possible for the claimant to send the signed forms direct to the council himself if he would prefer, subject to the council's agreement, and asked the claimant to let him know if he would like to explore that option further. Three days later the respondent responded to the holiday pay point the claimant had raised in his letter of 16 March and, with regard to the request to review his suspension, said 'the terms of your suspension were detailed in the letter sent at the beginning of your suspension in July 2019 [sic] and have not changed. I would kindly suggest referring to this letter for clarity on the reasons for your suspension.'

243. In March 2019, following a preliminary hearing, Employment Judge Shepherd decided that the respondent was the claimant's employer.

244. The following month, the respondent sought to restart the stalled investigation into whether the claimant had disclosed confidential information to AA the previous year. On 25 April 2019 the respondent wrote to the claimant telling him that he was required to attend an investigation meeting to discuss 'some concerns we have about your conduct'; that the meeting was arranged for Friday 3 May; that the claimant would be paid for his time attending the meeting; and that the meeting would be conducted by a Face2Face Consultant from Peninsula. He said 'possible outcomes from the meeting are that we may decide that it is necessary to pursue a formal disciplinary procedure with you, or alternatively we may decide that there are no grounds for this.' He went on to say that the claimant should make every effort to attend and that if he failed to do so without good reason or failed to tell them of the good reason for non-attendance in advance of the meeting then the Consultant would proceed with the investigation in his absence and his non-attendance would be treated as a separate issue of misconduct as the requirement to attend the investigation meeting during his working hours was 'deemed by the company to be a reasonable management instruction'. The respondent did not, in that letter say what the concerns about conduct were that were being investigated.

245. The claimant responded by letter of 26 April 2019. In his letter the claimant said his union rep was not available on the date arranged for the meeting. He also made the point that the respondent had not specified what the conduct was that was being investigated and that he had not been given any evidence. The claimant said until the respondent provided the further information and evidence he would not be accepting the 'invitation' to the meeting on 3 May. The claimant added, under the heading 'formal grievance' the following 'I put you on notice that I believe you are now formally attempting to dismiss me from employment during what is an ongoing official Employment Tribunal process, and that I shall be adding this to the list of issues for the Employment Tribunal when necessary as a matter of, once again, attempting to constructively dismiss me. I also consider your conduct as bullying and harassment and I expect that this formal grievance is explored and correctly investigated too.' He ended the letter by saying 'I'm giving you serious notice that I am considering terminating my employment by way of resignation, and thus pursue a complaint with the tribunal of constructive dismissal. I await your reply'.

246. The following day, the claimant sent a further letter to the respondent and XX, this one handwritten. In that letter he said 'I wanted to let you know that even if I done what you said I've done in terms of telling things about QQ, and you have never ever told me what exactly you are accusing me of for almost a year, that I would never have any intention at all to harm QQ and that he has not been subjected to any harm by me or [AA] at all. I wanted to let you both know you have destroyed my trust in you both, and made me feel like I'm worthless and at times I have thought about suicide.' He referred to some personal issues which he said the respondent was aware of and said ' … all you two are bothered about is punishment. Try seeing the world through my eyes, and knowing that I know you're both lying to everybody about things. It's horrible and the hurt is just about to heal and you then accuse me of new things whilst suspended which are going to be lied to. Leave me

alone and stop writing to me or I will go to the police. You're now harassing me and I've told you this before. Write to me via our representatives or I will go to the police. I hate this you have made and all I want to do is come back to work.'

247. On 28 April AA wrote a letter to the respondent which he sent by email, post and delivered by hand. He reminded the respondent that the claimant had asked him to stop writing directly to him and said that all communication should go to AA 'as his representative'. He said 'you did not take notice of this, and [the claimant] is within his rights to inform the police, should he wish to do so, that his employer is now harassing him.' AA referred in this letter to the fact that he was representing the claimant during his Employment Tribunal dispute. He told the respondent that the claimant had declined the 'invitation' to the meeting on 3 May and went on to say 'with regards to any further attempts to bring what we consider to be contrived allegations against [the claimant], then be warned that we have legislative and case precedent sound authorities to make application for an injunction against you.' He added that he, too, would be attending any meeting that the claimant 'elects to attend' and that 'the likely outcome of any meeting is that [the claimant] would reply to any comments with the words 'no comment' anyway'. He ended the letter saying 'I look forward to receiving ALL copies of evidence for the new allegation you have against [the claimant] in this matter and ALL evidence you have to hold [the claimant] in suspension for the allegation you suspended him for.'

248. On 2 May the respondent sent a letter to the claimant directly. He also sent a copy to AA. He said the meeting on 3 May would no longer go ahead. He acknowledged that he had been asked to address all communications to AA alone but said 'I believe my duty as an employer is to communicate directly with you and will continue to do this when necessary, however I will send a copy of these letters to [AA] by post also.' The respondent went on to refer to the grievances outlined in the claimant's letter of 26 April and said that an impartial Face2face consultant from Peninsula would hear his grievance on Friday 17 May at 9am. He told the claimant that he could, if he wished, be accompanied by a colleague or trade union official at that meeting. He acknowledged that the claimant had asked AA to attend meetings as his representative and said he would explain his stance on that matter in a subsequent letter.

249. On that same day the claimant saw his GP who completed a statement of fitness for work saying the claimant was experiencing 'depression, stress and anxiety due to ongoing issues at work' but that he was 'fit for basic contractual duties.' The statement said nothing about whether the claimant was capable of attending meetings to discuss conduct matters or grievances. AA sent a copy of that GP notes to the respondent saying 'it is our argument that at this material time, and given [the claimant's] new prescription medication for depression that includes night-time sedation, that he would then be unfit to attend anything outside his contracted duties, such as overtime grievance/investigatory hearings.'

250. The claimant then sent a handwritten letter to the respondent dated 5 May 2019. He reminded the respondent that he had asked him not to write to him or contact him, saying that the respondent's letters are 'raising my anxiety levels every single time the postman comes because I live in fear of your next threat of discipline action and punishment' and also saying the respondent was upsetting his nana. He

repeated his request that the respondent communicate with AA rather than writing to himself and, again, threatened to report the respondent to the police for harassment if he did not do so. He said 'this is my final warning to you … and I have been more than polite and reasonable. You have no statutory rights to continue to write to me if I ask you to communicate with my representative and you are now being completely unreasonable, overbearing and giving further rise to your bully behaviour. As I said last time, stop it and leave me alone.' He said he was consulting his doctor about the meeting on 17 May and added 'you are pushing me to resign because you won't leave me alone one more letter and I will go to the police, I am serious.'

251. By an email dated 5 May AA repeated the request that the respondent correspond only with him 'except for matters pertaining to current employment scenarios such as holiday requests and timesheet submissions et cetera'.

252. On 6 May AA sent a further letter to the respondent by email and post. He referred to the grievance meeting on 17 May and questioned the impartiality of HR Face2Face.

253. On 9 May the respondent wrote to the claimant again. He made the following points in that letter:

253.1. He referred to the fact that the claimant had been told his attendance was required at an investigation meeting on 3 May, that the claimant had said he would not attend and that the claimant had raised a formal grievance and had subsequently been invited to a grievance meeting.

253.2. He referred to the claimant's and AA's letters and emails dated 27, 28 and 29 April and 2, 5 and 6 May and the questions that had been raised about the impartiality of Face2Face and how the claimant would exercise a right of appeal. The respondent responded to those points and said 'I hope you feel able to proceed with the grievance on this basis on 17th May'.

253.3. The respondent went on 'as you have stated that the current situation is causing your anxiety and stress if you are unable to attend the grievance on this day you may provide written submissions to me by 5pm Thursday, 16 May 2019 so that the Face2Face consultant may consider your grievance in your absence. If you do not attend the hearing and I am not in receipt of written submissions I will assume you no longer wish to proceed with the grievance process.'

253.4. The respondent acknowledged receipt of the note from the claimant's GP and observed that it stated that the claimant was 'fit for basic contractual duties.' the respondent said that he believed that attending meetings regarding his employment constituted basic contractual duties and that he, therefore, did not believe that the certificate should prevent any such meeting taking place.

253.5. Addressing the claimant's request that he correspond only with AA, the respondent said 'I have considered and taken advice on this matter and, although I concede writing to AA appears to be a reasonable request, your consent to this does not absolve me of my responsibilities as an employer to ensure you are aware of all correspondence. Should AA decide to protect you by not passing on my letters informing you of the content you would be at a detriment. Therefore I feel I must continue to write to you, however I will continue to send copies to AA, unless you advise me against this at any future date, and I will only send through normal post so as to avoid you needing to sign for them.'

253.6. The respondent then went on to refer to the proposed investigation meeting that had been scheduled for 3 May. With regard to the concerns that were to be investigated at that meeting, the respondent said 'there is no requirement for me to advise you in advance of an investigation meeting of the allegations or evidence to be used. The purpose of an investigation as to discuss concerns with you informally and to use the information provided at that meeting, shortly after, to decide if any following allegations are to be made. Any evidence could be provided to you at the meeting and you would be given the opportunity to provide any counter evidence within a reasonable time period following the investigation meeting.'

253.7. Having made that point, the respondent then referred to: the fact that the claimant had said in his letter of 27 April, and AA had reiterated in his letter of 28 April, that the claimant would not attend any meetings until he was provided with evidence and allegations; that AA had said the claimant was, in any event, likely to reply 'no comment' to any questions posed to him during such a meeting; and that the claimant and AA had stated that the process and repeated letters were affecting the claimant's health.

253.8. The respondent went on 'In light of the above I believe that my attempt to deal with this matter informally has failed and I instead invite you to attend a formal meeting to be held on Friday 17 May…' The respondent said the meeting would be conducted by an impartial consultant from Peninsula and would follow on from the grievance meeting scheduled for 9 am; that it would be audio recorded; and that a copy of the transcript would be made available to the claimant. He said the 'hearing will discuss the following matter of concern: alleged breakdown of the working relationship between yourself and [the respondent].'

253.9. The respondent went on to say that he was enclosing copies of documents that would be used at the hearing. Those documents included letters/emails from the claimant dated 10 July 2018; 20 July 2018; 18 August 2018; 22nd August, 24th August, 28th August, 3 September, 6 September, 10 September, 11 September, 13 September, 25th September, 26 April, 27th April and 5 May 2019 and letters/emails from AA sent on behalf of the claimant dated 28 April 2019, 29 April, 2 May, 5 May and 6 May. He also referred to, as examples of 'action taken/complaints made against' the respondent, correspondent of 21 August 2018; 8 August; 13 August; 4 September; 11 September; 12 September; 13 September; undated handwriting analysis; and witness statements from other carers.

253.10. The respondent said the meeting would be dealt with by someone who had had no prior involvement in this matter who would provide recommendations to the respondent and that, upon receipt of their report, he would write to the claimant with an outcome. He warned the claimant that his employment may be terminated 'if the allegation is substantiated', adding that any termination 'would not be for your conduct or capability but would be for 'some other substantial reason' because of the breakdown in our working relationship.'

253.11. The respondent added that because the meeting had been arranged in paid working time he considered the requirement for the claimant to attend to be a reasonable instruction.

253.12. The respondent said he did not think it was appropriate for AA to accompany the claimant to employment related meetings because AA had raised claims against him himself and written letters on the claimant's behalf

which the respondent said 'I feel to be of a harassing nature'. the respondent said the claimant could, however, be accompanied by a colleague or Trade Union official.

254. The respondent enclosed with that letter a statement in which he set out certain events, as he saw them. We make the following observations about that statement:

254.1. The respondent said the claimant was a very good carer and QQ enjoyed being with him. They had welcomed the claimant into their family and treated him like a son.

254.2. The respondent said the claimant had been secretly recording them and other staff, passing information to AA and that AA had then used that information to 'put in allegations against myself, my wife and QQ's grandparents.' He said that by the point of the meeting on 27 June 2018 with the council safeguarding team they knew the claimant had 'breached confidentiality by passing on information' to AA.

254.3. The respondent referred to the claimant then raising grievances which, he said, came as quite a shock. He referred to the fact that he had arranged a grievance hearing and then an appeal and said the claimant refused to attend any further meetings; then filed civil proceedings attempting to prevent the appeal hearing from going ahead.

254.4. The respondent described having received correspondence from AA which, he said, was 'becoming more and more threatening' and was causing stress and anxiety to he and his family. The respondent said XX had been diagnosed with depression, stress and anxiety and was having fortnightly counselling sessions as a consequence.

254.5. The respondent referred to being 'constantly bombarded with letters and emails which are intimidating and quite frightening.' He referred to the fact that AA had started to copy in XX to the correspondence despite the fact that she was not the claimant's employer.

254.6. He also referred to the repeated threats from the claimant and AA to report them to the police. He said the claimant had also told them he had reported them to the Crown Prosecution Service.

254.7. The respondent referred to the fact that the claimant continued to accuse him of bullying and harassment whilst he was attempting to carry out his responsibilities as an employer. He said this was making it very difficult for him to carry out those responsibilities as an employer. He also expressed concern about the fact that the claimant had instructed him not to contact him on matters relating to his employment.

254.8. The respondent said there was a now a 'significant lack of trust and confidence as [the claimant] has been covertly recording both myself, my wife and other staff members and shared those recordings with AA who subsequently shared it with other individuals.' The respondent then referred to 'recent events that have occurred over the last 10 months' and said the claimant's behaviour has 'led me to believe he cannot be trusted with the confidential matters relating to my son, myself and my family.' As a family we feel wholly violated and I can see no way in which any trust and confidence could now be restored.'

254.9. The respondent ended the statement by referring to the civil claims the claimant had brought and said 'given the level of abuse, allegations and civil claims that I and my family have received, the level of stress and anxiety placed

upon us as a family would determine that there is a serious breakdown of the relationship with 'the claimant] and [it is] therefore inconceivable that he could return to work now or in the future. The situation has consumed our normal life.'

255. By email of 11 May AA replied to the respondent's letter. He challenged the appropriateness of the meeting; said the meeting was outside the scope of the claimant's basic duties of employment; challenged the decision not to allow AA to attend; claimed it was automatically unfair dismissal to terminate employment for failing to attend a meeting when an employee as said they are unwell; said the claimant may not be well enough to attend; said the claimant's representative would not be available to attend and proposed that the meeting take place on another day at 9pm. He also said the claimant may seek an injunction.

256. The following day AA emailed the respondent again. He asked again to postpone the meeting and said the claimant would call nine witnesses in total at the meeting and that he wanted to question others. He also said the respondent had no right to record meetings (notwithstanding that the claimant himself had previously said he would be recording meetings). In addition, he asked if there was any real need for the respondent's actions given that the respondent was not responsible for paying the claimant's wages.

257. The respondent wrote a letter to the claimant in response to AA's various emails. He told the claimant that he would postpone the meeting to a date within five working days of 17 May but would not be holding the meeting at 9pm. He also told the claimant that the consultant would contact the claimant's witnesses as part of the investigation if the consultant felt it pertinent and that it may be helpful for the claimant to bring witness statements to the meeting if he was able to provide them. He also said the meeting would be recorded to avoid any dispute of the accuracy of any notes.

258. On 14 May the claimant sent an email to the respondent solicitor in which he said "I do not believe [the relationship] is beyond repair." The respondent's solicitor passed that email to the respondent and the respondent wrote to the claimant on 15 May in response. He told the claimant that the next date they could have a meeting falling within the claimant's normal working hours would be 31 May but that he felt it would be in everyone's best interests to hold the meeting sooner and asked the claimant to let him know if there was a date the following week when both the claimant and his union rep would be available. He told the claimant he would be paid if he attended a meeting outside his normal working hours. He added "the formal meeting which will follow your grievance meeting is not a termination meeting. It is my belief that the working relationship has broken down irretrievably however it is only fair that you be given the opportunity to give a view on this. If your view is that the relationship can be salvaged you will need to explain to the consultant why you feel that way.' He went on to explain the process that consultant would follow, including that the consultant would speak to the respondent himself and any witnesses and thereafter prepare two separate reports containing recommendations on the grievance and the question of whether the relationship had broken down and that the respondent would then make a decision on each matter and let the claimant know what that decision was.

259. In the event, the meeting did not go ahead at that time. The claimant had applied to the County Court for an injunction with a view to preventing the respondent from continuing with the meetings.

260. The claimant's injunction application was listed for hearing to take place on 17 June. The claimant and AA attended court on that day as did the respondent and his solicitor. XX also went along to the hearing as did the respondent's sister. We accept the evidence of the respondent and his sister that they were present to support the respondent. The hearing did not in fact go ahead. [the claimant] withdrew his application for an injunction and the parties entered into discussions with a view to resolving their differences. The respondent's sister was made aware that those discussions were taking place. Subsequently, the respondent's sister told her son that it looked like the claim might settle. The respondent's solicitor had been aware of matters concerning the claimant's suspension from the outset: the respondent and XX had told her about the allegations AA had made to the council, including the fact that the council were treating the allegations as, potentially, an allegation of sexual abuse. The respondent's sister had, in turn, shared information with her son, as had her parents (QQ's and Stewart's grandparents).

261. The claimant the respondent did not manage to resolve their differences through negotiation.

262. On 12 August the respondent wrote a letter to the claimant saying "we will now revert to the processes which had been put on hold in anticipation of an agreement being reached.' He told the claimant that his grievance would be heard by a Face2face Consultant from Peninsula on Friday 23 August. The letter went on to say the consultant would then 'discuss the following matter of concern:… Alleged breakdown of the working relationship between yourself and [the respondent].' The letter referred to the claimant's right to be accompanied by a colleague or trade union official and went on to say 'all the details are as per my previous letters…' The letter was sent to AA for forwarding to the claimant.

263. The meeting date was later changed to 6 September. On 5 September AA emailed to the respondent a letter from the claimant. In that letter the claimant informed the respondent that he was giving eight weeks' notice to terminate his employment, the termination to take effect on 31st October. He said "I feel that I'm left with no choice but to resign in light of my recent experiences at the hands of your and your wife's conduct." He made it clear he considered himself to have been constructively dismissed. He referred specifically to: 'failing to adequately hear grievances impartially and furthermore making unwarranted discriminatory comments about me and my potential (though none of your business) sexuality to at least 2 different solicitors and a union official….anticipated breach of contract- in that you are intending to remove me from employment using a false rationale and logic…; breach of trust and confidence- in that your continuous actions and comments to other people outside the scope of my employment is an attempt to damage my reputation and career and that furthermore, you have breached my trust as stated in my handwritten letter to you in April 2019…etc Suspending me from work without solid reason to do so...' He then referred to the 'last straw' being withdrawing offers of settlement and said he did not think the meeting on 6 Sept would be a fair hearing. He said 'my workplace trust in you has reached breaking

point' and 'I feel entirely unsafe in your presence and that of others acting on your behalf.' He alleged again that HH had not been impartial and said he would not be attending the meeting the following day.

264. The respondent emailed a reply via AA. He acknowledged the termination on notice and said the claimant remained an employee until 31 October and that the hearings scheduled for the next day would be going ahead. Referring to the claimant saying he felt unsafe, the respondent said he himself would not be present, that the meeting was scheduled to take place in a public building and that the claimant would be accompanied by a Trade Union official. He urged the claimant to reconsider his decision not to attend. The respondent also said 'Due to the circumstances I feel it is best to place you on gardening leave for the duration of your notice period. You will therefore be paid as per your contractual rights during this time.'

265. There then followed an email from AA which he said was on behalf of the claimant. It read 'Your representative has communicated that [the claimant] is on gardening leave. This is not a term expressly stated within [the claimant]'s contract of employment. We argue that you have now communicated a term that you are not entitled to communicate and have therefore repudiated that contract. [The claimant] therefore accepts that breach on your behalf, and … the contract is now ceased and at an end. ...'

266. Subsequently, the respondent sent the claimant a report prepared by a Peninsula Consultant dealing with the claimant's grievance and the issue relating to confidential information. The author of that report referred to AA as the claimant's 'partner'. The respondent's solicitor had also referred to AA as the claimant's partner in other documents as had someone with whom the respondent had been dealing at the council. The claimant's case is that this is evidence that the respondent and/or XX had used this term to refer to AA and had been discussing the claimant's sexual orientation.

267. The respondent acknowledged that he may have used the term 'partner' when referring to the relationship between the respondent and AA but he said he was using the term in the sense of being 'partners in crime'. XX did not recall using that term. She said she did not know whether AA and the claimant were partners or not but thought that people might perceive them to be partners because they seemed to spend so much time together and would go on holiday together.

268. On balance, we think it more likely than not that the respondent and/or XX did refer to AA as the claimant's partner at some point when discussing him with those advising them, including the council.

Conclusions

Claim of detriment on grounds of protected disclosures

The alleged protected disclosures

269. As recorded above, the protected disclosures the claimant alleges he made are those set out in table form at pages 69 – 76 of the bundle, subject to the correction referred to above.

270. The first of the alleged disclosures concern things the claimant alleges he said about insurance in 2015 and 2016. We have found that the claimant said to the respondent, in January 2015, that it was wrong that he did not have employer's liability insurance, that he had a duty of care to have it for the staff, that he needed to put it on a notice board, and that the respondent needed to sort it out. We have also found that in 2016 the claimant raised again the need for employer's liability insurance and said that the respondent needed to 'put in on a notice board.' During his closing submissions, Mr Howson conceded that, if we find (as we have) that the claimant said these things, they constituted protected disclosures. (These were referred to by the claimant in his witness statement as PID1 and PID2 respectively).

271. We have found that, in July 2016, the claimant told the respondent and XX that QQ's carers needed to be DBS checked. During his closing submissions, Mr Howson conceded that, if we find (as we have) that the claimant said this, it constituted a protected disclosure. (This was referred to by the claimant in his witness statement as PID3).

272. We have found that, in January 2017, the claimant told the respondent and XX that a daily care record was needed for QQ and that the workplace should have fire extinguishers and an accident book and a first aid box. During his closing submissions, Mr Howson conceded that, if we find (as we have) that the claimant said this, it constituted a protected disclosure. (This was referred to by the claimant in his witness statement as PID4).

273. During his closing submissions, Mr Howson also conceded that the claimant made protected disclosures as follows.

273.1. On 19 January 2018, when the claimant told XX that he had not been paid what he was owed for Bank Holidays for the Christmas and New Year period. (This was referred to by the claimant in his witness statement as PID5).

273.2. On 16 March and 13 April 2018, when the claimant told XX that he had not been paid what he was owed because the timesheets he had submitted were wrong. (Referred to by the claimant in his witness statement as PID14 and PID16 respectively).

273.3. On 10 May 2018, when the claimant raised the need for training, at a meeting with the respondent, XX, JJ and the Personalisation Officer from the council. (Referred to by the claimant in his witness statement as PID19).

273.4. On 20 May 2018, when the claimant spoke with the respondent about the new contracts, told the respondent he could not simply TUPE the staff to an agency and said he was working more than 48 hours a week without sufficient breaks. (Referred to by the claimant in his witness statement as PID21).

273.5. On 31 May 2018, when the claimant spoke to the respondent and complained again that he was owed wages and told the respondent that he thought it was fraud that XX claimed wages when QQ was not with her. (Referred to by the claimant in his witness statement as PID22).

273.6. On 7 June 2018 and 10 June 2018 when the claimant complained to the council and XX respectively that there was a shortfall in his pay. (Referred to by the claimant in his witness statement as PID23 and PID24).

273.7. When the claimant said, in his letter of 10 July 2018, that the respondent had made threats to dismiss him, referring to things allegedly said in February, March, May and June of that year, and that the respondent's letter of suspension 'could be construed as an attempt to make an 'unfair dismissal' as an employee has followed 'whistle blowing' procedures.' (Referred to by the claimant in his witness statement as PID26).

273.8. When the claimant's union representative said to HH, in an email of 19 July 2018, 'I assume from your email that you are refusing to rearrange your meeting with [the claimant] so that I can attend…' and asserted that the claimant had the right to be accompanied at the meeting that had been arranged. (Referred to by the claimant in his witness statement as PID27).

273.9. When the claimant said, in his letter of 20 July 2018 and at the meeting with HH on 27 July 2018, that he was still unhappy with holiday entitlement calculations and felt he was owed money. (Referred to by the claimant in his witness statement as PID28).

273.10. When the claimant said, in his letter of 24 August 2018, that he had worked, on some occasions, 13 days in a row with 1 day off then 8 days straight after, referred to the EU Working Time Directive and said there had been a breach of Health and Safety Executive Rules and the law. (Referred to by the claimant in his witness statement as PID29).

273.11. When the claimant said, in his letter of 11 September 2018, that the respondent and XX had permitted him to use a vehicle without adequate insurance. (We believe this is the alleged disclosure referred to by the claimant in his witness statement as PID30. Although he suggests in his table of protected disclosures that the disclosure was made on 6 and 12 September 2018, the letter of 6 September does not disclose the information referred to in the schedule and we have not found that the claimant made any disclosure on 12 September).

273.12. When the claimant referred, in his letter of 13 October 2018, to the respondent having offered HH the use of his cabin and said that could be an offence within the Bribery Act 2010. (Referred to by the claimant in his witness statement as PID31).

Alleged PID6

274. On 26 January 2018 XX received a phone-call from QQ's GP surgery shortly after they had returned from the hospital; the claimant was present and heard elements of the conversation but did not hear everything the caller said; at the start of the conversation, the caller said QQ needed to go back to hospital for a blood transfusion; the caller's initial expectation, whether expressed or not, was that QQ would be taken to hospital that evening; XX questioned whether it was advisable to take QQ straight back, explaining that he had cerebral palsy and had just returned home from the hospital after having a general anaesthetic and was tired; the caller said she would need to check with a senior Doctor and put the call on hold; when she returned she informed XX that the senior doctor had advised not to take QQ back to hospital that evening, to keep a close eye on him over the weekend and bring him to the surgery first thing Monday morning; a double appointment was then made for 8.30am on Monday 29 January 2018. After the telephone conversation, the claimant said to XX that QQ needed to go back to hospital there and then. The claimant's case is that this statement by him constituted a protected disclosure.

275. In our judgement, the claimant's statement that QQ needed to go back to hospital was simply an expression of his opinion, having heard part, but not all, of a conversation between XX and another person. That expression of opinion had no factual content capable of tending to show that QQ's health or safety had been, was being or was likely to be endangered.

276. In any event, we are not satisfied that the claimant reasonably believed that QQ's health was being or was likely to be endangered given that he had heard only part of the conversation between XX and the doctor's surgery: either he had not heard the advice she was given (that QQ should not go back to hospital as initially suggested) or he had heard it and knew his opinion ran contrary to what XX had been advised.

277. It follows that we do not accept that the claimant made a protected disclosure as alleged.

Alleged PID7

278. In early February 2018, the claimant suggested that there should be a system for recording QQ's daily prescription medication, referred to in these proceedings as a CardEx. At the time, the claimant said something along lines of: 'it's needed so the other carers know what QQ has taken daily'. He did not say to XX or the respondent that there was a legal obligation to have such a system in place. Nor was there any suggestion that at any time in the past the claimant had been given too much or too little medication because carers had been unaware of what QQ had already been given.

279. We accept that the claimant thought it would be sensible to have a record of the medication (paracetamol and laxatives) that the claimant was taking. We do not accept that, by suggesting such a system in the way he did, the claimant was disclosing information that he reasonably believed tended to show that anyone had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject or that he was disclosing information that tended to show QQ's health or safety had been, was being or was likely to be endangered. He was simply suggesting something that he thought would be a sensible precaution to guard against the possibility that QQ might otherwise be given too much or too little medication at some point. Therefore, we do not accept that the claimant made a protected disclosure by saying words to the effect that a CardEx system was 'needed so the other carers know what QQ has taken daily'

Alleged PID8

280. The claimant's claim, as particularised in the schedule of disclosures, is that, in early 2018, he reported to the respondent and XX that QQ's grandparents were not filling in the CardEx. As recorded above, we are not persuaded that the claimant did, as he alleges, report to the respondent and/or XX that QQ's grandparents were not filling in the CardEx. Therefore, we do not find that the claimant made a protected disclosure in this regard.

281. We have found that the claimant probably did say something critical to QQ's grandmother about the fact that she and QQ's grandfather were not completing the form. However, the claimant did not give any evidence as to what he actually said to her. That being the case, the claimant has not persuaded us that he disclosed any information to QQ's grandmother, nor that that he reasonably believed that whatever he did disclose tended to show that she had failed, was failing or was likely to fail to comply with any legal obligation to which she was subject nor that QQ's health or safety had been, was being or was likely to be endangered. It follows that we do not accept that the claimant made a protected disclosure as alleged.

Alleged PID9

282. We have found that, in early February 2018, the claimant complained to the respondent and XX that another of QQ's carers, JJ, had been smoking in the bedroom in QQ's flat, that it was not legal to smoke at work and that it was dangerous, was affecting his health, making QQ feel sick, and making QQ's home smell.

283. This was clearly a disclosure of information to the respondent. We accept, given the content of what he said to the respondent, that the claimant believed that it was unlawful to permit employees to smoke in the workplace, that his own and QQ's health had been, was being or was likely to be endangered through passive smoking, and that the information he disclosed tended to show that was the case. Those were reasonable beliefs for the claimant to hold. It was also reasonable for the claimant to believe it was in the public interest to draw this to the respondent's attention, given that the claimant's concern was not merely for his own health but for QQ's a vulnerable person. We find, therefore, that this was a qualifying disclosure. Given that the disclosure was made directly to the respondent, it was also a protected disclosure.

Alleged PID10

284. The claimant's claim, as particularised in the schedule of disclosures, is that, on 14 February 2018, he 'told the respondent and XX that he was seriously concerned with them both for failing to take medical advice seriously' and also that he said to the respondent that he 'can't just sack people/replace people.'

285. As recorded in our findings of fact, we are not persuaded that the claimant did say to the respondent or XX that he was 'seriously concerned with them both for failing to take medical advice seriously.'

286. We have found that the claimant did say 'you can't just terminate people', in response to a comment made by the respondent in the context of the conversation about wills to the effect that it would not be appropriate for the claimant to be an executor because the claimant was just an employee and not family and could be replaced. The claimant's case, as we understand it, is that this was a qualifying disclosure because, in the claimant's reasonable belief, it tended to show that the respondent was likely to fail to comply with any legal obligation to which he was subject. The claimant did not, however, identify any relevant legal obligation and did not say, whether to the respondent in the course of this conversation, or in evidence

at this hearing, in what way terminating his employment would be a breach of a legal obligation. In any event, the claimant had not been dismissed and nor had the respondent said that he intended to dismiss the claimant; he simply alluded to the fact that the claimant may not remain in employment indefinitely. In our judgement, the claimant's statement that 'you can't just terminate people' had no factual content capable of tending to show that the respondent was likely to (ie that it was more probable than not that he would) fail to comply with a legal obligation to which he was subject.

Alleged PID11

287. We have found that, on 15 February 2018, the claimant spoke to a nurse at the hospital and told her that he did not believe that the respondent and XX had been entirely honest about QQ's prescription laxatives the previous day, that QQ was not always being given his laxatives properly and that the doctor had calculated the dosage for the Kleen-Prep solution without this information. We have found that the claimant did so because he was genuinely concerned that there was a risk to the claimant's health. We are satisfied that the claimant reasonably believed that this was a disclosure of information tending to show that QQ's health or safety was being or was likely to be endangered. We also accept that the claimant genuinely believed that his disclosure was in the public interest, being about a vulnerable individual who was reliant on others for his care.

288. The claimant's case is that the disclosure was protected because it was made in accordance with section 43G of the employment Rights Act 1996. To qualify for protection, at least one of the conditions set out in section 42G(2) must be satisfied.

289. The claimant did not say in evidence that, at the time he made the disclosure, he believed he would be subjected to a detriment by the respondent or that evidence relating to the matter would be concealed or destroyed if he made the disclosure to him. We do not find either of those two conditions to be satisfied. Nor, on the facts found by us, had the claimant made a disclosure of substantially the same information to the respondent (or to XX). In this regard we have rejected the claimant's assertion that he said to the respondent and XX that he was 'seriously concerned with them both for failing to take medical advice seriously'.

290. It follows that the disclosure made by the claimant to the nurse was not a protected disclosure.

Alleged PID12

291. At a meeting on 5 March 2018 when the claimant coughed, XX said 'you want to stop smoking.' The claimant replied 'tell your other employee'. He contends that this was a protected disclosure, in that it was a disclosure of information that he reasonably believed tended to show that someone had failed, was failing or was likely to fail to comply with a legal obligation or that his or QQ's health or safety had been, was being or was likely to be endangered. His case, as we understand it, is that he was referring to JJ, whom he believed to be (still) smoking in QQ's flat.

292. We reject the claimant's submission. This was not a disclosure of information. It was simply a sarcastic comment made by the claimant which had no factual content capable of tending to show anybody's health had been, was being or was likely to be endangered or that a legal obligation had been, was being or was likely to be infringed. The claimant may well have believed that JJ was still smoking in QQ's flat but he can have had no reasonable belief that this comment conveyed that fact to the respondent or XX.

Alleged PID13

293. The claimant's case is that he made a protected disclosure in mid-March 2018, about comments made by the respondent and XX at the 5 March meeting, when he spoke, on the phone, to the Review Officer he had met on 5 March. As recorded in our findings of fact, the claimant has not persuaded us that he told the Review Officer about what the respondent and XX had said to QQ. Therefore, we are not satisfied that the claimant made the protected disclosure alleged.

294. Even if we had been persuaded that the claimant had made the alleged disclosure to the Review Officer and that it was a qualifying disclosure, we would not have been satisfied that the disclosure was protected. The claimant contends that the disclosure was made in accordance with section 43G of the Employment Rights Act 1996. However, the claimant did not say in evidence that, at the time he made the disclosure, he believed he would be subjected to a detriment by the respondent or that evidence relating to the matter would be concealed or destroyed if he made the disclosure to the respondent; indeed on the latter point, the claimant was in possession of evidence of the comments as he had covertly recorded the comments made by XX and the respondent. We, therefore, would not have found either of those two conditions to be satisfied. Nor had the claimant made a disclosure of substantially the same information to the respondent. Therefore, none of the conditions set out in section 42G(2) would have been satisfied even if we had been persuaded that the claimant did make a qualifying disclosure as alleged.

Alleged PID15

295. The claimant's case is that he made a protected disclosure in mid-March 2018 when he raised with the respondent his 'concerns surrounding training for all staff members for medication, first aid, manual handling'.

296. We have found that the claimant was genuinely concerned that the staff caring for QQ had not been provided with this kind of training and, in mid-March 2018, he raised those concerns with XX and the respondent, saying words to the effect that those caring for QQ needed to have training in manual handling and use of the hoist and administering medicine. We accept that the this was a disclosure of information that, in the reasonable belief of the claimant, tended to show that QQ's and the carers' health or safety was being endangered. We also accept that the claimant reasonably believed his disclosure was in the public interest: the claimant was not just thinking of his own health but that of others.

297. We are, therefore, satisfied that this was a protected disclosure.

Alleged PID17 and PID20

298. On 9 May 2018, AA made a telephone call to the council and spoke to someone about what he described as safeguarding concerns about QQ. AA followed up that telephone call with a letter to the council dated 18 May. As recorded in our findings of fact, we have rejected the claimant's allegation that AA made the phone-call and sent the letter on the claimant's behalf. It follows that, even if AA disclosed information tending to show a failure within section 43B of the Employment Rights Act 1996, that was not a disclosure that was made by, or that can be treated as having been made by, the claimant.

299. As recorded in our summary above of the claims and issues, AA appeared, at one stage, to suggest that the claimant had been subjected to detriment because he had made protected disclosures to AA that were not particularised in the table. AA resiled from that suggestion when we sought clarification. Notwithstanding that conversation, AA's written submissions continue to maintain that the claimant made protected disclosures to him. That may be because, as is apparent from other matters referred to in those submissions (including the withdrawn holiday pay complaint), they were prepared ahead of the hearing.

300. Had it been the claimant's case that he made protected disclosures to AA we would have rejected that contention. It is for the claimant to prove that he made a protected disclosure. As recorded in our findings of fact, the claimant has shown a marked reluctance to say precisely what information he passed to AA and when he provided that information, and has sought to downplay the significance of any role he may have played in providing AA with information that AA later used when contacting the council. The evidence does not support a finding that the claimant made a qualifying disclosure to AA. Nor, in the absence of any clear evidence from the claimant as to what information he disclosed to AA and why, does the evidence support a finding that any information that the claimant did disclose was disclosed in accordance with any of sections 43C to H of the Employment Rights Act 1996. We note in his submissions that AA suggested that information disclosed by the claimant would have been a disclosure made in accordance with sections 43C (because AA is a friend of QQ and therefore, he claims, owes him a responsibility as a friend), 43D (because AA has unspecified 'qualifications in law' and has helped people with legal proceedings, and/or section 43G. Dealing with each of these in turn:

300.1. AA seems to have misunderstood section 43C. It would only be relevant if the claimant had made a disclosure to AA about a relevant failure by AA or a failure for which AA had legal responsibility. Clearly neither provision has any application here.

300.2. Section 43D applies to disclosures to a legal adviser. We do not accept that the concept of 'legal adviser' extends to anyone who happens, on occasion, to help others with legal issues or provide them with advice as to the law. In any event, clearly a disclosure would only attract protection if the relevant disclosure was made to someone in their capacity as a legal adviser. There is no evidence at all that the claimant disclosed any information to AA fro the purpose of or in the course of seeking legal advice from him.

300.3. Section 43G only applies to disclosures where certain conditions are satisfied. Given that the claimant has not said what he disclosed to AA and why, there is no basis on which we can find that those conditions were satisfied.

Alleged PID18

301. On 9 May 2018, the claimant telephoned the council and alleged that XX was claiming wages for time spent caring for QQ when she was not in fact caring for him and that XX and the respondent had refused to take QQ for a blood test on 26 January, against medical advice.

302. We accept that, in this conversation, the claimant disclosed information that, in his reasonable belief, tended to show that XX was acting fraudulently and had, thereby, failed to comply with a legal obligation to which she was subject and/or had committed a criminal offence. We also accept that the claimant reasonably believed the disclosure was in the public interest given that this concerned the use of public money. It follows that this was a qualifying disclosure within the terms of section 43B of the Employment Rights Act 1996. The claimant's case is that the disclosure was a protected disclosure because it was made in accordance with sections 43C(1)(b)(ii), 43G or 43H. On this matter, out conclusions are as follows;

302.1. Section 43C(1)(b)(ii) is not engaged because the alleged infringement by XX was not something for which the council had legal responsibility.

302.2. The disclosure was not made in accordance with section 43G because none of the conditions in section 43G(2) are satisfied. The claimant's own evidence was that he went to the council because he believed the respondent would not listen to him, not because he believed evidence would be destroyed or that he would face any kind of retaliation if he raised the matter with the respondent. Therefore, we are not persuaded that either of the conditions in paragraphs (a) or (b) of subsection (2) is satisfied. Not is the condition in paragraph (c) satisfied: the claimant had not previously raised this matter with the respondent – he did not raise it with the respondent until 31 May 2018. As none of the conditions in subsection (2) are satisfied, it follows that the disclosure was not protected. It is unnecessary, therefore, for us to reach any conclusions as to whether the other criteria in paragraph (1) are satisfied.

302.3. As for section 43H, this only applies where the disclosure concerns an 'exceptionally serious failure'. The claimant's disclosure concerned something that he believed amounted to criminal behaviour. That, in itself, is insufficient to categorise the failing as 'exceptionally serious'. The condition implies that this provision only applies where the matter is so serious that disclosure to the employer would be inappropriate notwithstanding that there is no reason for the claimant to believe that disclosing the matter to his employer would not result in any retaliation or the destruction of evidence. As it is put in Harvey on Industrial relations and Employment Law 'The implication is that the matter must be so serious that the public interest in its disclosure is of overriding importance.' The reason the claimant gave for making his disclosure to the council rather than the respondent was that he did not think the respondent would listen to him, not that he considered it so serious that he considered it essential to bypass his employer and go straight to the council. In all the circumstances, we do not accept that the disclosure did concern an 'exceptionally serious failure'.

303. It follows that the disclosure about XX wage claims, although a qualifying disclosure within section 43B, was not a protected disclosure because it was not made in accordance with any of sections 43C to 43H.

304. The claimant also alleged during this 'phone-call that XX and the respondent had refused to take QQ for a blood test on 26 January, against medical advice. The claimant's case is that this was a qualifying disclosure because the information disclosed tended to show that XX had endangered QQ's health and that it was a protected disclosure because it was made in accordance with sections 43C(1)(b)(ii), 43G or 43H. On the latter issue, our conclusions are as follows:

304.1. Section 43C(1)(b)(ii) is not engaged because the alleged infringement by XX was not something for which the council had legal responsibility.

304.2. The disclosure was not made in accordance with section 43G because none of the conditions in section 43G(2) are satisfied. The claimant's own evidence was that he went to the council because he believed the respondent would not listen to him, not because he believed evidence would be destroyed or that he would face any kind of retaliation if he raised the matter with the respondent. Therefore, we are not persuaded that either of the conditions in paragraphs (a) or (b) of subsection (2) is satisfied. As for paragraph (c), we concluded that the claimant did not disclose information to XX on 26 January 2018 when he expressed his opinion that QQ should be taken back to the hospital. Therefore, the condition in paragraph (c) is not satisfied. As none of the conditions in subsection (2) are satisfied, it follows that the disclosure was not protected.

304.3. Furthermore, as recorded above, we have concluded that, even on 26 January 2018, the claimant did not reasonably believe that QQ's health was being or was likely to be endangered given that he had heard only part of the conversation between XX and the doctor's surgery. Any belief the claimant may have held that QQ's health had been endangered should have been dispelled by 29 January when he went to the GP surgery with QQ: not only was there was no suggestion then by those responsible for QQ's care that XX had acted improperly by not returning QQ to hospital the previous Friday but it became apparent that QQ did not in fact require a blood transfusion after all. Taking into account all the evidence we find that, on 9 May 2018, when he told the person he spoke to at the council that the respondent (and/or XX) had refused to take QQ for a blood test on 26 January and that this was against medical advice, the claimant did not reasonably believe that the information disclosed was substantially true. Therefore, for that further reason, the disclosure was not made in accordance with section 43G.

304.4. Our finding that the claimant did not reasonably believe that the information disclosed was substantially true means that the disclosure was not made in accordance with section 43H either.

304.5. Furthermore, we are not persuaded that the disclosure concerned an 'exceptionally serious failure', for the same reasons as set out above in relation to the fraud allegation.

305. As the disclosure about XX and the respondent not returning QQ to hospital on 26 January was not made in accordance with any of sections 43C to 43H, it was not a protected disclosure.

Alleged PID25

306. The claimant appears to allege that his suspension from work by the respondent in June 2018 was itself a protected disclosure. Mr Howson conceded that the claimant made a protected disclosure *about* his suspension in his letter of 10 July 2018 (PID26, referred to above). Clearly, however, the suspension itself was not a disclosure of information by the claimant.

Complaint about suspension on 21st June 2018

307. It is not in dispute that the respondent suspended the claimant in June 2018 (albeit that we have found that he suspended the claimant at the end of June rather than on 21 June as alleged).

308. Mr Howson did not accept that this was a detriment: he pointed to the fact that the claimant continued to receive his full contractual pay and submitted that suspension itself is a neutral act.

309. However, the concept of detriment is to be considered from the claimant's perspective. The suspension may have been 'neutral' from the respondent's perspective but from the claimant's it was not. The claimant and QQ were friends and the claimant's suspension deprived him of the ability to spend time and interact with QQ. In addition, being suspended meant the claimant lost the opportunity to work overtime and thereby increase his pay. In the circumstances we accept that a reasonable worker in the claimant's position might take the view that suspension was to his detriment.

310. It is therefore necessary for us to consider whether the Respondent subjected the Claimant to that detriment on the ground that the claimant had made one or more protected disclosures.

311. The respondent's case is that he suspended the claimant because he believed the claimant had disclosed confidential information to AA and he considered it appropriate to suspend the claimant so that that matter could be investigated. We have found as a fact that the respondent and XX believed that the claimant had passed information to AA about matters concerning QQ, including information about the phone call XX had received on 26 January 2018 saying QQ needed a blood transfusion, QQ's sleeping arrangements at his grandparent's house, copies of photographs of care documents and diary entries and information about QQ's finances and how they were managed. This clearly prompted them to suspend the claimant whilst they sought to investigate with the claimant exactly what information he had passed to AA and what reasons he might have for doing so. That is apparent from the chronology (the claimant's suspension taking place immediately after the meeting with the council to discuss AA's allegations), the letter informing the claimant of his suspension and the subsequent attempts by the respondent to arrange a meeting with the claimant to discuss the issue.

312. For reasons explained above, whatever the claimant may have disclosed to AA, that was not a protected disclosure.

313. It is equally apparent to us that the claimant's suspension was materially influenced by the fact that the respondent and XX believed that the claimant had been somehow complicit in AA making the allegations to the council, in that they believed the claimant knew about AA's allegations and had provided him with information that formed the basis of the allegations: that is apparent from XX' message to the claimant on 21 June 2018 and the statement compiled by the respondent in May 2019. The respondent and XX were extremely distressed by the allegations and understandably so, especially as the council had suggested to them that one of the allegations made against QQ elderly grandparents may be 'tantamount to sexual abuse': although those were not the words used by AA, that is how the council put the matter when first making XX aware of the allegations, seemingly because AA had suggested there was something improper about a man of QQ's age sharing a bed with his grandparents. There were also allegations that the respondent and XX were themselves exposing their son to harm.

314. Although it follows that the respondent's decision to suspend the claimant was materially influenced by AA's phone-call to the council on 9 May 2018 and his letter to the council of 18 May 2018, we have found that neither of those communications was a protected disclosure by the claimant.

315. Nor was the claimant's suspension influenced by the claimant's own phone-call to the council on 9 May 2018: we have found that XX and the respondent were unaware he had made that phone-call and, in any event, the claimant did not make protected disclosures during that telephone call.

316. Similarly, the decision to suspend the claimant was not influenced by what the claimant said to the council's review officer in March 2018 or to the hospital nurse on 15 February 2018. We have found that the respondent and XX did not know of those conversations and, again, they did not constitute protected disclosures in any event.

317. The respondent did make other protected disclosures before he was suspended but we find that these did not materially influence the decision to dismiss for the following reasons:

317.1. We accept that the respondent and XX were finding it difficult to cope with the day to day responsibilities of employing staff. They had expressed that frustration in the meeting on 10 May 2018 and it is apparent that they were considering whether they wished to continue employing any staff. The evidence of the respondent when questioned suggested that his main frustration was with what he considered to be bickering between the claimant and JJ about whether they were each pulling their weight. However, the fact that the claimant had complained about his pay being incorrect on a number of occasions in 2018 (which Mr Howson conceded were protected disclosures) may well have added to the respondent's sense of frustration: although the respondent was not responsible for paying the claimant, he and/or XX had to spend time dealing with pay issues when they were raised. Furthermore, although XX and the respondent took steps to arrange training via the council after the matter was raised by the claimant (including in protected disclosures), and the respondent himself said in the meeting of 10 May 2018 that the claimant's suggestion about

manual handling training had been a good idea, this was another matter that XX and the respondent had to spend time dealing with with the council and may have added to a growing unease at the amount of time they were having to devote to employment matters. The fact that the claimant complained about his hours of work on 20 May 2018 can only have added to the concerns of the respondent that dealing with staff matters was taking up too much time.

317.2. However, it appears to us that the respondent's concerns were not specifically with employing the claimant: we accept he and XX considered him to be a good worker and good friend to QQ. The concerns they had were with the idea of employing anyone at all.

317.3. Furthermore, had the respondent wished to divest himself of the stresses and pressures that are part and parcel of being an employer, the simple solution would have been to do what the council had said he could do and hand over responsibility for providing care to an agency. Although Mr Howson concedes that the claimant made a protected disclosure on 20 May 2018 when the claimant said to the respondent he could not simply TUPE staff to an agency, the claimant's opinion on that matter is not something that would have been a barrier to the respondent taking that course of action had he been so inclined.

317.4. Looking at the evidence in the round we are satisfied that none of the protected disclosures the claimant made about pay, training, hours of work or the claimant not being able to 'simply TUPE staff to an agency' before his suspension materially influenced the decision to suspend the claimant or, for that matter, any of the respondent's actions subsequent to the suspension.

317.5. Nor do we find that the claimant's suspension was influenced by his assertion on 31 May 2018 that it was fraud when XX claimed wages when QQ was not with her. There is no evidence that the respondent was at all perturbed by the claimant's statement.

317.6. The claimant made a protected disclosure in early February 2018 about another staff member smoking. The respondent took action to put a stop to that and there is no evidence that it materially influenced the claimant's suspension or any subsequent action by the respondent. Indeed we accept XX evidence that she is against people smoking around QQ and in his home, which suggests she would have welcomed the claimant letting her and/or the respondent know that another member of staff had been smoking.

317.7. The claimant made protected disclosures in 2015 and 2016 about insurance and in January 2017 about the need for a daily care record, first aid kit, fire extinguisher and accident book. The comments about insurance were made years before the claimant's suspension and the other issues were raised some 17 months before suspension. There is no basis on which we would properly infer that they played any part in the claimant's suspension or any events that occurred afterwards.

318. It follows that the claimant's complaint that his suspension was a detriment done on the ground that he made a protected disclosure is not made out.

Complaint about the respondent's attempts or proposals to dismiss the claimant at meetings in September 2018, March 2019 and September 2019

319. When the respondent suspended the claimant he made it clear that the purpose of the suspension was to allow an investigation to take place into whether the

claimant had disclosed confidential information to AA and that disciplinary action may follow depending on the outcome of that investigation. No doubt the respondent had intended to arrange a meeting with the claimant as part of that investigation. However, before that meeting could be arranged, the claimant lodged a grievance. the respondent then decided not to pursue the investigation pending resolution of the grievance proceedings. The grievance meeting took place in July 2018, following which HH produced a report outlining his conclusions. The claimant then immediately appealed and the respondent arranged for the appeal to be considered by a different Consultant at a meeting on 3 September 2018. That meeting was rescheduled to 17 September but did not go ahead because the claimant refused to attend and applied for an injunction to prevent the meeting taking place and prevent any disciplinary investigation.

320. The respondent did nothing in September 2018 that could be construed as an attempt or proposal to dismiss the claimant: the meetings were arranged to consider the claimant's own appeal against the way HH had dealt with his grievance.

321. If and in so far as this complaint concerns the decision in June 2018 to investigate whether the claimant had passed confidential information to AA, the reasons for instigating that investigation were the same as the reasons for suspending the claimant: as already explained, none of the claimant's protected disclosures materially influenced that decision.

322. Nor did the respondent do anything in March 2019 that could be construed as an attempt or proposal to dismiss the claimant. The respondent did, however, seek to restart the stalled investigation into the alleged breach of confidentiality in April 2019, when he wrote to the claimant telling him that he was required to attend an investigation meeting on 3 May 2019. We do not accept that it is appropriate to characterise that meeting as an attempt or proposal to dismiss the claimant. It was a meeting for the purpose of investigating what information the claimant had passed to AA and if the claimant may have breached confidentiality by doing so. We do not accept that the respondent subjected to detriment as alleged by attempting or proposing to dismiss the claimant.

323. Nevertheless, we accept that the claimant probably subjectively viewed it as detrimental to him to have to attend a meeting to explain his conduct (even though that meeting did not, in the end, go ahead). It was clear from the terms of the letter arranging the meeting that disciplinary action could follow: a person in the claimant's position could reasonably perceive having to justify his actions as being to his detriment. That does not mean, however, that we consider that the respondent's actions were not justified; we simply find that the claimant could reasonably have perceived it as detrimental to have to explain himself, in the knowledge that if the respondent was not satisfied with his answer then disciplinary action could follow. That being the case, we have considered whether the respondent's instruction that the claimant attend the meeting on 3 May 2019 was itself done on the ground that the claimant made a protected disclosure.

324. It is clear to us that the reason the respondent arranged this meeting is that the matters that caused him to suspend the claimant in June 2018 remained matters of concern to him. Although the respondent did not spell out in the April letter what

conduct was being investigated, we are satisfied from the respondent's evidence that it was the same issue that he suspended the claimant for in June 2018. This is supported by the fact that the respondent wrote to the claimant in March 2019 making clear that the reasons for the claimant's suspension remained the same. The investigation into that matter had not progressed the previous year, initially because the claimant brought a grievance and the respondent and the claimant both thought that should be addressed ahead of the disciplinary investigation. The claimant then applied for an injunction with a view to preventing both the grievance appeal and the investigation into the alleged breach of confidence. When the respondent said in his letter of 30 October that he intended to continue with the conduct investigation, the claimant threatened to apply for an injunction again to prevent him from doing so. The respondent then put the matter on hold pending a determination by the Employment Tribunal as to the identity of the claimant's employer. Once that matter had been determined, the respondent sought to raise the conduct issue again by arranging, by his letter of 25 April 2019, for an investigation meeting to take place on 3 May 2019. Just as the initial decision, in June 2018, to suspend the claimant and investigate potential misconduct was not materially influenced by any of the claimant's protected disclosures, not was this attempt to progress that investigation. We acknowledge that the claimant had, by this time, made further allegations that the respondent concedes were protected disclosures (in July, August, September and October 2018). However, it is clear that even before those disclosures were made the respondent intended to investigate the suspected breach of confidentiality and it was only the fact that it was considered prudent to deal with the grievance first and then the claimant's continued efforts to prevent the investigation taking place that prevented it from progressing sooner.

325. The claimant also complains that the respondent attempted or proposed to dismiss him in September 2019. This is a reference to the fact that, on 12 August 2019, the respondent arranged a meeting (initially to take place on 23 August but then rearranged for 6 September) at which there was to be a discussion about an 'alleged breakdown of the working relationship between the claimant and respondent'. The respondent first proposed a meeting to discuss this in May 2019, and we have considered that proposed meeting alongside the September meeting.

326. Considering, first of all, whether the instruction to attend these meetings constituted a detriment, we observe that the claimant himself in his letter of 27 April 2019 said that the respondent and XX had destroyed his trust in them. Further evidence that the claimant no longer had trust or confidence in the respondent as his employer (or XX) can be found in the fact that, having previously insisted that the respondent communicate with him only by post, by April 2019 the claimant made it clear he did not wish the respondent to communicate with him at all directly, insisting that the respondent should only communicate with AA and threatening to go to the police if the respondent contacted him; he also made it clear that he would not cooperate with the investigation into his alleged misconduct (AA saying he would either not attend or simply answer 'no comment' in any investigation meeting); he repeatedly applied for and threatened to apply for injunctions to prevent the respondent from investigating his alleged misconduct or even from dealing with his grievances; and he brought other civil claims against the respondent and XX, making wide-ranging and unparticularised allegations against them. We have cited much of the correspondence from the claimant and AA at length in our findings of

fact to demonstrate the tenor of the claimant's communications with the respondent. The claimant repeatedly criticised the respondent, including for not responding immediately to his requests for documents, (notwithstanding that the respondent, as the claimant knew, had a full time job to attend to); for referring to himself as a company; for saying he would record meetings (notwithstanding that the claimant himself has said he wished to record meetings). Given the level of distrust the claimant was demonstrating towards the respondent, on the face of it a meeting to discuss whether the relationship had broken down may not be considered detrimental to the claimant as the claimant's own behaviour indicated that he agreed that the relationship had broken down. However, it was apparent from the respondent's letter to the claimant of 9 May 2019, and the statement enclosed with that letter, that the respondent was holding the claimant responsible for the relationship breaking down. Furthermore, notwithstanding all the evidence pointing to the claimant believing that the relationship had broken down, he said in an email of 14 May that he did not think the relationship was beyond repair. Unlike the previous meetings to investigate the claimant's alleged misconduct, in the statement accompanying the 9 May letter, the respondent made it clear that he believed the relationship had broken down. It was clear that termination would follow unless the claimant could persuade the respondent that the relationship was salvageable. In all the circumstances, we find that the instruction to attend the meetings in May and then September to discuss the breakdown in the relationship could reasonably be perceived as detrimental by someone in the position of the claimant and was so perceived by the claimant.

327. As for the reason the respondent was considering terminating the claimant's employment, the respondent said this was because the respondent believed the relationship had broken down. In a statement accompanying the letter of 9 May the respondent explained his position. We accept that he genuinely did believe at that time that the relationship had broken down and that is why he tried to arrange a meeting with the claimant, first in May 2019 and then in September 2019. We find the reasons the respondent formed that view were those set out in the statement he sent with his letter of 9 May. Those reasons included:

327.1. The respondent's belief that the claimant had secretly recorded them and other staff.

327.2. The respondent's belief that the claimant had passed confidential information to AA who had then used that information to make allegations to the council about the respondent and XX and the respondent's parents. The claimant had steadfastly refused to explain what information he had disclosed to AA and had made it abundantly clear that he would not cooperate with the respondent's attempts to investigate the matter.

327.3. The fact that the claimant had failed to cooperate with his attempts to deal with his grievances and had attempted to prevent the appeal hearing from going ahead by applying for an injunction.

327.4. The tone of the correspondence sent by AA in April and May 2019.

327.5. The sheer volume of correspondence that he was having to deal with from the claimant and AA.

327.6. The repeated threats from the claimant and AA to report them to the police.

327.7. The fact that the claimant had instructed him not to contact him on matters relating to his employment and accused him of bullying and harassment when he tried to arrange meetings to discuss the claimant's grievances and investigate the claimant's conduct.

327.8. The fact that the claimant had repeatedly made or threatened applications for injunctions to prevent him holding grievance meetings or investigating whether the claimant had disclosed confidential documents.

327.9. The fact that the claimant had made wide ranging civil claims against him and XX.

328. We accept that all of the above had, as the respondent said, placed a huge amount of stress and anxiety upon the respondent and his family and had, in his words, consumed their normal life. He was an inexperienced employer who had a full time job to do. As a consequence of the above, the respondent believed the relationship had broken down and there was no sign that it would improve. That belief was also influenced by the fact that the claimant himself had said and had demonstrated, through his actions, that he did not trust the respondent or XX. That is the reason the respondent sought to meet with the claimant in May 2019 and, after negotiations had broken down, in September 2019.

329. As with the claimant's suspension, we find that this decision was influenced by the allegations AA made to the council in May 2018. These were not protected disclosures, however. Again, we do not consider that the decision was influenced by any of the protected disclosures made by the claimant before his suspension, any more than the suspension itself was influenced by those earlier disclosures.

330. As for the disclosures that took place after the suspension, having considered all the evidence as a whole we have reached the conclusion that those disclosures did not materially influence the respondent's decision that the relationship had broken down, for the following reasons:

330.1. We acknowledge that letters containing those disclosures were amongst those referred to in the respondent's letter of 9 May 2019. Reading those references in context, however, the respondent appears to have been illustrating the volume and extent of the correspondence he had had to deal with from the claimant since he had been suspended.

330.2. Mr Howson has conceded that the claimant's letters of 10 and 20 July 2018 contained protected disclosures, repeated by the claimant in a grievance meeting on 27 July. Far from dismissing the grievance out of hand, the respondent recognised that the matters raised should be looked into and arranged, promptly, for HH to do just that. The claimant suggested in cross examination that someone with no connection at all to the respondent should have been identified to deal with his grievance. That is simply unrealistic, as was apparent from the claimant's response when asked on cross-examination who the respondent should have asked to look into the claimant's grievance; the claimant's response was that he should have selected somebody at random. Although the claimant has criticised the appointment of HH, we consider that, in deciding to ask him to look into the grievance, the respondent did the best he could with limited options. The respondent did not interfere with the way HH dealt with the grievance, as is apparent from the conclusions reached by him.

The grievance itself was dealt with reasonably well, we find. The outcome was, on its face, fair and balanced and broadly in favour of the claimant, albeit that not every point the claimant made was accepted. We reject the allegation that the respondent bribed HH: he simply offered him the use of his cabin as a token of his gratitude and to compensate HH for his time. Had the respondent sought to influence the outcome of the grievance the outcome would not have been so favourable to the claimant. Furthermore, when the claimant appealed HH's conclusions the respondent arranged for that appeal to be considered by someone else. The fact that the respondent dealt with the claimant's grievances in this way weighs against the claimant's claim that, some eight months later, the fact that those grievances were raised motivated the respondent to threaten the claimant's employment.

330.3. Mr Howson conceded that the claimant's union rep made a protected disclosure on his behalf to HH on 19 July 2018 about his assertion that the claimant was not entitled to be accompanied at the grievance meeting. There is no evidence that the respondent was even aware of this exchange at the time, which seems to have been something of a storm in a teacup. HH and the claimant's union rep disagreed about whether the claimant had a right to be accompanied at the meeting with HH. Notwithstanding HH's initial reluctance to reschedule the meeting to enable the claimant's union rep to attend, he did relent and the claimant had his union rep with him at the grievance meeting. Furthermore, when the claimant referred to the matter in his grievance appeal the respondent arranged for someone else to look into it. The evidence does not suggest the respondent bore the claimant any ill will for raising this issue.

330.4. Mr Howson has conceded that the claimant's letters of 24 August 2018 and 11 September 2018 contained protected disclosures. In response to the claimant's request, the respondent provided documents concerning the matters raised, promptly, to the extent it was in his power to do so. There is no evidence of reluctance on the part of the respondent to do so at the time nor of any attempt to conceal matters. We accept that the respondent was frustrated by the claimant's many demands for documents but the evidence does not support an inference that the fact of the disclosure itself materially influenced the respondent's conclusion 9 months later that the relationship had broken down.

330.5. Similarly, the allegation made by the claimant on 13 October about alleged bribery was made some seven months before the respondent sought to arrange a meeting to discuss the apparent breakdown in the relationship.

331. It follows that we reject the claimant's complaints that the respondent subjected him to detriment on the ground that he made protected disclosures by taking action described by the claimant as 'attempts or proposals to dismiss' him in 2018 and 2019.

Complaint about the length of suspension from 21st June 2018 to 5th September 2019 when he resigned

332. The reason the claimant's suspension lasted as long as it did is that the claimant resisted all attempts by the respondent to investigate the matter that had led to the claimant's suspension. Almost immediately after his suspension, the claimant raised a grievance. The claimant himself made it clear that he wished the investigation into the alleged breach of confidentiality to be postponed pending the consideration of

his grievances; he then applied for an injunction with a view to preventing the investigation going ahead; when he withdrew the injunction application he made it clear that he considered it inappropriate to continue with the investigation whilst the Tribunal proceedings were in train; even after EJ Shepherd had ruled that the claimant was employed by the respondent and not QQ as the claimant had asserted, the claimant refused to cooperate with the respondent's attempts to investigate whether or not the claimant had divulged confidential information to AA.

333. The duration of the claimant's suspension was in no way influenced by any protected disclosures made by the claimant.

334. This complaint is not made out.

Complaint about the claimant's pay being reduced during the period of the suspension

335. During the period of his suspension, the claimant was paid the amount he would have been paid if he had worked his normal working hours. Because the claimant was not working, however, he did not have the opportunity to increase his pay by working overtime. That is the only sense in which the claimant's pay was 'reduced' during his suspension. That reduction in pay was simply a consequence of the fact that the claimant had been suspended. It was not detrimental treatment done on the ground that the claimant had made any protected disclosures.

336. This complaint is, therefore, not made out.

Complaint about the respondent allegedly giving confidential information about the claimant to members of the public.

337. The claimant confirmed in his further particulars of this allegation that he alleges that the respondent gave confidential information about him to a KK when he spoke to him in June 2018 and November 2018.

338. In June 2018, the respondent was in a bar with QQ when he encountered KK, with whom he was friendly. QQ said that the claimant had "been sacked". The respondent immediately corrected QQ, saying he had not been sacked. We find it more likely than not that the respondent added that the claimant had been suspended, given that that was the account set out by the respondent in a document he wrote on 3 November 2018, and that it was a long story, as KK said.

339. We find that the respondent had been put on the spot on this occasion by QQ saying, incorrectly, that the claimant had been sacked. The respondent, quite properly, felt the need to say something to correct the impression QQ had given. In doing so, he gave an honest answer by saying the claimant had been suspended. A more diplomatic response might have been to say that the claimant was away from work. However, that could have generated further questions from QQ. It appears to us clear from the respondent's reply that he was trying to shut the conversation down as quickly as possible without being drawn further. The respondent is the best judge of how QQ was likely to react to certain types of input. In the circumstances,

we are not persuaded that a reasonable worker would or might take the view that he or she had been disadvantaged by this comment.

340. In any event, the respondent's comment was not materially influenced by any protected disclosure made by the claimant any more than the decision to suspend the claimant was so motivated.

341. On 2 November 2018, KK approached the respondent and told him the claimant had asked him to sign witness statements. The respondent explained that the claimant had been suspended and the reasons why. He said unfounded allegations had been made that he and his family were abusing QQ. KK then said he did not like AA and the respondent said he had nothing against the claimant and everything would have been okay if the claimant had got rid of AA sooner.

342. This was a private conversation between two adults who were in a friendly relationship. The conversation was instigated by KK not the respondent. KK already knew the claimant had been suspended. It is clear from statements signed by KK before this date that the claimant himself had already given KK his version of events. That being the case, the claimant could not have had any reasonable expectation that the respondent would not himself speak to KK about the claimant's suspension. In any event, the respondent's comments were not materially influenced by any protected disclosure made by the claimant any more than the decision to suspend the claimant was so motivated.

343. The claimant also suggested that the respondent had shared information with Mr HH and with the Human Resource manager at the company at which the respondent worked.

344. We have not found that the respondent shared confidential information about the claimant with the Human Resource manager at his place of work, as alleged.

345. As for HH, the claimant seems to be suggesting that the respondent should not have provided him with the claimant's contact details. We reject the suggestion that there was anything detrimental about sharing the claimant's contact details. HH needed to contact the claimant to deal with his grievance.

346. The claimant also refers to the fact that XX told the day centre that the claimant had been suspended. We accept she did so. She had reasonable and proper cause for so doing as it was important that the day care centre know about a change of carer. We also accept it was important that they knew the claimant should not be allowed to see QQ whilst the investigation was pending. There is no evidence that XX was acting in the course of employment when she spoke to the manager of the day centre about this. In any event, what she said was not materially influenced by any protected disclosure made by the claimant any more than the decision to suspend the claimant was so motivated.

347. The claimant complains that the respondent told his nephew, Stewart, about the claimant's suspension and other matters relating to his employment. We have not found that to be the case. The respondent did share information with his sister about the claimant's suspension and the reasons for it and she was privy to the fact that

settlement discussions were taking place in June 2019. However, the fact that the respondent shared information with her about the claimant's suspension and settlement discussions was not materially influenced by any protected disclosures made by the claimant any more than his suspension.

348. The claimant also refers to the fact that people he played football with were aware of his suspension as were other carers. That may well be the case and it could be that information reached those people via PP, who knew of what was happening through his mother and grandparents. Alternatively, it could be that people were aware of the claimant's situation because he himself had spoken to many people about his suspension. The claimant simply has not proved that, if people knew about his work circumstances, that was because the respondent had breached his confidence.

349. The claimant's complaints that the respondent subjected him to detriments for making a protected disclosure by sharing confidential information with members of the public is not made out.

350. In conclusion, none of the claimant's complaints that the respondent contravened section 47B of the Employment Rights Act 1996 by subjecting him to detriments on the ground that he made a protected disclosure are well founded.

Unfair constructive dismissal

Allegation that the respondent breached the implied term of trust and confidence by failing to deal with the claimant's grievance in a fair and reasonable manner throughout the grievance process.

351. When the claimant raised formal grievances in July 2018, the respondent arranged for them to be considered by HH.

352. The respondent could have considered the claimant's grievance himself but he decided instead to arrange for a third-party to look into them.

353. The claimant criticises the decision to ask HH to deal with the grievance because he and the claimant worked at the same company and must have been known to each other. He also criticises the decision to appoint a consultant from Peninsula to consider his appeal against the grievance. We reject those criticisms. The respondent had limited options available to him. The idea put forward by the claimant in cross-examination that the respondent should have selected someone 'at random' to deal with his grievance is risible. HH was, on the face of it, appropriately qualified for the role as were Peninsula consultants. The respondent had reasonable and proper cause to ask him to look into the claimant's grievance and, viewed objectively, his doing so was not calculated or likely to destroy or seriously damage the relationship of trust and confidence.

354. The respondent did not interfere with the way HH dealt with the grievance, as is apparent from the conclusions reached by him. We have rejected the allegation that

the respondent bribed HH: he simply offered him the use of his cabin as a token of his gratitude and to compensate HH for his time.

355. In addressing the grievance, HH considered the major issues raised by the claimant. He spoke to others involved and considered documents. He produced a report explaining his conclusions. The outcome was, on its face, fair and balanced and broadly in favour of the claimant, albeit that not every point the claimant made was accepted. The claimant complained in his appeal that HH did not take his enquiries as far as he could have done. It may well be that more extensive enquiries could have been made but the question is not whether HH left any stones unturned: it is whether the respondent afforded the claimant a reasonable opportunity to have his grievance heard. The respondent did so, in our judgement: the investigation was proportionate to the issues concerned, bearing in mind the size and resources of the claimant's employer.

356. Indeed in our view the respondent went further than could reasonably be expected of him by giving the claimant the right to appeal against the outcome of his grievance to another third party. Arranging for that appeal to be considered by a consultant from Peninsula can not, reasonably, be considered a breach of the implied term of trust and confidence, notwithstanding that a different limb of the company was advising the respondent on employment issues. As we have already identified, the respondent had limited options open to him and the reality was that, whoever he appointed to deal with the appeal would have some relationship to him.

357. The claimant was unhappy with the fact that HH initially declined to reschedule the meeting in July so that the claimant's union rep could attend. However, that issue was resolved fairly quickly in the claimant's favour. We reject the suggestion that HH's approach to this issue was calculated or likely to destroy or seriously damage the relationship of trust and confidence that existed between the claimant and the respondent.

358. The claimant also criticises the fact that the notetaker was a good friend of the respondent. The notetaker was simply present to take notes. There is no evidence that she played any part in HH's decision-making process and we reject the claim that having a family friend taking notes of a meeting was calculated or likely to destroy or seriously damage the relationship of trust and confidence

359. The claimant criticises the respondent for not having a written grievance procedure. The claimant had a statement of terms and conditions that set out how any grievance should be dealt with and was in line with the ACAS Code of Practice and what one could reasonably expect from a small employer. The absence of a more extensive written procedure can in no sense whatsoever be considered likely to destroy or seriously damage the relationship of trust and confidence that existed between the claimant and the respondent.

360. The claimant also criticised the respondent for arranging meetings at council owned buildings. There is no merit whatsoever to this complaint. Buildings are not biased. The meetings had to be held somewhere and the council were willing to make premises available for that purpose. In no way was that calculated or likely to

destroy or seriously damage the relationship of trust and confidence that existed between the claimant and the respondent.

361. For those reasons we reject the allegation that the respondent breached the implied term of trust and confidence by failing to deal with the claimant's grievance in a fair and reasonable manner.

Allegation that the respondent breached the implied term of trust and confidence by inviting the claimant to a disciplinary meeting/hearing in March/April 2019.

362. The respondent sought to restart the stalled investigation into the claimant's alleged breach of confidentiality in April 2019, when he wrote to the claimant telling him that he was required to attend an investigation meeting on 3 May 2019.

363. The respondent believed the claimant had disclosed confidential information to AA and he wished to carry out in investigation. The respondent had a reasonable basis for that belief, not least because AA appeared to have come into possession of copies of documents concerning the claimant's care and information about a conversation in January 2019 that only the claimant and XX were privy to. The claimant's terms and conditions made it clear that information about the family was confidential. On the face of it, the respondent had reasonable grounds to suspect that the claimant had breached that term.

364. The respondent had reasonable and proper cause to require an explanation from the claimant and to instigate a formal investigation to ascertain the facts. The respondent had a responsibility to QQ to preserve his confidentiality and had grounds for concern that, if the claimant had disclosed confidential information to AA, he might do so again.

365. By April, despite his efforts to engage with the claimant on this issue, the respondent had yet to get to the bottom of the confidentiality issue. The respondent had reasonable and proper cause to wish to investigate that issue and require the claimant's attendance at a meeting to explain what information he had passed to AA and why. Furthermore, his arranging this meeting was not, viewed objectively, calculated or likely to destroy or seriously damage the implied trust and confidence between employer and employee.

366. For those reasons we reject the allegation that the respondent breached the implied term of trust and confidence by arranging this meeting.

Allegation that the respondent breached the implied term of trust and confidence by inviting the claimant to a disciplinary hearing/meeting in May 2019.

367. The respondent arranged a meeting in May 2019 to discuss an 'alleged breakdown of the working relationship between the claimant and respondent'.

368. We have set out the reasons for arranging that meeting above in addressing the complaints of detrimental treatment. In summary:

368.1. the respondent did not trust the claimant with confidential information and he believed the claimant did not trust him;

368.2. the claimant had resisted the respondent's attempts to discuss the allegation that he had breached Martin's confidence and was continuing to do so, refusing to engage with any kind of investigation process; he was even demonstrating reluctance to engage with the grievance process;

368.3. since the grievance meeting in July 2018, every time any further meeting was arranged the claimant gave a reason not to attend, even when the purpose of the meeting was to address the claimant's own grievance;

368.4. the respondent already had his own full-time job, alongside which he was facing a barrage of demands and correspondence from the claimant and lately from AA, threatening to go to the police and litigating in several different forums. The claimant appeared to be expecting the working relationship to be conducted through the courts.

369. It is clear that things could not continue in this way with the claimant refusing to cooperate. The claimant had been suspended for 10.5 months by this time. That was not sustainable. One of the reasons for the meeting arranged for May was to have a discussion about whether or not the relationship was retrievable. This gave the claimant an opportunity to say if he believed the relationship was salvageable. It was not inevitable that point that the relationship would terminate: although the respondent had formed a view on the matter we accept that he was willing to hear what the claimant had to say. Resolving the issue of the breakdown of the relationship was in the claimant's best interests as well as that of the respondent. However stressful claimant might have found it, it was the only way things could be moved forward and although, in April, the claimant's GP had said he was fit for basic duties: that did not suggest there was a health reason that would prevent the claimant attending meetings to discuss work issues.

370. In all the circumstances, we find that the respondent had reasonable and proper cause for acting as he did in arranging this meeting. Furthermore, his arranging this meeting was not, viewed objectively, calculated or likely to destroy or seriously damage the implied trust and confidence between employer and employee.

371. For those reasons we reject the allegation that the respondent breached the implied term of trust and confidence by requiring the claimant to attend these meetings.

Allegation that the respondent breached the implied term of trust and confidence by disclosing to PP on or about July 2019 the contents of confidential settlement negotiations between the claimant and the respondent.

372. PP knew that there had been settlement negotiations because his mother (the respondent's sister) had told him. She and her parents also told PP about the allegations AA had made to the council. There is no evidence that the respondent or XX themselves shared information with PP.

373. The claimant contends that the respondent breached the implied term of trust and confidence by permitting the respondent's sister to be present on 17 June 2019 when settlement negotiations were ongoing. We disagree. The respondent's sister

was present to support the respondent and XX. The respondent had reasonable and proper cause for wanting her support at a stressful time.

374. In any event, the court proceedings were not a private matter. Viewed objectively, the respondent's actions in allowing his sister to be privy to the fact that settlement negotiations were in train was not something that was calculated or likely to destroy or seriously damage the implied trust and confidence between employer and employee.

375. For those reasons we reject the allegation that the respondent breached the implied term of trust and confidence as alleged.

Allegation that the respondent breached the implied term of trust and confidence by inviting the Claimant to a disciplinary hearing/meeting in September 2019.

376. The respondent arranged a meeting in September 2019 to discuss an 'alleged breakdown of the working relationship between the claimant and respondent'. The respondent had originally sought to arrange this meeting in May 2019. The reasons for attempting to rearrange the meeting for September remained the same and for the same reasons we find the respondent had reasonable and proper cause for acting as he did in arranging the September meeting and that his arranging this meeting was not, viewed objectively, calculated or likely to destroy or seriously damage the implied trust and confidence between employer and employee.

Suspension/garden leave

377. AA, in his written submissions, appears to suggest that the respondent breached the claimant's contract of employment by suspending him and, after he had resigned, placing him on garden leave.

378. As explained in our summary of the legal framework, we have rejected AA's submission that because there was no express term permitting suspension and garden leave then the respondent's actions were inevitably a breach of contract.

379. The claimant's written terms and conditions of employment set out his hours of work as a total of 123 hours and 10 nights, working alternate weeks comprising 22.5 hours plus 4 nights and then 39 hours plus one night. Those hours were subject to the employer's right to change the hours of work as required. The terms provided for the claimant to be paid £7.75 per hour and £81 per waking night.

380. On the face of the document containing those terms, nothing suggests to us that the terms of the claimant's contract, properly construed, expressly or impliedly obliged the respondent to permit the employee to do the work he was engaged to do: his pay was not dependent on carrying out work as would be the case for, say a piece worker, and not did the claimant's role involve the use of skills that could atrophy if not exercised continuously. Indeed, the nature of the claimant's work, providing one to one care for a vulnerable individual in that person's home, strongly indicates that that there was no obligation on the respondent to permit the claimant to attend work: such an obligation would put the respondent in an invidious situation if, for example, QQ said he did not consent to the claimant providing him with care

on any particular day or if the claimant's attendance at work might be thought to be to potentially detrimental to QQ. The obligation, we find, was confined to payment of the remuneration agreed.

381. Therefore, preventing the claimant from attending work, whether by suspending him or placing him on garden leave, would only breach the claimant's contract if it was a breach of the implied term of trust and confidence.

382. The respondent suspended the claimant in June 2018 because he believed the claimant had disclosed confidential information to AA and he wished to carry out an investigation. The respondent had a reasonable basis for that belief, not least because AA appeared to have come into possession of copies of documents concerning the claimant's care and information about a conversation in January 2019 that only the claimant and XX were privy to. The claimant's terms and conditions made it clear that information about the family was confidential. On the face of it, the respondent had reasonable grounds to suspect that the claimant had breached that term.

383. The respondent had reasonable and proper cause to require an explanation from the claimant and to instigate a formal investigation to ascertain the facts. We do not consider that the claimant's suspension was a knee-jerk reaction. It was appropriate to suspend the claimant and keep him apart from QQ whilst matters were being investigated given that it might be appropriate to speak to QQ himself during the course of the investigation and it was important to ensure the claimant could not exert any undue influence over him. In any event, the respondent had a responsibility to QQ to preserve his confidentiality and had grounds for concern that, if the claimant had disclosed confidential information to AA, he might do so again.

384. In all the circumstances we accept that the suspension of the claimant was done with reasonable and proper cause.

385. The respondent had reasonable and proper cause for maintaining that suspension throughout the remainder of the claimant's employment. The claimant was refusing to cooperate with the respondent's attempts to get to the bottom of the question of what, if anything, he had disclosed to AA. Meanwhile, the reasons for the initial suspension still remained.

386. In the circumstances, we find that the respondent had reasonable and proper cause for suspending the claimant and insisting that he remain away from work, both at the time of the original suspension and for the remainder of the claimant's employment.

387. As we have found that the respondent did not breach the claimant's contract of employment in any of the ways alleged, we find that the claimant was not dismissed. It follows that the claim of unfair dismissal fails.

Unlawful harassment/discrimination on the grounds of sexual orientation

Allegation that XX harassed or discriminated against the claimant by 'mocking' another member of staff and his 'partner' for the death of their ferret.

388. This complaint concerns things said by XX on 31 January 2018. As recorded in our findings of fact above, we have found that, during a conversation about one of the carers not being willing to give QQ junior paracetamol, XX said 'I think he is a bit upset because his ferret died'. XX went on to make some other comment about that matter in which she referred to the ferret belonging to the carer and his partner and, from the context of which it was apparent that the carer's partner was male (presumably because XX used male pronouns when referring to him). XX did not know the name of the staff member's partner at the time and there was nothing in her tone of voice when she used the word 'partner' that suggested she was using the word in a denigratory way.

389. The claimant suggests that XX' comments constituted unwanted conduct related to sexual orientation because of her use of the word 'partner'. We have rejected the claimant's suggestion that XX used the word 'partner' in a denigratory way and the claimant has failed to prove that XX 'mocked' the other member of staff.

390. The claimant suggests that XX' use of the word 'partner' was unwanted conduct related to sexual orientation because it revealed to him that the staff member was homosexual, which was something he claimed he did not know. The claimant's case appears to be that the merely describing two male people as partners is itself 'unwanted conduct related to sexual orientation', even if that word accurately characterises the nature of their relationship to each other, because the use of the term 'partner' implies that the two individuals may be in a sexual relationship and, therefore, reveals something of the sexual orientation of the individuals referred to. We do not accept that argument.

391. In any event, the claimant has not proved facts from which we could infer that XX' used the term 'partner', in this context, with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him: there is no evidence that XX had any ill intent; she was simply describing something that had happened to two people who happened to be in a relationship with each other.

392. We also reject the contention that XX' use of the term 'partner' had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In this regard, the claimant had no reason to suppose that the other staff member had asked XX to keep his sexual orientation a secret or that he would object to the claimant knowing he was homosexual. That being the case, we do not accept that XX' use of the word 'partner' was unwanted by the claimant, nor that the claimant genuinely perceived that the use of that word had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Even if he had genuinely felt that way, we do not accept that it was reasonable for XX' comments to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

393. In any event, the respondent is only liable for the acts of XX if they were done in the course of her employment. Whilst the claimant was present at the hospital in the course of his employment, XX was not present in hospital on this day in her capacity

as an employee: she was there because she was QQ' mother. Whatever she said was not said in the course of her employment and is, therefore, is not conduct for which the respondent was liable.

394. For those reasons, this complaint of harassment and/or direct discrimination fails.

Allegation that the respondent harassed/discriminated against the claimant by virtue of the respondent's sister, with the respondent's knowledge, making lewd comments to AA, casting aspersions about his relationship with other men, the claimant and another member of staff, making inappropriate hand movements and touching AA.

395. This complaint concerns the alleged behaviour of the respondent's sister at a social event on the evening of 13 May 2018.

396. The respondent's sister was neither employed by nor an agent of the respondent. As we have explained in our summary of the relevant legal framework, the Equality Act 2010 does not make employers vicariously liable for the acts of third parties who are neither the employer's employee nor agent (UNITE the Union v Nailard [2018] EWCA Civ 1203, [2018] IRLR 730; Bessong v Pennine Care NHS Foundation Trust [2020] IRLR 4). This is so even if the employer knows that the third party is engaging in unwanted conduct which is related to a protected characteristic and the purpose or effect of which is to create the kind of environment referred to in section 26(1)(b) of the Act, and does nothing to stop it happening (and, for the avoidance of doubt, we have made no findings that that was the case here). Therefore, insofar as the claimant's claim rests on the proposition that the respondent is vicariously liable for the acts of his sister, that claim must fail.

397. If the respondent's failure to intervene to prevent his sister behaving as she is alleged to have done was itself motivated by sexual orientation then that inaction could, in itself, have constituted harassment related to sexual orientation if the inaction was unwanted and had the purpose or effect of creating, for the claimant (as opposed to AA) the kind of environment referred to in section 26(1)(b) of the Act; or it could constitute direct sexual orientation discrimination, but only if the inaction was itself motivated by sexual orientation and the respondent could properly be considered to have thereby treated the claimant less favourably than he would have treated others. However, as noted in our summary of the claims and issues, this was not how the claimant put his case: it was not alleged that the respondent's own failure to intervene was motivated by sexual orientation. In any event, such a conclusion is not supported on the facts. We have found that, whatever the respondent's sister said to AA, the respondent did not hear it. Even if he had heard what she said, that, in itself, would – on the facts of this case - be insufficient to warrant an inference that the respondent's failure to intervene was motivated by sexual orientation (whether the claimant's, AA's or anyone else's).

398. For those reasons, this complaint of harassment and/or direct discrimination fails.

Allegation that the respondent (or XX in the course of her employment) informed Council staff (Rebecca Jackson), his solicitor (Nigel Broadbent) and a consultant from Peninsula (Vicky Hart) that the Claimant and AA were "partners".

399. We have found that the respondent and/or XX did refer to AA as the claimant's partner at some points when discussing him with those advising them.

400. These actions can only constitute harassment under the Equality Act if the respondent's conduct was unwanted, related to sexual orientation and had either the purpose or the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. To the extent that the complaint concerns XX' conduct, her use of the word partner would also have to have been during the course of her employment.

401. We deal first with intention. In this regard it is important to note that the respondent and XX used the term 'partner' in discussions to which the claimant was not privy. That being the case, we reject the suggestion that they did so in order to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

402. The claimant's case appears to be that the respondent and XX must have been speculating or gossiping about his sexuality with those from whom they were seeking advice and that the only explanation there can be for this is that they are 'somehow offended by people who are homosexual being close or in relationships and then want to cause a level of disgust and historical distain in people's mind about homosexual people.'. We do not accept there is any evidence from which we could properly infer that was the case. The use of the term 'partner' denotes a close relationship. The fact that the claimant and AA were close was something that was not irrelevant to the matters that were being discussed with those who were providing advice and guidance: it is clear from what the respondent told KK in November 2018 that he believed the claimant was behaving out of character and that AA was influencing his behaviour. That being the case, the fact that the two were close was relevant.

403. That the use of the term partner might also suggest that those using the term believe that the individuals concerned are in a sexual relationship does not mean the use of the word is conduct 'relating to sexual orientation'. In any event, the claimant himself says in his witness statement 'we live in a modern world where, even if people are homosexual, it doesn't bother people.'

404. In our judgement, there are no facts from which we could conclude that, in referring to the claimant and AA as partners, the respondent's (or XX') purpose was to violate the claimant's dignity.

405. As for the effect of referring to the claimant and AA as partners, for the same reasons, this cannot reasonably be said to have had the effect of violating the claimant's dignity. Nor, in all the circumstances, was it reasonable for it to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Therefore, even if the claimant subjectively felt that it had that effect, (and there is little evidence that that really was the case) we find that referring to AA as the claimant's partner did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant given that it was not reasonable for it to have that effect.

406. In conclusion, none of the claimant's complaints made under the Equality Act 2010 are well founded.

Failure to provide itemised pay statements

407. The claimant's complaint concerns the content of pay slips supplied to him from April 2019 to the end of his employment. Specifically, the claimant contends that the respondent failed to comply with the requirement in section 8(2)(e) of the Employment Rights Act 1996 to include in his pay statements particulars of the total number of hours worked because the respondent did not identify the number of hours comprised in a night shift. The reason the claimant's arguments are confined to the period beginning in April 2019 is that, before then, there was no requirement to include information about hours worked in itemised pay statements.

408. The first difficulty this claim faces is that section 11(4) provides that an employment tribunal shall not consider a reference under that section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made—
(a) before the end of the period of three months beginning with the date on which the employment ceased, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.

409. The claimant's application was not made until EJ Johnson permitted the claim to be amended in January 2020. That is more than three months after the claimant's employment ended in September 2019.

410. AA gave evidence as to the reason this claim was not made in the three month time limit. In summary his evidence was that neither he nor the claimant were aware of this requirement at the time the claim was made but that he (AA) became aware that the law had changed when he saw a news item about it over the Christmas period. He said he knew there was to be a case management hearing at the end of January so he made an application to amend the claim early in the New Year with a view to it being considered at that hearing. We accept what he says about being unaware of the statutory requirement and how he became aware of it. The question for us is whether that ignorance of the law was reasonable. Had AA been a professional adviser we would not have considered his lack of knowledge of this aspect of the law reasonable: professional advisers are expected to keep abreast of changes in the law. However, although AA refers in his written submissions to having a legal qualification of some sort, he does not specify what that is and he is not a legal professional. That being the case, we do not think it was unreasonable that neither the claimant nor AA were aware of the new legal requirement that had come into effect only months before the claimant's employment ended. In all the circumstances, we accept that it was not reasonably practicable for the claim to have been brought within the primary three-month limitation period. AA acted promptly once he became aware of the new law and ensured the application to amend was considered at the first available opportunity. We accept, therefore, that the

application was made within such further period as was reasonable and the Tribunal therefore has jurisdiction to consider the reference.

411. However, the claimant's reference faces another difficulty. That is that the requirement to include particulars of hours worked only applies if 'the amount of wages or salary varies by reference to time worked'; the requirement then is to provide particulars of 'the total number of hours worked' in one of two prescribed ways.

412. Throughout the period with which this reference is concerned, the claimant was suspended and did not carry out any work. The suggestion has been made on behalf of the claimant that he may have been working when he attended court for the hearing of his injunction application in June: clearly he was not.

413. Given that the claimant was suspended throughout this period and not working, his pay did not vary by reference to time worked at all in that period. It was calculated not by reference to time worked but by reference to the amount the claimant would have earned if he had worked his contracted hours. That being the case, we find that the requirement in section 8(2)(e) did not apply. Therefore, we are satisfied that the respondent provided the particulars he was required by section 8 to provide.

EMPLOYMENT JUDGE ASPDEN

REASONS SIGNED BY EMPLOYMENT JUDGE ON 19 January 2021

Annex
List of Issues

Claim of detriment on grounds of protected disclosures

1. What was said or written by the Claimant in respect of each alleged disclosure?
2. Were these qualifying disclosures?
    2.1. Were these disclosures of information?
    2.2. Was the alleged disclosure referred to as PID17 a disclosure of information by the claimant? The claimant's case is that AA disclosed information to the Council on behalf of the claimant.
    2.3. Did the Claimant believe that the disclosure was made in the public interest? If so, was that belief reasonable?
    2.4. Did the Claimant believe that the information disclosed tended to show something falling within one or more of paragraphs (a) to (f) of section 43B (1) of ERA 1996? If so, was the Claimant's belief reasonable?
3. Were the disclosures protected?
    3.1. In the case of any disclosure alleged to have been made to the Respondent in accordance with section 43C of the Employment Rights Act, the following issues arise. Was that disclosure made to the Respondent? Or is the Claimant to be treated as having made the disclosure to the Respondent by virtue of section 43C(2) or otherwise? Or was the disclosure made in accordance with section 43C(1)(b).
    3.2. In the case of any disclosure alleged to have been made to someone other than the Respondent in accordance with section 43G of the Employment Rights Act, the following issues arise. Did the claimant reasonably believe that the information disclosed, and any allegation contained in it, was substantially true? Did the claimant made the disclosure for personal gain? Were any of the conditions in subsection (2) met? Was it reasonable for the Claimant to make the disclosure?
    3.3. In the case of any disclosure alleged to have been made to someone other than the Respondent in accordance with section 43H of the Employment Rights Act, the following issues arise. Did the claimant reasonably believe that the information disclosed, and any allegation contained in it, was substantially true? Did the claimant made the

disclosure for personal gain? Was the relevant failure of an exceptionally serious nature? Was it reasonable for the Claimant to make the disclosure?

4. If the disclosure was made to someone other than the Respondent, did the Respondent know about it? If so, when did the Respondent learn of the disclosure?

5. Did the respondent subject the Claimant to the alleged detriments (as set out under the heading Claims and Issues above)?

6. If so, did the Respondent subject the Claimant to that detriment because of the disclosure(s)?

7. Time Limit:

   7.1. Was the claim brought within three months of the date of the detrimental act or deliberate failure to act? In this regard, did the act extend over a period and, if so, when did that period end?

   7.2. If the claim was not brought with that time limit, was it reasonably practicable for the claim to have been brought within that period? If not, was the claim brought within such further period as was reasonable?

Unfair constructive dismissal

8. Did the Respondent do the following:

   8.1. Fail to deal with the claimant's grievance in a fair and reasonable manner throughout the grievance process.

   8.2. Disclose to PP on or about July 2019 the contents of confidential settlement negotiations between the claimant and the respondent.

   8.3. Invite the claimant to a disciplinary meeting/hearing in March/April 2019.

   8.4. Invite the claimant to a disciplinary heating/meeting in May 2019.

   8.5. Invite the Claimant to a disciplinary hearing/meeting in September 2019, the 'last straw'.

9. Was that conduct which was without reasonable and proper cause and calculated or likely to destroy or seriously damage the implied trust and confidence between employer and employee?

10. Did the claimant resign in response to the alleged breach rather than for some other reason?

11. Did the claimant delay before resigning so that we was deemed to have accepted the breach and thereby affirmed the contract?

12. If a last straw case, did the last straw contribute something or was, objectively viewed, an innocuous act?

Unlawful harassment/discrimination on the grounds of sexual orientation

13. What did the Respondent do or say or omit to do or say? Ie

13.1. In the case of the first allegation (about comments made on 31 January 2018): Did XX do the act alleged? If so, did she do so in the course of her employment?

13.2. In the case of the second allegation (about things said and done by the respondent's sister): Can and should acts of the respondent's sister to be treated as done by the Respondent? If so, did the respondent's sister do the act alleged?

13.3. In the case of the third allegation (about describing AA as the claimant's partner): did the Respondent do the act alleged?

14. Did what was said or done by the Respondent amount to unwanted conduct related to [the Claimant's] sexual orientation? This involves considering the following issues:

14.1. Was the conduct because of [the Claimant's] sexual orientation?

14.2. If not, was it otherwise related to [the Claimant's] sexual orientation?

15. Did that conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

16. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for him?

17. If the acts do not constitute harassment, by doing the acts did the Respondent subject the claimant to detriment and thereby treat him less favourably because of [his] sexual orientation than he would have treated others.

18. Time Limit – was the claim brought within three months of the act of harassment /discrimination? If not, is there a continuing course of conduct such that the claim was brought within three months of the "last act" of harassment/discrimination and/or is it just and equitable to extend time?

Failure to provide itemised pay statements

19. What is included on the pay statements?
20. What is omitted from the pay statements?
21. Did the omission breach Section 8(e)(ii) of the Employment Rights Act 1996?
22. Time Limit:
    22.1. Was the claim brought within three months beginning with the date the claimant's employment ended?
    22.2. If the claim was not brought with that time limit, was it reasonably practicable for the claim to have been brought within that period? If not, was the claim brought within such further period as was reasonable?