EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4103554/20 (V)

Held remotely on 6, 7, 8, 9, 12, 13 and 14 April 2021 and 17 May 2021 (deliberation day)

Employment Judge W A Meiklejohn
Tribunal Member Ms L Grime
Tribunal Member Mr A Matheson

Mr M McNaughton	**Claimant** **In person**
Four Square (Scotland)	**Respondent** **Represented by:** **Mr D Hay - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the complaints brought by the claimant of (a) constructive automatically unfair dismissal because of having made a protected disclosure, (b) constructive unfair dismissal and (c) detriment on the grounds of having made a protected disclosure do not succeed and are dismissed.

REASONS

1. This case came before us for a final hearing to determine both liability and remedy. The hearing was conducted remotely by means of the Cloud Video Platform. The claimant participated in person. Mr Hay represented the respondent. We took 6 April 2021 as a reading day.

Procedural history

2. Following a period of ACAS early conciliation ("EC") which commenced with the claimant's EC notification on 4 May 2020 and ended with ACAS issuing the EC certificate on 4 June 2020, the claimant (who at this stage was legally represented) presented his ET1 claim form to the Tribunal on 1 July 2020. He alleged constructive unfair dismissal and detriment in respect of his public interest disclosure. These complaints were resisted by the respondent in their ET3 response form. The respondent asserted that the claimant (a) had failed to particularise the alleged breach of contract relied upon to support the complaint of constructive unfair dismissal and (b) had failed to particularise fully the alleged detriment suffered as a result of making a public interest disclosure.

3. Following initial consideration the Tribunal (on the instructions of Employment Judge Hoey) asked on 6 August 2020 that the claimant should respond to the paragraphs in the respondent's grounds of resistance detailing these alleged failures "*to include specific details of the alleged breaches of contract relied upon in respect of the constructive unfair dismissal claims, specific details of the disclosure relied upon and if these amount to qualifying and protected disclosures and what the detriment is that the claimant says he suffered because of the disclosure".*

4. On 10 September 2020 the claimant's solicitor submitted further and better particulars on his behalf. On 2 October 2020 the respondent's representative asserted that the grievance process about which the claimant was complaining was carried out fairly and timeously, and also

stated that the respondent was unable to determine from the claimant's further and better particulars the exact nature of the alleged detriment relied upon. The claimant's solicitor responded on 22 October 2020.

5. A preliminary hearing (before Employment Judge R McPherson) took place on 23 October 2020. The principal outcome of this was that (a) the claimant was given until 6 November 2020 to provide (further) further and better particulars and (b) the respondent was given until 20 November 2020 to provide responses to these. There were directions for the exchange of documents by 27 November 2020 and provision by the respondent to the claimant and to the Tribunal of a joint bundle of documents by 5 December 2020. These dates relating to documents were not adhered to but we understood that this was by agreement between the parties' representatives. There were also directions covering preparation by the claimant of a schedule of loss, provision of an agreed statement of facts, the use of witness statements and timetabling of evidence at the final hearing.

6. The claimant's solicitor duly submitted further and better particulars on 6 November 2020. The respondent's representative lodged amended grounds of resistance on 4 December 2020. These were the pleadings in terms of which the case came before us. An agreed statement of facts was submitted on 6 April 2021.

7. On 5 April 2021 the claimant's solicitor advised the Tribunal that he had required to withdraw from acting for the claimant, and that the claimant would be conducting the proceedings without representation. There was no suggestion that the claimant's solicitor had acted improperly in withdrawing, and the claimant confirmed to us at the start of the hearing on 7 April 2021 that he was happy to proceed without representation.

8. In his Note following the preliminary hearing on 23 October 2020, EJ McPherson referred to Rule 50 of the Employment Tribunal Rules of Procedure 2013 and reminded parties that if they considered there was a

need for anonymisation of the Tribunal's judgment or reasons, an application should be made to the Tribunal. There was no such application but it seemed to us, having read the papers, that it would be appropriate not to disclose the identity of the service user involved in the incident on 14 February 2019 which was the catalyst for the chain of events with which we were concerned. We raised this with the parties and there was consensus that the identity of the service user should not be disclosed. Accordingly I made an Order under Rule 50 and we refer to the service user within these reasons as "C".

Issues

9. These were as follows –

(a) Was the claimant constructively dismissed by the respondent?

(b) If so, was that dismissal automatically unfair under section 103A of the Employment Rights Act 1996 ("ERA") because the reason (or principal reason) for the dismissal was that the claimant had made a protected disclosure?

(c) If not, was it nevertheless unfair under sections 94 and 98 ERA?

(d) Did the claimant make a protected disclosure (or disclosures) under section 43A ERA which qualified for protection under section 43B ERA?

(e) Did the claimant suffer detriment under section 47B ERA on the ground that he had made such a disclosure (or disclosures)?

(f) Had the claimant's detriment claim been presented late under section 48 ERA? If so, had it been not reasonably practicable for the claim to be presented timeously and, if so, had it been presented within such further period as we considered reasonable?

(g) If any part of the claimant's case succeeded, what compensation should be awarded?

10. We should add that the automatically unfair dismissal claim under section 103A ERA was not expressly articulated in any of the incarnations of the statement of claim nor was it discussed at the preliminary hearings. However, it seemed to us from reading the papers that it was foreshadowed by the circumstances narrated in the statement of claim in its final form. In the course of the hearing the claimant made an application to add a complaint under section 103A ERA to which Mr Hay, sensibly in our view, did not object.

Evidence

11. We heard evidence from the claimant. For the respondent we heard evidence from (a) Mrs D Meikle, their Vice-Chair and grievance appeal officer, (b) Ms J Devine, their Chief Executive and (c) Miss S Gray, their HR Manager (since December 2019) and grievance officer. The evidence in chief of each witness was contained in written witness statements which were taken as read under Rule 43 of the Tribunal Rules.

12. We had a joint bundle of documents extending to over 900 pages. We refer to this by page number.

Findings in fact

13. The respondent is a company limited by guarantee (SC078310) and is a charity registered with the Office of the Scottish Charity Regulator (SC017242). Its principal object is expressed in these terms –

"the prevention and/or relief of poverty by promoting and/or delivery of services, alone or in conjunction with others, that provide support and

advice to people who are homeless or in other ways disadvantaged and vulnerable"

It has a number of other objects but this captures the essence of what it does.

14. The respondent operates a number of services which are regulated by the Care Inspectorate ("CI") in Scotland. These include Stopover which is a hostel providing accommodation for and support to homeless young people. Under the same CI registration the respondent operates two other services including Number 20 which provides accommodation for vulnerable young women.

15. The claimant's working life has centred around the social care of vulnerable people including 25 years with City of Edinburgh Council ("CEC"). He has also undertaken voluntary work in the same field and continues to do so.

16. The claimant commenced employment with the respondent in July 2017 as a Team Leader at Stopover. His line manager was Ms L Mugadza who was also the Registered Manager at Stopover. Ms Mugadza reported to Ms J Hardie, Social Care Manager, when she joined the respondent in 2018. Ms Hardie in turn reported to Ms Devine.

17. As a social services worker the claimant was required to comply with the Scottish Social Services Council ("SSSC") Codes of Practice. These included a Code of Practice for Employers of Social Services Workers (126-128) and a Code of Practice for Social Service Workers (128-131).

Claimant acting up

18. Ms Mugadza retired on or around 6 December 2018. At the same time the claimant was asked by Ms Hardie to act up in the position held by Ms Mugadza, except that Ms Hardie became the Registered Manager. A

temporary variation to the claimant's contractual terms and conditions was signed on 14 December 2018 (219-220) setting out the additional duties he was taking on.

19. The claimant asserted that the variation was drafted by him rather than Ms Hardie. This was true to the extent that Mr Sturrock has responded to an email from the claimant on 10 December 2018 (212-213) asking him to "*list headlines of some specific responsibilities you will take".* We understood that the claimant had complied and Mr Sturrock had incorporated his reply into the variation form. We also understood that there was no formal announcement made by the respondent of the claimant's change of role despite (a) the claimant requesting this in an email to Mr C Sturrock, then HR Manager, on 14 December 2018 (222) and (b) the claimant asking and Ms Hardie agreeing to do this on 7 January 2019 (239-240).

20. The claimant asserted that Ms Hardie had failed (a) to provide an induction when he changed role in December 2018 and (b) to provide 1-2-1 supervision sessions. These assertions were well founded but we saw no evidence of the claimant complaining about these matters while employed by the respondent.

Care Inspectorate questionnaires

21. On 14 December 2018 the claimant sent an "all staff" email advising that the CI had sent questionnaires to staff and residents. He said that *"this probably means an inspection is looming".* The CI routinely carry out unannounced inspections of the services which they regulate. The claimant had experience of such inspections while with CEC.

22. Thereafter the claimant took steps to prepare for an inspection. He sent an email to all staff indicating that he was drafting a plan and seeking their input (229). He emailed Ms Hardie on 7 January 2019 setting out a list of items relating to a CI inspection (242-243). He emailed Ms Devine about the *"need to start planning"* on 10 January 2019 (246). He emailed Ms Hardie on 21 January 2019 (260-261) with various action points. He circulated a "*Stopover: Current issues and action points"* document on 30 January 2019 (262-267) which included a section on CI inspection preparation. He emailed Ms Hardie and others on 25 February 2019 (290-292) attaching a document "*Draft Care Inspection preparation: 25 February 2019".*

23. There was little if any engagement by senior management (ie Ms Devine and Ms Hardie) with the claimant's efforts to prepare Stopover for a CI inspection. It seemed to us that this was because (a) they had other operational priorities and (b) they had confidence in the claimant in his acting up role to prepare the service for an inspection and were aware from his various communications that he was *"on the case".*

Room checks

24. When the claimant joined the respondent there was an established practice at Stopover of room checks being carried out each evening around 11.30pm (the "night check"). We understood that this was done for health and safety reasons, to establish which residents were present in the building, and also for residents' welfare. We also understood that the practice was for staff to knock on the resident's door and only to enter the room if there was no response. We understood that this reflected the CEC Service Specification for Homelessness Prevention: Homeless Accommodation with Support (Young People) (150-151) which included the following –

"*The Provider or the Providers staff should enter rooms at the same time daily to allow bins to be emptied and to check on the welfare of Service Users…."*

25. There had also been a practice of room checks at 12 noon but by May 2018 this was no longer done. The claimant, evidently with Ms Mugadza's approval, sought to re-introduce these. His email to staff on 8 August 2018 (195) indicated that these checks, now at 12.30pm, started the previous day. His email to staff on 17 September 2018 (196) indicated that the checks had started but had *"fizzled out",* but were restarting. His email to staff on 16 October 2018 (197) indicted that the checks (now described as the "*1.00pm H+S check")* were again to restart as a *"non-negotiable task".*

Incident on 14 February 2019

26. An incident involving a resident ("C") at Stopover took place on 14 February 2019. Staff had entered C's room when doing the night check but had not seen him. Around 12.10am another resident ("SB") expressed concern about C having suicidal thoughts. Around 12.30am SB told staff that he had found C in his room, unresponsive. One member of staff went to C's room, without a mobile phone, and found C in that state, placed C in the recovery position and returned to the office to call an ambulance, leaving SB in C's room. Some empty packs of Ibuprofen were found. Ambulance crew attended and when C became responsive, they took him to A&E. C was unsteady but able to walk with assistance. C returned to Stopover around 06.30am.

27. One of the two staff who had been on duty completed a serious incident form (269-271). In the claimant's absence from work – he was recovering from an operation – Ms Hardie completed the manager's section of the form. Ms Hardie reported the incident to the CI on 14 February 2019.

The CI did not respond which we understood to indicate that they were content with the report. Ms Hardie sent the claimant a copy of the report form on 15 February 2019 (276).

28. The claimant described C as "*exceptionally vulnerable"* and we did not understand that to be in dispute.

Claimant returns to work

29. The claimant returned to work on 21 February 2019. He regarded the incident on 14 February 2019 as "*the top priority".* He had concerns about how the incident had been handled and expressed these in an email to Ms Hardie (277). This read as follows –

"*From the report uncertain if you raised any of the following points with Mev and/or Sean*

- *Unclear from the first sentence in the report if the resident was in the room during the "midnight check". If he was it is a concern that staff – Mev/Sean or both – didn't see him. If he was lying there unnoticed and having effectively overdosed, this is a*

  real worry.

- *When the report writer talks about "staff" is it singular of plural? This makes a difference in a number of ways.*

- *<u>If</u> Mev was on his own did he summon help? If he didn't summon help, was leaving SB monitoring the casualty the best option? Sean was on sleep over and is a qualified first aider.*

- *Depending on the answer to the above questions, we might just have SB to thank on a number of levels both on behalf of the resident and staff.*

Any thoughts?

If you didn't take the above forward, do you want to do this given your initial involvement? If you rather I do this perhaps better saying to the staff involved that you've asked me to follow this through lest it look as though we are "divided" or whatever in how to approach these situations? Clearly, depending on the answer to the above questions, there are potential learning opportunities as it could have serious practice implications and might, for instance, lead to a review of practice in relation to these "checks", when to call sleep-over person etc.

It's perfectly possible that the Care Inspectorate might also want to revisit this at inspection given it resulted in a notification. If these questions haven't been resolved it might be better for us to be able to say to the CI – if they express an interest – that you have left this part of it for me to take forward etc. rather than them putting awkward questions to us.

Then again, maybe Mev/Sean have since clarified and the situation is much clearer than it looks from the written record?"

30. Ms Hardie replied to the claimant some three hours later on 21 February 2019 –

"*From speaking to Sean I do not have any concerns about how this was handled."*

31. In the meantime Ms L White, who was C's key worker, spoke to the claimant about the 14 February 2019 incident. According to the claimant

she expressed concern about the handling of the incident and made reference to staff having been fortunate not to have found C dead in the morning.

32. The claimant responded to Ms Hardie's email about an hour later (279). He referred to *"a staff member….registering serious concerns".* He said that he thought "*this is one we could talk through Jacqui rather than email about".*

33. The claimant described Ms Hardie's response to his first email of 21 February 2019 as a *"watershed moment".* He contended that "*This initial protected disclosure on 21 Feb 2019 was unquestionably the pivotal point in the immediate and lasting deterioration in my treatment by the Respondent that continued until my constructive dismissal on 11 February 2020".*

Telephone conversation on 21 February 2019

34. Ms Hardie telephoned the claimant later on 21 February 2019. According to the claimant, Ms Hardie *"behaved in a hostile manner, aggressively questioning my entitlement to raise these matters with her"* and asked "*Are you questioning my professional judgment?".* When interviewed on 28 May 2019 in the course of the subsequent whistleblowing investigation (453), Ms Hardie accepted that "*It was along the lines of that".*

35. In the same interview, Ms Hardie stated that the claimant "*got angry"* and "*his voice was getting higher on the phone".* Ms Devine and Ms Hardie worked in the same office and Ms Devine's evidence about this call was that Ms Hardie *"was firm in her approach as the Claimant was questioning her professionalism".* Ms Devine continued –

"*I do not believe Jacqui was hostile or aggressive towards the Claimant, I feel it was more a response in keeping with the employment relationship. There was clearly a personality clash between the Claimant and Jacqui and there was a difference of management style and approach. Jacqui found the relationship with the Claimant difficult and felt constantly challenged by him."*

36. Our view of this was that the conversation between Ms Hardie and the claimant had become heated and that the catalyst for this had probably been Ms Hardie reacting defensively to what she correctly interpreted as criticism of her professional judgment by the claimant. We could understand that the claimant might have perceived this as hostility and aggression on the part of Ms Hardie.

37. An element of Ms Devine's perception of a personality clash between the claimant and Ms Hardie related to their respective styles of communication. It appeared to us that the claimant's default method of communication was by email and this was a source of concern to Ms Hardie. She referred at the interview on 28 May 2019 to getting 20 emails from the claimant on 21 February 2019 *"and on average 20 emails every day"* (452). She said of the claimant "*I know MM's style, it is cover your arse, he has got everything logged"* and *"He wants to cover his own arse"* (457).

38. Ms Devine said that she had advised Ms Hardie to pick up the phone to the claimant which indicated that they had discussed the matter. The claimant denied that he had sent as many emails as alleged and we believed that there was probably a degree of exaggeration in the reference to "*20 emails every day".* We noted that Ms Hardie raised her concern about the volume of emails she was receiving from the claimant at a meeting with Mr Sturrock where she referred to receiving "*up to 20"* emails in a day (304). We were satisfied that by 21 February 2019 there

was a deteriorating relationship between Ms Hardie and the claimant which, as it transpired, was going to get worse.

Return to work meeting on 25 February 2019

39. The claimant attended a return to work meeting with Ms Hardie on 25 February 2019. Ms Hardie apologised to the claimant about their telephone conversation on 21 February 2019. She was concerned at how the claimant presented, appearing frail. They spoke about room checks. Ms Hardie regarded these as an invasion of privacy while the claimant regarded them as necessary for the health, safety and wellbeing of the young people at Stopover.

40. Ms Hardie acknowledged that she had been incorrect when she stated in her email of 21 February 2019 that she had spoken to Sean. She had been unable to speak to either Sean or Mev because they were working night shift. It was another employee at Stopover (Andy) to whom she spoke. This caused the claimant concern as it appeared that there had not been a debrief with the staff who had dealt with the incident on 14 February 2019.

41. After the meeting the claimant sent an email to Ms Hardie (294) in these terms –

"Once again thank you for the apology to-day. As I said, for my part, in emailing you last week, I was simply looking for more information to better understand what happened in the incident and it's aftermath. The report was very unclear. It is my professional duty to do this and anything less, would be a serious failure on my part. Thank you also for clarifying that you were mistaken last week in saying you had spoken to Sean; it was Andy as per your original report. This makes a difference in how I take this forward.

The resident involved is a vulnerable young person who has recently disclosed he was abused while in care has recently self-harmed and has reported suicidal ideation.

As you hadn't spoken to staff involved in the incident, I suggested that in taking this forward that I say to them that you had asked me to de-brief them. Important that we are seen to act together here. You agreed to this.

Here are some of the questions I have in mind when discussing this with the staff. Most of these questions will, I think, be answered "naturally" in the course of the de-briefing without my having to specifically ask them:

[The claimant then set out some 17 questions]

If you have any points or questions you want to make, before I take this forward, please do. I will not action this until I hear back from you."

42. The claimant's position was that Ms Hardie did not respond. Ms Devine's position was that Ms Hardie telephoned the claimant and told him to proceed. Ms Devine also said that she did not understand why the claimant needed permission from Ms Hardie to speak to his own staff. There was no reference to such a telephone call in a report prepared by Ms Hardie (303-304) covering the events of 14-25 February 2019.

43. We were not able to resolve this conflict of evidence. We found that (a) the claimant understood that matters were left on the basis that he had sought Ms Hardie's permission to debrief the staff on duty at the time of the incident on 14 February 2019 and had not received that permission

and (b) the respondent did not consider that such permission was needed and, in effect, it was up to the claimant whether or not he spoke to the staff.

Care Inspectorate inspection on 26 February 2019

44. An inspector from CI arrived unannounced at Stopover on 26 February 2019 at around 10.45/11.00am. She was taken directly to the claimant's office and a lengthy meeting ensued. In an email from the claimant to Ms Reid sent at 16.40 on the day of the inspection, the claimant referred to "*an unbroken two and a half hour session"* with the inspector. Following this meeting the claimant telephoned Ms Hardie to advise her of the inspection. Ms Devine's evidence was that, by that point, it would have been too late for Ms Hardie to attend. We did not agree with that. Ms Hardie was the Registered Manager for the service and should, at the very least, have offered to attend.

45. During the inspection, the inspector requested access to care plans for service users in the other two services covered by the Stopover registration. When the claimant took this request to Ms Hardie, she advised him that this was not possible without the service users' permission. The claimant knew this to be incorrect and, following his resignation in February 2020, obtained confirmation of this from CI (895-899). At the time (ie during the inspection) Ms Hardie's erroneous response placed the claimant in a difficult position with the inspector. The claimant perceived Ms Hardie's behaviour towards him during their telephone conversations in the course of the inspection to be surly and obstructive.

46. The inspection did not end until 6pm that day. At the end of it, the inspector asked the claimant to communicate with services within the Stopover registration and senior management over various inspection

related matters. She needed papers from them to complete the inspection. The inspector told the claimant that the tentative outcome of the inspection was "*very good"* which was the second highest rating (and was the same rating as had been given to the service at the previous inspection).

Claimant's email of 27 February 2019

47. In a conversation with Ms Hardie early on 27 February 2019, the claimant told her about the tentative outcome of the inspection and the inspector's request for further information. He told Ms Hardie that he would be emailing shortly listing the inspector's requirements. Ms Hardie did not query this.

48. The claimant then emailed Ms Hardie and a number of others, including senior management and all staff at Stopover, on 27 February 2019 (300-300a). He reported on the positive aspects of the inspection. His email contained a section which read as follows –

"*Jacqui*

On the Registered Manager side, and as part of the inspection, she identified three outstanding tasks that she is looking for you to complete but I think better we discuss this rather than include in this email. I can give you a ring later this morning."

49. A couple of hours after the claimant had sent his email, Ms Devine responded in these terms (300b) –

"*I have some concerns over how this information has been communicated. I believe Jacqui has arranged a meeting for the four of us (Jacqui, Kay, you and I) on Friday afternoon and I would like to talk about this email and the whole process of the inspection including how it has been handled internally at this meeting. Please prioritise this in your diary.*

On another matter, I would like to remind you and others that if the CI want to speak to the young people in our services, we must have their consent before passing on contact details. The CI do not have the right to all information. We need to comply with DP legislation and GDPR and not all aspects of access to information are covered by the statutory instruments the CI was established with.

I look forward to Friday's discussion."

50. The reference to "*Kay"* was to Ms Reid, another Team Leader, employed by the respondent at Number 20. The claimant did not consider that it was appropriate for Ms Reid, being junior to him while he was acting up, to be involved in a meeting to discuss concerns about his behaviour. We agreed with that. We could however understand that it might well be appropriate to have Ms Reid attend a meeting to discuss the CI inspection which covered all of the services on the Stopover registration.

Incident at Stopover on 27 February 2019

51. On 27 February 2019 an incident occurred at Stopover when a service user alleged that she had been assaulted by an agency worker. The claimant dealt with this on site, interviewing those involved and reporting

the matter to the agency which supplied the worker and to the Police. He liaised with Ms Hardie.

52. Having done that, the claimant realised that there was a risk that the agency worker might have been assigned, possibly through a different agency, to another of the respondent's services. To address this concern, he sent an email after 5pm on 27 February 2019 (301) to colleagues at other services. In this email he named the agency worker. He was not aware when he did so that Ms Hardie had also been in contact with the supplying agency and the other agency used by the respondent.

53. Ms Devine's position was that the claimant should not have shared this information (ie the name of the agency worker) "*with people who did not need to know about the incident as the risk had been managed by Jacqui".* The respondent contacted the recipients of the claimant's email and instructed them to delete it permanently.

First meeting on 1 March 2019

54. This was attended by Ms Devine, Ms Hardie, Ms Reid and the claimant. In addition Mr Sturrock, who shared an office with Ms Devine and Ms Hardie, asked at short notice if he could attend, and did so. The claimant recalled that Mr Sturrock was introduced as notetaker but we understood that no note of the meeting was prepared.

55. At the start of the meeting Ms Devine referred to the claimant's email relating to the CI inspection (300-300a). Only the claimant had brought a copy of this to the meeting. The claimant offered to copy this for the others but Ms Devine declined. We accepted her evidence that she knew what she wanted to talk about in relation to the email. We also accepted her evidence that when the claimant started to read the email, she and

the other attendees told him to stop. We did not accept the claimant's evidence that he had been "*required"* to read the email. We noted that this was not asserted in the claimant's statement of claim nor in either version of his further and better particulars.

56. We accepted the claimant's evidence that Ms Devine told him that his email was "*unacceptable"* and that he had acted "*discourteously"* towards Ms Hardie in sending it. Ms Devine's position was that the claimant should have provided feedback to peers and managers before feeding back more widely. That was a view Ms Devine was entitled to express, but she should not have done so in front of Ms Reid. We considered that this was (a) discourteous to the claimant and (b) probably born of Ms Hardie's irritation at the claimant making reference in his email to her "*three outstanding tasks".*

57. The meeting then moved on to the subject of the CI inspection itself. There was some discussion about which of the services covered by the Stopover registration were to be inspected. The claimant said that he had raised this with Ms Hardie in January 2019 but Ms Hardie evidently could not recall this. Ms Reid expressed the view that there was "*something strange"* about the inspection, echoing a comment she had made in an email to the claimant on 26 February 2019 (298).

58. The claimant's position was that Ms Devine "*problematised"* the CI inspection. He perceived that Ms Devine's instruction that Ms Hardie would now lead on outstanding matters relating to the inspection was designed to embarrass him. He referred to "*negativity towards me at the meeting"* and complained that Ms Devine had not made "*one positive comment – never mind extend her thanks or that of the board – about this inspection outcome".* Our view was that the claimant was being unrealistic and overly sensitive to criticism. He had effectively invited that negativity by highlighting failures by Ms Hardie in his email (300-300a) about the CI inspection.

Second meeting on 1 March 2019

59. At the end of the first meeting on 1 March 2019, Ms Devine asked the claimant to stay behind for a second meeting. He asserted that "*everyone in the room, except me, most likely knew the subject matter of this second meeting".* That was probably true in the case of Mr Sturrock as HR Manager, but less likely in the case of Ms Reid.

60. At the second meeting Ms Devine spoke to the claimant about his email relating to the agency worker (301). Her concern was that he had named the individual before the matter had been investigated, and had *"shared her name with people who did not need to know about the incident as the risk had been managed by Jacqui".* Ms Devine regarded this as a GDPR breach.

61. This was not entirely fair to the claimant. Our view was that, at the time he sent his email on 27 February 2019 (301), the claimant (a) did not know that Ms Hardie had made contact with both (i) the agency which supplied the worker who was alleged to have assaulted the service user at Stopover and (ii) the other agency which supplied agency workers to the respondent and (b) believed that disclosure of her identity was necessary to protect service users. The excerpt from the GDPR which was included in the bundle (696-697) supported the claimant's argument that there was no breach. In fairness to Ms Devine, we accepted that she had discussed the matter with Mr Sturrock who was the respondent's data protection officer.

62. We found no evidence that Ms Hardie had told the claimant that she had been in contact with both agencies. That was an unfortunate breakdown in communication, responsibility for which in our view rested with Ms Hardie as the senior employee involved. The claimant had acted in good faith in sending his email of 27 February 2019 and it was certainly

arguable that in doing so he was acting within one of the exceptions contained within Article 6 GDPR (Lawfulness of processing).

63. Ms Devine said that she "*ensured the Claimant realised what he did was wrong and solicited an agreement that it wouldn't happen again".* The claimant said that he "*anticipated the consequences of refusing to comply with the instruction could mean disciplinary action up to and including dismissal".* Our view of this was that the claimant had little option but to acquiesce. He agreed to comply with Ms Devine's instruction but added that he would need to "*reflect on this further".*

64. The claimant's position was that he had made two protected disclosures in relation to the alleged assault. The first was in his email of 27 February 2019 to his peers (301). The second was at the meeting on 1 March 2019 when he explained his rationale for sending that email.

Further incidents involving C

65. Two further incidents involving C occurred on 23 February 2019 and on or around 5 March 2019. Both involved apparent self harm resulting in minor injury. Both took place outwith Stopover and were therefore not reportable to the CI.

Claimant goes off sick/writes to Ms Unsworth

66. On or around 7 March 2019 the claimant commenced a period of sickness absence. His first Fit Note (and all of his subsequent Fit Notes) referred to "*Stress at work".* He considered that he had made a number of protected disclosures and his evidence was as follows –

"*It was crystal clear to me that I was unable to continue at work unless….I was prepared to disregard my duties and obligations under the National Health and Social Care Standards and the Scottish Social Services Council Code of Practice. I had been fundamentally compromised by the Respondent's treatment of me."*

67. On 11 March 2019 the claimant wrote to Ms J Unsworth, Chair of the respondent's board (321-323). His letter was headed "*WHISTLE BLOWING POLICY: Safeguarding issue".* After referring to the incident on 14 February 2019, the claimant continued –

"*Urgent action needs to be taken first and foremost to safeguard the lives and well being of young people who use the service. I am also concerned about the well being etc. of the staff who were on duty on 14 February – Ms Hardie did not approach either about this incident – but also the professional reputation of this service and the wider organisation if this failure is not addressed and resolved.*

I could have taken this matter to the Care Inspectorate, OSCR etc. but, with the full support of my union, I decided to take this matter forward within the organisation so that it is given the opportunity to "put its own house in order". If this proves impossible, it is my duty to look out with the organisation to get this resolved; I do hope this will not be necessary."

68. Ms Unsworth replied to the claimant on 15 March 2019 (326). From the terms of this response, it is clear that the claimant's letter of 11 March 2019 was understood to be raising whistleblowing concerns. He was invited to meet with Ms Unsworth and Mr Sturrock on 22 March 2019. In advance of this meeting the claimant emailed Mr Sturrock on 19 March 2019 (327) asking for policy documentation and also requesting access to his work laptop.

69. Mr Sturrock replied on 19 March 2019 (328) telling the claimant that he was "*free to call in to Stopover to pick up your laptop if you feel you need to access information".* Mr Sturrock also stated –

"*The meeting is your opportunity to share with the Chair (Janet Unsworth) your reasons why you feel the incident was not correctly dealt with as the meeting is planned for 1 hour, we need to be mindful of time. It will then be up to the Chair to establish, based on your points raised, whether an investigation into the incident is required….the Chair will likely need to take what you raise at the meeting and provide a response later. If a decision to investigate is taken, it may involve another board member or an independent investigator."*

70. The meeting took place on 22 March 2019. The claimant was accompanied by his trade union representative. According to the claimant –

"*I made a further verbal protected disclosure and again requested that immediate safeguarding action be taken."*

71. The claimant emailed Mr Sturrock on 25 March 2019 (332) pressing for urgent action, six weeks having passed since the incident on 14 February 2019, and raising a number of points about the nature and scope of any investigation. Mr Sturrock replied on the same date (333) confirming that an "*external and independent consultant with knowledge of the sector has been selected and we await confirmation of the date the investigation will take place".* This was confirmed in Ms Unsworth's letter to the claimant of 27 March 2019 (336-337).

Claimant goes to Care Inspectorate

72. On 28 March 2019 the claimant took his concerns to the CI. His evidence to us was that it was over two weeks since he had *"elevated my whistleblowing complaint to the board"* and "*I had still not heard back from Ms Unsworth as to whether Four Square would appoint a WB independent investigator".* That was technically correct but it was disingenuous. The claimant had already been told by Mr Sturrock on 25 March 2019 that an external consultant had been selected and that the respondent was waiting for confirmation of the date of the investigation – meaning by necessary implication that the consultant had been appointed.

73. The complaints which the claimant raised with the CI were expressed as follows –

"*1 A young person using the service was at risk because he was not cared for properly during an incident.*

2 Young people using the service have had their health, welfare and safety compromised because lessons were not learned from a serious incident.

3 Young people using the service have had their health welfare and safety compromised because serious incidents were not recorded or debriefed properly."

Whistleblowing investigator appointed

74. The respondent appointed Ms G d'Analese (then Mackay) to investigate the claimant's whistleblowing complaint. This was confirmed to the claimant in an email from Ms S Morrison, then Deputy Chief Executive on 10 April 2019 (346). In his response on 12 April 2019 (348) the claimant asked that Ms d'Analese did not contact him at that time as he had a meeting with the CI the following week.

75. Contact between the claimant and Ms d'Analese started on 10 May 2019 (365).

76. Around this time Ms Morrison left the respondent. The claimant objected to Ms Devine overseeing the investigation. Ms Unsworth advised the claimant on 15 May 2019 (377) that the investigation would be overseen by Ms S Nicholson who had recently been appointed as Head of Fundraising.

Occupational Health report

77. In the meantime the claimant had been referred for an occupational health assessment. A report was issued by PAM OH Solutions on 16 April 2019 (350-351). This advised that the claimant was "*unfit for his substantive role at the present time"* and that he was *"experiencing symptoms that may be indicative of moderate depression and mild anxiety".* The report expressed the hope that the claimant would be able to return to work "*upon satisfactory resolution of his perceived issues".*

78. The report contained the following recommendations –

(a) Completion of a stress risk assessment once the outcome of the ongoing investigation is known.

(b) A phased return to work.

(c) Formal or informal mediation upon conclusion of the ongoing investigation.

Whistleblowing investigation

79. Ms d'Analese met with the claimant on 21 May 2019. The claimant was accompanied by Mr D McGreevy, an employee of the respondent. Ms d'Analese prepared notes of the meeting by inserting the claimant's answers opposite questions she had prepared (381-396). We understood that her normal practice was to have the interviewee review and sign off the notes at the end of the meeting. However, in the claimant's case, she emailed the notes to him and he took a day or two to review these before returning them to Ms d'Analese with his revisions (397-416).

80. Ms d'Analese then conducted interviews with Mr Cairns (438-445), Ms Hardie (446-460) and Mr Brown (461-468) on 28 May 2019, with Ms Kelly (472-477 and 479-481) on 7 and 11 June 2019 and with Mr Flowerdue (483-486) on 13 June 2019. She also spoke to the CI via their telephone helpline in relation to Duty of Candour, clarification on when an incident is required to be reported and the level of detail required to be reported. For reasons explained in the report, she was unable to interview Ms White.

81. Ms d'Analese produced a report dated 19 June 2019 (487-502). This was well-structured and comprehensive. Ms d'Analese set out a number of recommendations for the respondent to consider. These included –

- Provision of clear written guidance on the level, purpose and timing of checks on service users.

- Addressing data protection compliance by the claimant.
- Deciding what information should be disclosed to the claimant.
- Training to ensure staff were clear on the level of detail required in an incident report.
- Mediation between the claimant and Ms Hardie.
- Potential action in relation to Ms Hardie.
- Updating the whistleblowing policy.

82. The claimant received an outcome letter from Ms Nicholson dated 26 June 2019 (506). There was no subject heading but it was clear that the letter related to the independent investigation report. The claimant was not provided with a copy of the report because, in Ms Devine's words, it "*contained details which related to another member of staff*".

83. Ms Nicholson's letter described actions taken by the respondent as a result of the investigation. These comprised (a) a detailed debriefing of staff on duty on 14 February 2019 and (b) rewriting the room check policy. The letter also referred to "*a number of other follow up actions"* of which "*due to data protection"* the respondent was "*not in a position to share the detail".*

84. Ms Nicholson's letter did not state that the claimant's whistleblowing complaints had been upheld. It would have been clear to the claimant that he had been vindicated at least in part by the reference to a "*detailed debriefing"*. However we noted that Ms d'Analese was unable to reach a conclusion as to whether Ms Hardie had given the claimant permission on 25 February 2019 to speak to staff.

85. The conclusions in Ms d'Analese's report were not expressed in terms of the claimant's whistleblowing complaint being upheld. Indeed, Ms d'Analese sat on the fence as to whether the claimant had actually made whistleblowing disclosures. It seemed to us that the report was not designed to say who had been right or wrong, but to identify issues and to assist the respondent in moving forward to deal with these. That may have reflected the terms of reference given to Ms d'Analese, to which we were not privy.

86. The claimant's immediate reaction to the outcome was positive as expressed in his email to Ms Nicholson and Ms d'Analese on 1 July 2019 (507) –

"*This outcome reflects the evidence I submitted."*

However, we found that the absence of a clear statement in the outcome letter that his complaints had been upheld came to be a matter of disappointment for the claimant.

Meeting on 12 July 2019

87. Ms Nicholson's letter of 26 June 20129 indicated a wish to arrange a meeting with the claimant *"in order to understand how we can support you back to work".* A meeting was duly arranged and took place on 12 July 2019. The claimant was accompanied by his trade union representative. The respondent was represented by Ms Nicholson and Ms Gray.

88. The claimant was looking for an apology from the respondent for his perceived mistreatment by Ms Devine and Ms Hardie. He was also

looking to be paid his "lost" salary during his period of absence since March 2019. He prepared a document dated 12 July 2019 covering these points. He followed this up with an email to Ms Gray and Ms Nicholson on 13 July 2019 (516).

89. Ms Gray's view of this was that the claimant had raised serious allegations against the respondent's CEO and his former line manager. The reference to "*former*" reflected Ms Hardie's departure from the respondent at the end of July 2019 to take up another position and that, allowing for holiday entitlement, she ceased working for the respondent in mid July 2019. Ms Gray considered that the claimant's concerns could not be dealt with informally and that they needed to be addressed as part of a formal grievance process. She confirmed this to the claimant in her email of 16 July 2019 (524). She answered some queries from the claimant in her further email to him of the same date (526) including the statement that the grievance "*would be chaired by Sian and I"* (Sian being Ms Nicholson).

90. The claimant confirmed in an email to Ms Gray/Ms Nicholson on 15 August 2019 (549) that, on the advice of his trade union, he would *"take up your offer of pursuing outstanding matters via the grievance route".* On the same date Ms Gray emailed the claimant (551-552) about a grievance hearing and referred to the meeting on 12 July 2019 as an "*Absence Review Meeting"*. It seemed to us that this description of the meeting was applied retrospectively – it was not a description used by Ms Nicholson when proposing the meeting on 26 June 2019 nor in her invitation emails to the claimant of 2 July 2019 (511-512).

Care Inspectorate outcome

91. On 7 August 2019 the CI wrote to the claimant (532-537) and the respondent (538- 547) providing the outcome of their investigation of the claimant's complaints. That outcome was as follows –

1. *A young person using the service was at risk because he was not cared for properly during an incident.*

This complaint was not upheld.

2. *Young people using the service have had their health, welfare and safety compromised because lessons were not learned from a serious incident.*

This complaint was upheld.

3. *Young people using the service have had their health, welfare and safety compromised because serious incidents are not recorded or debriefed properly.*

This complaint was upheld.

92. The CI imposed a Requirement – "*To ensure that the service learns from serious incidents the provider must put in place a robust quality assurance system that includes the monitoring of key procedures."* The CI also identified an Area for Improvement – "*The provider should review and improve the systems around the recording of incidents and the support of staff involved."*

93. Both parties exercised their right to seek a review of the CI outcome. The respondent sought to have one word removed and this was upheld. The claimant sought to persuade the CI to change the outcome of his first complaint which was not upheld. The CI declined to do so (614-615).

Claimant submits grievance

94. As mentioned above, on 15 August 2019 Ms Gray emailed the claimant about a grievance meeting (551-552) –

"*I would now like to invite you to attend a meeting with Janet Unsworth, Chair of the Board, on* ***Friday 23 August 2019*** *at* ***9.00am*** *within* ***Four Square, 67A Logie Green Road, Edinburgh EH7 4HF.*** *I will also be in attendance in the capacity of HR Business Partner, in order to support both parties as well as take minutes of the meeting.*

The purpose of the meeting is to discuss the contents of your concerns and the issues that you have raised. I understand your points are…."

95. Ms Gray then set out eight bullet points intended to record what she understood to be the subject matter of the claimant's grievance. We pause to observe that – in terms of who was going to make the decision on the claimant's grievance - Ms Gray's said email could only be interpreted as telling the claimant that it was Ms Unsworth who would be doing this.

96. In advance of the meeting scheduled for 23 August 2019 the claimant submitted an email of 22 August 2019 (560-561) setting out his grievance. The grievance meeting on 23 August 2019 did not proceed as such. Instead, a protected conversation took place. This evidently did not resolve matters and Ms Gray wrote to the claimant on 23 August 2019 (562) to reschedule the grievance meeting to 27 September 2019. In her letter Ms Gray used language identical to that quoted at paragraph 94 above (apart from the final sentence).

97. The claimant then submitted a document dated 25 August 2019 (564-565) setting out his grievance. He broke his grievance down into 8 sections which he identified as follows –

"1.1 Ms Devine and Ms Hardie's behaviour and competence.

1.2 Acting-up arrangements etc. (Dec 2018 – Jan 2019).

1.3 Ms Hardie's behaviour towards me following 14 Feb incident and its impact on me (21 February onwards).

1.4 Personal abuse, Equal Opps etc. (Unspecified but circa February 2019).

1.5 Care Inspectorate inspection preparation etc. (1 March meeting 2019 etc.)

1.6 Unethical instruction, humiliation etc. (1 March meeting 2019 etc.)

1.7 Salary and Statutory Sickness payments (May-August 2019).

1.8 Whistle blowing investigation and outcome letter.

98. The claimant subsequently submitted a further document dated 17 September 2019 (566-582) supplementing his grievance and extensively referencing the SSSC Codes of Practice.

99. Ms Gray emailed the claimant on 19 September 2019 (620) to advise that the respondent would pay for a further four counselling sessions. In her email Ms Gray also advised the claimant that Ms Kelly had been appointed as Registered Manager for Stopover and would be the claimant's new line manager. She also advised the claimant that a Head of Services had been appointed to replace Ms Hardie, but was not yet in post.

100. The claimant submitted a document entitled "*Grievance overview and update"* on 25 September 2019 (622-623) In this he stated –

"*My main focus at Friday's hearing will be to* ***examine senior management's practice and treatment of me – the two are inextricably linked – and its impact largely but not exclusively between 21 Feb – 6 March, in the context of the SSSC Code of Practice****."*

101. The claimant emailed Ms Gray on 26 September 2019 (628-630) to give "*some prior indication of how I intend to explain my case tomorrow".* He referred to a *"linear narrative"*. He identified 20 sections within the SSSC Code of Practice (6 within Employer duties and 14 within Employee duties) to which he intended to refer. He also referred to "*Action required to resolve matters".*

Grievance hearing

102. This took place on 27 September 2019. In attendance were Ms Unsworth, Ms Gray, the claimant and his trade union representative. According to the minutes (633-636) prepared by Ms Gray, Ms Unsworth opened the meeting by telling the claimant that *"the maximum amount of*

time of the hearing would be a period of 2 hours, until 12.00pm and that it would be structured in a way to be effective and efficient".

103. The minutes then record Ms Unsworth telling the claimant that *"we were not able to support his proposed linear structure as two independent investigations have already taken place and have been concluded".* The minutes go on to record Ms Unsworth telling the claimant that *"he had to establish what [h[is specific grievance was regarding JD and in light of these things, there are no further investigations that can take place as Four Square have gone over and above in their support for MM with regards to counselling sessions offered and the additional ones at MM's request".*

104. We pause to make the following observations –

(a) If the respondent had decided to constrain the time available to conduct the grievance hearing it would have been a matter of courtesy to advise the claimant of this in advance so that he could prepare accordingly.

(b) The "*two independent investigations"* were not investigations into the matters which were the subject of the claimant's grievance.

(c) The statement by Ms Unsworth that "*there are no further investigations that can take place",* apparently regarding Ms Devine, and linking this to the claimant's counselling sessions, was difficult to understand and, taken literally, indicated to the claimant that this part of his grievance was not to be investigated.

(d) It should have been made clear to the claimant what roles Ms Unsworth and Ms Gray were undertaking in respect of his grievance, but according to the minutes this did not happen. Ms Unsworth led the meeting at the outset and this would have served

to confirm what Ms Gray had told the claimant in her email of 15 August 2019 (551-552, see paragraphs 94-95 above), ie that Ms Gray was in attendance as HR Business Partner and notetaker.

105. Before recording what the claimant said, the grievance hearing minutes state –

"Please note that each Grievance Point has been summarised in order to try and ensure clarity."

106. Thereafter the minutes contain two headings –

"*Point 1 – The response MM received from JH relating to the 14th February 2019 and MM's request for clarification."*

and

"Point 2 – The behaviour of JD and JH together"

107. These appear to relate to the claimant's grievance issues 1.1, 1.3, perhaps 1.4 and 1.6 (see paragraph 97 above). We could find no evidence of each of the claimant's grievance points being *"summarised".* Some were not mentioned. Ms Gray told us that if the claimant had asked for more time to present his grievance, that would have been granted. It must have been apparent to Ms Unsworth and Ms Gray that the claimant had not covered all of his grievance points, yet no additional time was offered to allow him to address these.

108. The minutes record the meeting ending with Ms Gray thanking the claimant for his time and explaining –

"….*that she would carry out an investigation into everything and provide him with an outcome of his grievance submission."*

This was the first indication given to the claimant that Ms Gray's role was other than HR support and notetaker.

Grievance investigation

109. Following the grievance hearing, the claimant emailed Ms Gray on 2 October 2019 (637) attaching a list of questions (638-641) which he wished to be put to Ms Devine. In his email the claimant stated –

"*At this stage, I have limited questions to JD. My reasoning is that I am reluctant to involve JH, CS etc. unless this is absolutely necessary as I very much appreciate this could be stressful etc. for some of the witnesses. In addition, if JD answers these questions in a way that allows you to fully uphold my grievance then calling on other witnesses – be they current or ex-staff, experts, etc. – would be unnecessary.*

If you disagree here do please say and I will identify everyone I would like interviewed…."

110. Ms Gray acknowledged the claimant's email on 3 October 2019, saying –

"*I shall review and advise if I require any further information from you."*

111. The claimant emailed Ms Gray again on 4 October 2019 (645) with his list of witnesses. He repeated his point that the need to interview these witnesses depended on Ms Devine's answers to his questions. The claimant's list comprised –

- Jane Devine
- Jacqui Hardie
- Colin Sturrock
- Linda Mugadza
- Lynne White
- Stewart Ferguson
- Kay Reid
- Team leader Cranston Street
- Any other recipient of my 27 February email
- Expert witnesses from both the Care Inspectorate and the Information Commissioner's Office

112. Ms Gray met with Ms Devine on 4 October 2019. There was a follow up by email on 12 October 2019. Ms Gray produced notes covering her sessions with Ms Devine (655-659 and 660-664). No other witnesses were interviewed. The claimant was critical that Ms Gray had not asked all of the questions he had submitted. However, we were satisfied that Ms Gray had followed the structure of the claimant's questions. We noted that within the claimant's 84 questions, some 30 began with the word *"If"* indicating that the need to ask the question was predicated on the answer to a previous question.

113. Apart from questioning Ms Devine, Ms Gray's investigation involved reading the extensive material provided by the claimant. In her outcome

letter, Ms Gray listed in 45 appendices the documentation considered during her investigation.

Grievance outcome

114. Ms Gray wrote to the claimant on 24 October 2019 (672-679) to advise the outcome of his grievance. Within this letter the grievance points were expressed in these terms –

1. *Jane Devine's and Jacqui Hardie's treatment of you was fundamentally unfair and disrespectful, their actions making your compliance with both the NHSCS and the SSSC Code of Practice impossible.*

2. *You were informed that JH allegedly described you to a work colleague as a "nightmare" and made clear that your prospects of the Registered Managers job, should you apply, were non-existent.*

3. *JH and JD repeatedly problematized your contribution in relation to the Care Inspectorate.*

4. *JD unfairly criticised your practice, issued an unethical instruction and humiliated you.*

5. *You request clarification over salary and Statutory Sickness payments.*

6. *You believe your Whistleblowing investigation outcome letter is inadequate.*

7. *You requested 4 additional work-related stress and counselling sessions.*

8. *Your loss of earnings.*

115. When dealing with the first grievance point Ms Gray stated in her letter –

"*Having reviewed the evidence as well as taking into consideration your comments that the outcome of your whistleblow and the Care Inspectorates investigation are directly related to your grievance, I can confirm that as both your whistleblow and Care Inspectorates investigations have been conducted and concluded, I can see no further action that can be taken."*

116. Ms Gray concluded -

"*….I am satisfied that this point of grievance has been expansively investigated upon with an active Action Plan implemented in place in order to address the concerns raised and to abide by the Care Inspectorates instruction, thus that this point has been resolved…."*

Point 1

117. Ms Gray accepted in the course of her evidence that she had misunderstood the claimant's grievance so far as relating to the conduct of Ms Devine and Ms Hardie. She accepted, in effect, that what Ms d'Analese and the Care Inspectorate had investigated were the matters covered by (a) the claimant's letter to Ms Unsworth of 11 March 2019 and (b) the claimant's submission to the Care Inspectorate on 28 March 2019. These were not the same as the claimant's complaints

about his treatment by Ms Devine and Ms Hardie. The claimant was correct in his assertion that Ms Gray had been wrong to rely on these investigations.

Point 2

118. Ms Gray stated in her outcome letter that it was not possible to interview Ms Hardie as she was no longer employed by the respondent. She did not provide an explanation for not interviewing Mr Ferguson, who had reported Ms Hardie's alleged comments to the claimant. Ms Gray stated –

"….we have not received or established any evidence which supports or contradicts this allegation."

and concluded –

"Consequently, this point of grievance is rejected."

119. We agreed with the claimant that Ms Gray had been wrong to reject this grievance point on the basis set out in her letter. The only evidence available to Ms Gray came from the claimant. We did not understand her to find that the claimant had been untruthful about what he said Mr Ferguson had told him. This point was not investigated and there was no logical explanation provided for its rejection.

Point 3

120. Ms Gray's conclusion here was expressed in these terms –

"*….I am satisfied that this point of grievance has been expansively investigated upon. Consequently, this point of grievance is rejected."*

121. Ms Gray described the evidence as "*namely the outcome of your whistleblow letter of 26th June 2019".* That outcome was Ms d'Analese's report (487-502). This report makes no reference to the Care Inspectorate's inspection of Stopover on 26 February 2019. Ms Gray's reliance on this to support her conclusion was entirely misplaced.

Point 4

122. This related to the claimant's alleged GDPR breach by naming the agency worker in his email of 27 February 2019 (301). The rationale for rejection of this point was set out in Ms Gray's outcome letter in these terms –

"*Having reviewed the evidence, I have been advised that your email of 27th February 2019 was not correct practice…."*

"Your belief that your email was wholly appropriate under the circumstances does not in fact make your actions lawful."

"The instruction to delete the email is not unethical but part of the process where there has been a GDPR breach…."

"There is no evidence to suggest that JD has criticised your practice, issued an unethical instruction or humiliated you."

123. Our view of this was that –

(a) Ms Gray was incorrect to find that there was no evidence that Ms Devine had not criticised the claimant's practice, as least so far as relating to the sending of the email of 27 February 2019. That was exactly what Ms Devine had done at the second meeting on 1 March 2019 (see paragraph 63 above).

(b) Ms Gray was entitled to find that Ms Devine had not issued an unethical instruction. It would have been apparent to Ms Gray when she spoke to Ms Devine in the course of her investigation that Ms Devine had knowledge of GDPR as she referred to *"rolling out a compliance programme across the organisation".*

(c) Ms Gray was not entitled to find that there was no evidence that Ms Devine had humiliated the claimant. Her reason for not interviewing Ms Hardie was that she (Ms Hardie) had left the respondent's employment. That reason did not apply to Mr Sturrock and Ms Reid who attended the first meeting on 1 March 2019 (and were named in the claimant's list of witnesses). This matter was not adequately investigated.

Point 5

124. Ms Gray's finding that this point had been resolved was based on her review of email correspondence between the claimant and Ms H Hartman, the respondent's Deputy CEO and Head of Finance. The

claimant criticised this as inadequate but we did not agree. It was proportionate to the importance of the issue. It was not necessary for Ms Gray to review all of the correspondence about this to be satisfied that the claimant had been provided with the clarification he had sought.

Point 6

125. Ms Gray dealt with the claimant's criticism of the grievance outcome letter of 26 June 2019 (506) by issuing an amended version on 27 September 2019. This contained the heading "*Outcome of Whistleblow Investigation"* and wording was added confirming that "*Four Square has upheld your whistleblow and has implemented a number of actions".* It was reasonable for Ms Gray to regard this point as resolved.

Point 7

126. Ms Gray was correct to regard this point as resolved because the respondent did offer to pay for the additional counselling sessions. However, she struck a raw nerve when in her outcome letter she described the respondent as being *"incredibly compassionate"* towards the claimant.

Point 8

127. In relation to this (loss of earnings) Ms Gray concluded -

"*….you have been paid as per Organisation policy and are not entitled to receive full salary throughout which you have been absent from work due to ill-health."*

That was a conclusion Ms Gray was entitled to reach.

128. Ms Gray recorded in summary that the claimant's grievance points 1 and 5-7 had been resolved and points 2-4 and 8 had been rejected. She listed the 45 appendices containing documentation considered during her investigation. She advised the claimant of his right of appeal to Ms C McGovern who we understood to be the Managing Director of the external HR consultancy by which Ms Gray was at that time employed.

129. That the claimant remained uncertain as to who had decided his grievance outcome was confirmed in his email to Ms Gray of 27 October 2019 (683) where he asked whether Ms Gray made the decision on her own or whether Ms Unsworth, or anyone else, was also involved. Ms Gray replied on 28 October 2019 (684) –

"*I undertook the investigation and made the conclusions regarding each Grievance Point."*

Claimant appeals

130. The claimant appealed against the grievance outcome in terms of his email to Ms McGovern of 2 November 2019 (685-686). In email correspondence between Ms McGovern and the claimant on 6-12 November 2019 (692-695) a hearing date of 15 November 2019 was set.

131. In his appeal email the claimant complained about the grievance hearing minutes and what he regarded as inaccuracies and misrepresentations in the answers provided by Ms Devine to Ms Gray on 12 October 2019. He also complained about the grievance outcome, stating in particular that he disagreed in relation to grievance points 1-4 and 8.

Appeal hearing

132. This took place on 15 November 2019. In attendance were Mrs Meikle, Ms McGovern, the claimant along with his trade union representative and Ms S Ledson as notetaker. Minutes were prepared (700-704).

133. Once again there was a lack of clarity as to who would be deciding the appeal outcome. The minutes recorded Ms McGovern as being the chair of the meeting. Ms McGovern opened the meeting by telling the claimant that *"no decision will be made today"* and that "*she may need to speak to others after the meeting".* Ms McGovern also told the claimant that *"she hopes to respond as quickly as possible".* This gave the impression that Ms McGovern was the decision maker, an impression which was reinforced by Ms McGovern telling the claimant at the end of the meeting that *"she will respond as soon as possible however she is going on holiday the week after next and it will probably be after her return".* The only contra-indicator was Mrs Meikle's statement that she was *"approaching this appeal with a fresh independent view".*

134. The appeal hearing minutes recorded that each of the claimant's 8 grievance points (see paragraph 114 above) was discussed. As he had done with the grievance minutes, of which he was highly critical, the claimant produced his own annotated version (710-717). We were however satisfied that the appeal hearing minutes were reasonably accurate.

135. The claimant's uncertainty as to who was the appeal decision maker was confirmed in his email to Ms McGovern of 29 November 2019 (709). He enquired –

"Could you please clarify for me who investigates this grievance and decides whether it should be upheld or not?"

136. The position was made clear to the claimant only when Mrs Meikle emailed him on 14 December 2019 (720) –

"I wish to confirm that I am leading this investigation and I will decide whether your appeal should be upheld."

Mrs Meikle advised the claimant that she was to interview Ms Devine the following week and aimed to provide an outcome by week beginning 23 December 2019.

Appeal investigation

137. Mrs Meikle met with Ms Devine on 16 December 2019. Minutes of this meeting were prepared (721-723) the accuracy of which we found no reason to doubt. Ms Devine's evidence was that this was a *"brief interview as it covered only two matters: the discussion I had with the Claimant about the way he communicated the Care Inspectorate inspection results; and the issues of breaching confidentiality".* The level of detail contained in the minutes confirmed the inaccuracy of this.

138. We also noted two areas where Ms Devine appeared to be economical with the truth in the information she gave Mrs Meikle–

(a) Mrs Meikle asked Ms Devine to confirm what the outcomes of the investigations (whistleblowing and Care Inspectorate) were and Ms Devine –

"*confirmed that Four Square were compliant but that improvements could be made".*

In our view, that misrepresented the outcome of the Care Inspectorate investigation (see paragraphs 91-92 above).

(b) In relation to the agency worker incident on 27 February 2019, Ms Devine told Mrs Meikle that "*JH had completely handled the incident".* The true position, as we have found (see paragraph 51 above), was that the claimant dealt with the incident on site, liaising with Ms Hardie.

139. Apart from her meetings with the claimant and Ms Devine, Mrs Meikle's investigation involved reading the extensive material provided by the claimant, the grievance meeting notes, the grievance outcome and the claimant's response to this, the independent whistleblowing investigation report, the Care Inspectorate report and the claimant's appeal letter. She re-read this material after her meeting with the claimant.

Appeal outcome

140. Mrs Meikle wrote to the claimant on 23 December 2019 (726-731) providing the outcome of his grievance appeal. The claimant was critical of the process as a rehearing of his grievance, contrary to the respondent's Grievance Policy (107-109) which states –

"*The appeal is not a rehearing of the original grievance, but rather a consideration of the specific areas with which you are dissatisfied in relation to the original grievance."*

141. We considered that the claimant's criticism was unfair. In his grievance appeal of 2 November 2019 (685-686) the claimant referred to each of the grievance outcome points. The grievance appeal minutes confirmed that all of these points were discussed. This involved dealing with the *"specific areas"* where the claimant was dissatisfied which was consistent with the Grievance Policy.

142. In her appeal outcome letter Mrs Meikle partially upheld the claimant's grievance point 1 (alleged unfair and disrespectful treatment by Ms Devine and Ms Hardie). She identified the *"inconsistent approach"* to room checks and *"the shortcomings in Four Square's quality assurance and support for staff"* following the incident on 14 February 2019.

143. Mrs Meikle did not uphold the claimant's appeal on grievance points 2, 3, 4 and 8. She set out her reasons for so deciding in her outcome letter. She regarded grievance points 5, 6 and 7 as *"resolved"*. The claimant was not happy at this description but in our view it was a reasonable view to take as no further action by the respondent was required.

144. In his witness statement the claimant set out a detailed critique of Mrs Meikle's outcome letter. He referred to matters being brought to his attention for the first time in the appeal outcome letter. Notwithstanding the claimant's views, we were satisfied that Mrs Meikle went about her task as appeal manager in a competent and considered way. She provided adequate reasoning for her decisions on each point, with one exception.

145. That exception related to grievance point 2. After telling the claimant that she was not prepared to interview Mr Ferguson, who was alleged to have overheard Ms Hardie describe the claimant as a "*nightmare",* Mrs Meikle's outcome letter stated as follows –

"*During my investigation, I saw evidence of JH being supportive of you and I have no reason to believe that a senior manager would make disparaging comments regarding a member of staff in front of other staff.*

I believe you when you tell me that the member of staff told you he overheard this comment however this does not prove that JH actually made those comments. I therefore do not uphold this area of your grievance appeal."

146. That did not sit comfortably with comments Ms Hardie had made about the claimant during her interview with Ms d'Analese (446-460), the notes of which were in the investigation report which Mrs Meikle had read. Ms Hardie told Ms d'Analese –

"*I know MM's style, it is cover your arse…."*

and

"*He wants to cover his own arse."*

147. If Mrs Meikle was approaching this on the basis of assessing whether, on the balance of probability, Ms Hardie had described the claimant as a "*nightmare"* she should have weighed in the balance (a) her belief in the claimant's credibility and (b) Ms Hardie's use of derogatory language

when speaking about the claimant. Arguably, she should not have attached weight to Ms Hardie being a senior manager.

148. Although he was advised in Mrs Meikle's appeal outcome letter that her decision was final, the claimant emailed Mrs Meikle on 6 January 2020 (739) attaching a version of her outcome letter (740-749) containing various annotations in the form of comments and questions. The claimant stated in his email that he was not "*further appealing"* but *"seeking clarification in order to better understand how you arrived at the decisions that you have made".*

149. Mrs Meikle responded on 8 January 2020 (750) stating that "*none of the points you raise give me cause to re-visit my decision".* She encouraged the claimant *"to commence the return to work process".*

Redundancy/restructure

150. In January 2020 the respondent commenced a consultation process with a view to implementing a restructure of the organisation for financial reasons. Part of this restructure involved the removal of the three Team Leader roles and their replacement by two Senior Practitioner roles. The claimant was included in the consultation process.

151. The claimant was unable for health reasons to attend a consultation meeting held on 13 January 2020. Ms Gray wrote to him on 14 January 2020 (764) to confirm that his role was at risk of redundancy. The claimant was contemplating resigning – this was confirmed in his email to his trade union representative on 14 January 2020 (765) where he stated "*I have not submitted my notice as yet as I am still in correspondence with them over a number of issues".*

152. On 24 January 2020 Ms Gray emailed the claimant (787) to invite him to a consultation meeting on 31 January 2020. Also on 24 January 2020 Ms Gray emailed the claimant (789) with a job application form (790-795) and job descriptions for the roles of Store Manager (796-797), Senior Practitioner (798-801), Outreach Housing Advice Specialist (802-804), Senior Practitioner (Mayday Trust) (805-807) and (Accommodation Services) (814-816), Night Practitioner (808-810) and Practitioner (811-813). She also sent the claimant a proposed employment contract (820-831) and employee handbook (832-862). She advised the claimant that the deadline for applications was 31 January 2020.

153. The claimant attended a one-to-one consultation meeting with Ms Gray and Ms Hartman on 31 January 2020. Prior to attending this meeting, the claimant submitted a grievance dated 31 January 2020 (872-873) regarding the reorganisation timeline, consultation and related matters. We understood that the claimant and other staff were encouraged by the trade union to do this. After the consultation meeting, the claimant emailed Ms Gray and Ms Hartman (870) complaining about the process and describing the consultation as a *"sham".*

154. Ms Hartman replied to the claimant on 4 February 2020 (875-877) in some detail. Her email included the following –

"*Although you have formally submitted a grievance against the process I would encourage further dialogue and would like to invite you to discuss the plans in more detail on an informal basis this week and explore whether you would re-consider an application for the Senior Practitioner role with an extended deadline of 7th February and a potential interview date of early next week."*

Claimant resigns

155. Ms Devine told us that if the claimant had applied for the Senior Practitioner role, he would probably have been appointed. However, he did not do so and on 11 February 2020 he emailed Ms Gray (880) in these terms-

"*Please accept this as notification that I am resigning from Four Square as of to-day.*

I intend pursuing a case – constructive dismissal – via the civil court and/or Employment Tribunal.

If you need this in writing, with my signature, please do let me know.

I wish Four Square all the best!"

156. Ms Gray replied to the claimant on 11 February 2020 (881) confirming receipt of his resignation and that his employment was terminating with immediate effect.

Computer access

157. The claimant told Ms Gray in his email of 25 September 2019 (621) that he was no longer able to access his work laptop from home. In her response of the same date (624), Ms Gray told the claimant that she would look into this. The claimant asked Ms Gray again about access to his work laptop in his email of 3 October 2019 (643). Ms Gray replied on

the same date (644) that she was "*back at Four Square tomorrow to review this with them".*

158. The claimant emailed Ms Gray on 7 October 2019 (647) seeking access to his emails etc. Ms Gray replied on the same date (648) advising the claimant that, due to the respondent rolling out a new IT system, he was required to return his laptop and phone. Later on 7 October 2019 the claimant emailed Ms Gray again (649) requesting access to a computer and printer the following day. Ms Gray replied promptly (650) saying that she would keep the claimant updated. She emailed the claimant again on 8 October 2019 (651) saying that computer access was not possible because the respondent did not have the claimant's new login details.

159. The claimant emailed Ms Gray on 27 October 2019 (683) stating that he wanted computer access before his appeal and asking Ms Gray arrange this. Ms Gray replied on 28 October 2019 (684) advising the claimant that she would speak to the respondent and *"set a date and time for this".*

160. The claimant emailed Ms McGovern on 29 November 2019 (709) expressing his disappointment that he had not been "*allowed access to my emails etc. on my laptop to retrieve evidence related to this grievance".* Mrs Meikle addressed this in her email to the claimant of 14 December 2019 (720) stating –

"*I have been advised by Jane that you requested access at short notice and on a day that nobody was in the office. Jane has advised that she is waiting to hear from you with alternative dates so please go ahead and arrange that."*

161. This did not square with what Ms Gray told the claimant on 28 October 2019. The claimant emailed Mrs Meikle on 23 December 2019 (733)

pointing out that he had sought email access more than 10 weeks ago. He continued –

"*The onus was on the organisation to get back to me and not the reverse. I will contact Jane to-day."*

162. The claimant and Ms Devine then exchanged emails on 23 December 2019 (734-736) with matters left on the basis that the claimant would make contact on 6 January 2020 to arrange access. The claimant emailed Ms Devine on 7 January 2020 (752) requesting a date/time when he could access his laptop. Ms Devine replied on the same date (755) indicating that she had been in touch with IT and would get some dates to the claimant.

163. Ms Gray emailed the claimant on 17 January 2020 (782) asking if he still required to access his emails. The claimant confirmed in his reply on 21 January 2020 (784) that he did. Ms Gray emailed the claimant on 22 January 2020 (785) asking when he would like to come into the office to do this. The claimant responded on 24 January 2020 (788) indicating "*as soon as possible".*

164. Ms Gray emailed the claimant on 27 January 2020 (863) asking if he could come into the office on 31 January 2020 to access his emails. The claimant replied on the same date (865) stating that he wanted to come in on that date. The claimant then asked Ms Gray in an email of 28 January 2020 (868) if his one-to-one redundancy consultation meeting could take place on 31 January 2020 "*when I will be visiting FS anyway to access computer".*

165. The claimant finally obtained computer access on 31 January 2020, as confirmed in the postscript to his email to Ms Gray and Ms Hartman on 31

January 2020 (870). It should not have taken the respondent more than four months to facilitate this.

Timescales

166. The claimant complained that the respondent did not adhere to the timescales set out in their Grievance Policy (107-109). That was true, but there were some mitigating factors. The original date for the grievance hearing was instead utilised for a protected conversation. Holiday arrangements delayed the rescheduled date. The volume of documentation submitted by the claimant was considerable, and inevitably took time for Ms Gray and Mrs Meikle to digest and consider.

167. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) states that grievance and appeal meetings should he held "*without unreasonable delay".* In the present case there was delay but it was not unreasonable.

Mitigation

168. The claimant had not sought alternative employment since his resignation. He provided a number of reasons for this – his age (66 at the time of his resignation), his vulnerable status relative to Covid-19, his residual stress, further health issues and his concern that he would be perceived as "*problematic"* by any potential new employer.

Injury to feelings

169. We found that the events described above have had a profound effect on the claimant. They have, to a significant degree, taken over his life. His

witness statement ran to 192 pages and covered every aspect in fine detail.

170. The claimant said –

"*The critical problem in all of this is that my treatment in relation to my protected disclosures and the Respondents response at each stage over the last two years has criss-crossed through what is most important to me in my life. As a consequence this has had an emotionally de-stabalising impact on me which to some extent continues. This is not a psychiatric problem but one that is a continuing source of anguish and distress to me."*

and

"I know and have been told by close friends and family that I need to move on and I do. I am however emotionally locked into this and I am genuinely unable to move on….I continue to be pre-occupied by these matters…."

Time bar

171. The claimant had experience of the Employment Tribunal system having presented an age discrimination claim some years ago. He advised us that this case settled after a preliminary hearing conducted by telephone conference call.

172. The claimant had previously been a member of Unite and rejoined on or around 21 February 2019. From that time on he was in regular contact

with his trade union representative. It was apparent that this included discussion about his intention to resign and pursue a claim – see paragraphs 148 and 152 above. It seemed to us probable that the claimant's focus at the time of his resignation was on bringing a complaint of constructive unfair dismissal and not on whether his alleged treatment by the respondent was detriment on the ground of having made a protected disclosure.

173. We had some difficulty with the following parts of Ms Gray's evidence –

"*It is also worth noting that the Claimant made comments to me previously regarding the fact that he was nearly employed by the Respondent for two years, therefore, once passed this date, he would be able to take the Respondent to court."*

and

"*After the one to one consultation, the Claimant's further grievance and a suggestion of a further meeting, instead of engaging further the Claimant chose to resign. I believe that once the Claimant reached his two years' service with the Respondent, he resigned in order to commence legal proceedings. As explained above, the claimant advised me many times that this was his plan and that he would play the long game in order to achieve this."*

174. The claimant denied that he had made these comments and we preferred his evidence to that of Ms Gray on this point. It seemed to us improbable that the claimant would discuss an intention to litigate against the respondent with their own external HR consultant which was Ms Gray's status in July 2019 (when the claimant was approaching two years' service) far less do so "*many times".*

Comments on evidence

175. The claimant was a credible witness but one who gave his evidence through the prism of his perception that he had suffered significant mistreatment at the hands of the respondent. That caused him to see the respondent's actions towards him in a negative light to a greater extent than could be objectively justified.

176. The respondent's witnesses were also credible. Mrs Meikle was measured and gave her evidence with the confidence of someone who was experienced in dealing with matters such as a grievance appeal. Ms Devine was also a confident witness whose style in giving evidence could fairly be described as robust. Ms Gray was less confident but, to her credit, was prepared to accept when challenged that she might have got some things wrong.

177. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus on those aspects which bore most closely on the issues we had to decide. Where we have not made reference to passages of evidence it is because of that approach.

Submissions

178. There was insufficient time at the conclusion of the evidence on 14 April 2021 to hear oral submissions. We agreed with the parties that they would provide written submissions which they duly did. We are grateful to the claimant and Mr Hay for these. These submissions are available within the case file and so we will not rehearse them here.

Applicable law

179. We set out below the various statutory provisions engaged in this case.

Right not to be unfairly dismissed

180. This is found in section 94(1) ERA –

"An employee has the right not to be unfairly dismissed by his employer."

Constructive dismissal

181. Section 95(1) ERA, so far as relevant, provides as follows –

"*….an employee is dismissed by his employer if –*

….(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Reason for dismissal

182. Section 98 ERA provides as follows –

"(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason)for the dismissal, and

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

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…."

Fairness of dismissal

183. Section 98(4) ERA provides as follows –

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

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

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

Automatically unfair dismissal (protected disclosure)

184. Section 103A ERA provides as follows –

"An employee who is dismissed shall be regarded….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Meaning of "protected disclosure"

185. Section 43A ERA provides as follows -

"*….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.*

Disclosures qualifying for protection

186. Section 43B(1) ERA, so far as relevant, provides as follows –

"*….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) ….

(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) ….

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

Disclosure to employer

187. Section 43C(1) ERA, so far a relevant, provides as follows –

"*A qualifying disclosure is made in accordance with this section if the worker makes the disclosure*

(a) to his employer…."

Disclosure to prescribed person

188. Section 43F(1) ERA provides as follows –

"*A qualifying disclosure is made in accordance with this section if the worker –*

(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes –

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true."

189. In terms of the schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014, Social Care and Social Work Improvement Scotland (now the CI) is a prescribed person in respect of matters relating to the provision of care services as defined in the Public Services Reform (Scotland) Act 2010.

Detriment (protected disclosure)

190. Section 47B(1) ERA provides as follows –

"*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."*

Time limit for complaint

191. Section 48 ERA contains the following provisions –

"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B….

(2) On a complaint under subsection….(1A)….it is for the employer to show the ground on which any act, or deliberate failure to act, was done….

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

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

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

(4) For the purpose of subsection (3) –

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer….shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done…."

192. We also reminded ourselves of what the courts have said about constructive dismissal and the implied term of mutual trust and confidence.

Meaning of constructive dismissal

193. The question of whether (a) the employer's conduct, in response to which the employee resigns, has to amount to a breach of contract or (b) it is sufficient if there has been unreasonable conduct causing the employee to resign was settled in ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27***. The contract test prevailed. Lord Denning expressed it as follows –

"*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at*

the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he 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. He will be regarded as having elected to affirm the contract."

194. The implied term of mutual trust and confidence is expressed, from the perspective of the employer's obligation, by Lord Steyn in ***Malik and Mahmud v Bank of Credit and Commerce International S.A. (in Compulsory Liquidation) [1997] UKHL 23.*** It imposes an obligation that the employer shall not -

"….*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

Discussion

195. We approached our deliberations on the basis of working through the list of issues.

Was the claimant constructively dismissed by the respondent?

196. We reminded ourselves of section 95(1)(c) ERA and the passage quoted above from ***Western Excavating***. For the claimant's resignation on 11 February 2020 to be a constructive dismissal, we would need to find that (a) there had been conduct of the respondent amounting to a breach of the claimant's contract of employment, (b) the breach was material, ie

going to the root of the contract, (c) the claimant had resigned in response to that breach and (d) the claimant did not wait too long before doing so.

197. The claimant's position, as set out in paragraph 37 of his revised Statement of Claim including Further and Better Particulars (75), was that –

"*….the Respondents were in breach of their duty of mutual trust and confidence towards him in respect of the treatment that he received following the incident on 14 February 2019 all as highlighted and articulated in the Statement of Claim and further that in their conduct of the grievance the Respondents failed to deal with this efficiently and in accordance with the principles of natural justice, ACAS Code of Practice for Disciplinaries and Grievances and in compliance with their own policy. On the basis of said breaches of contract the Claimant was entitled to treat his contract of employment with the Respondents as repudiated to the extent that he was entitled to resign and claim constructive unfair dismissal."*

198. The claimant was unhappy at how he perceived he had been treated by Ms Devine and Ms Hardie between 21 February 2019 (when he returned to work after surgery) and 6 March 2019 (when he commenced sick leave). However, and commendably, his primary focus at that time was on the safeguarding issue which he believed the incident of 14 February 2019 and its aftermath had highlighted. That was what he took to Ms Unsworth in his letter of 11 March 2019 (321) and to the CI in his submission on 28 March 2019.

199. By the time the claimant met with Ms Nicolson and Ms Gray on 12 July 2019 he had achieved a measure of closure on the safeguarding issue

following Ms d'Analese's investigation. Although Ms Nicholson's outcome letter of 26 June 2019 (506) did not state in terms that his whistleblowing complaint had been upheld (that itself being one of his subsequent grievance points) it was clear from the claimant's response – his email to Ms Nicholson of 1 July 2019 (507) – that this was what he understood:

"*This outcome reflects the evidence that I submitted."*

200. In the document he presented at the meeting on 12 July 2019 (514-515) the claimant referred to a number of matters – non-payment of salary, leave entitlement and an acknowledgement that his complaint had been dealt with under the Whistleblowing Policy. He referred to Ms Devine's behaviour towards him and sought a meeting with Ms Devine "*to address these issues informally".* His final paragraph read –

"*I once again confirm that it is my intention to resolve all of the above constructively and within the organisation, if possible, and thereafter to return to work as soon as my health will allow. I have worked in this sector for 42 years and my commitment to supporting service users at Four Square is unwavering."*

201. The claimant did not accept Mr Hay's contention that from 12 July 2019 the focus was on "*the handling of the Claimant's grievance and grievance appeal"* but we considered that contention to be correct. If the claimant believed at this point that the respondent's conduct towards him had been in breach of contract, he did not resign in response to that breach. The paragraph we have quoted above is more consistent with the claimant intending to continue with his employment than to resign from it. As Lord Denning put it, he *"elected to affirm the contract".*

202. A number of matters then impacted on the claimant's trust and confidence in the respondent. Principal amongst these were the grievance process and the grievance appeal. That was clear from paragraphs 26-36 of the claimant's revised Statement of Claim (70-75). We proceeded to consider the evidence relating to these.

203. Turning first to the grievance process, we found various aspects where this was open to criticism. We have referred to some of these at paragraph 104 above. In addition –

(a) the claimant was not allowed sufficient time to present his grievance and was not told that further time would have been allowed if it had been requested.

(b) the claimant was not told that the witnesses on his list (apart from Ms Devine) would not be interviewed. If the claimant had been told, he might have had an opportunity to obtain witness statements and to submit these before the grievance outcome was decided.

(c) Ms Gray mistakenly placed reliance on the outcomes of the whistleblowing and CI investigations in dealing with the claimant's grievance point 1 (see paragraph 117 above).

(d) There was no logical basis provided for the rejection of the claimant's grievance point 2 (see paragraphs 118-119 above).

(e) Ms Gray's rejection of the claimant's grievance point 3 based on the whistleblowing investigation outcome was misplaced (see paragraph 121 above).

(f) The claimant's grievance point 4 was not adequately investigated (see paragraph 123 above).

204. The claimant was unhappy with the grievance hearing minutes and outcome letter. We considered that these concerns were overstated. The minutes and outcome letter did not read as the claimant would have wished, but this was in our view less significant than the points listed above.

205. If the claimant had resigned on receipt of the grievance outcome letter because he had lost trust and confidence in the respondent's ability to deal with his grievance fairly, he might well have been able to argue that (a) the inadequate handling of his grievance was a breach of his contract of employment, (b) that breach was material, (c) he was resigning in response to that breach and (d) he had not delayed in doing so. However the claimant did not resign at this point and we make no criticism of him in that regard. He chose to appeal which was a logical and sensible decision.

206. Moving on to the grievance appeal, while we noted the claimant's criticisms, we were satisfied that Mrs Meikle dealt with this in a manner which was generally fair and reasonable. The claimant described it as a rehearing which was proscribed by the respondent's Grievance Policy. However, Mrs Meikle was entitled to approach matters on the basis of working through the claimant's appeal points which was effectively what she did. Those appeal points included the claimant's 8 grievance points and it was appropriate for Mrs Meikle to revisit each of these.

207. We found two areas where the grievance appeal process and outcome were open to adverse comment. The first was the lack of clarity as to the identity of the decision maker. This was avoidable and, given that the respondent had the benefit of external HR advice, should have been avoided. It was not however *"a significant breach going to the root of the contract of employment"* nor did it show that the respondent no longer

intended *"to be bound by one or more of the essential terms of the contract".*

208. The second area was Mrs Meikle's approach to the claimant's grievance point 2. Ms Gray had dealt with this inadequately and Mrs Meikle missed the opportunity to rectify matters. Her reasoning, that she believed that Ms Hardie, as a senior manager, would not have made "*disparaging comments regarding a member of staff in front of other staff",* was flawed because (a) she had evidence of Ms Hardie using derogatory language when speaking about the claimant (see paragraphs 146-147 above) and (b) she did not approach this point with sufficient objectivity.

209. Notwithstanding these concerns, we found that this also did not constitute a significant breach going to the root of the contract of employment nor did it indicate that the respondent no longer intended to be bound by the contract. Neither of the matters upon which we have made adverse comment amounted to conduct of the respondent which entitled the claimant to terminate the contract of employment without notice.

210. We next considered the respondent's conduct in relation to the claimant's request for computer access. We reviewed our findings in fact as set out at paragraphs 157-165 above. The respondent should have done better and the delay was discourteous to the claimant. It was not however conduct of the respondent in response to which the claimant was entitled to resign. Further, at the time when he did resign, the claimant had been afforded the computer access he had been seeking.

211. Having found that none of these matters about which the claimant complained was a breach of contract by the respondent in response to which the claimant was entitled to resign, we considered whether there had been a series of events which amounted cumulatively to a material breach of contract, and whether there had been a *"last straw"* event prompting the claimant to resign. We reminded ourselves of what the

Court of Appeal said in ***London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493***, in particular Dyson LJ at paragraphs 19-22.

212. We came to the view that (a) the matters about which the claimant complained did not amount cumulatively to a material breach of contract and (b) there had been no *"last straw"* event. In finding that there was no breach when matters were viewed cumulatively, we considered that the grievance appeal outcome addressed what we perceived as shortcomings in the grievance process. The opportunity was taken to revisit the claimant's grievance points.

213. While we understand this was not the claimant's perception, we found that the claimant achieved a better outcome following his appeal. Viewed objectively, the extent to which the claimant could justifiably complain that the respondent's obligation of trust and confidence had not been observed was less rather than more after the appeal. Contrary to the claimant's contention, neither the grievance nor the appeal process had been a sham.

214. The evidence indicated that the claimant was contemplating resignation in mid-January 2020 (see paragraph 151 above). We found that the reason for this was the appeal outcome. If the claimant's appeal had been upheld, we believe he would have felt vindicated and would not have been contemplating resignation. While the redundancy/reorganisation process was underway in January 2020 and the claimant was placed at risk of redundancy, we did not consider that this was a *"last straw"* for the claimant.

215. The claimant submitted a grievance on 31 January 2020 but our understanding of his position was that he did this on the advice of his trade union and that it was, in effect, a gesture of solidarity with his colleagues who were going through the redundancy consultation process. He would have been a strong candidate for the Senior Practitioner role

and indeed Ms Devine's evidence was that he probably would not have been made redundant.

216. Accordingly, our decision on the first issue was that the claimant was not constructively dismissed by the respondent.

If so, was that dismissal automatically unfair under section 103A ERA because the reason (or principal reason) for the dismissal was that the claimant made a protected disclosure?

If not, was it nevertheless unfair under sections 94 and 98 ERA?

217. We address these, the second and third issues, together because their determination flows from our decision on the first issue. For the claimant to succeed under section 103A ERA and/or sections 94/98 ERA, there had to be a dismissal within the meaning of section 95 ERA. Having decided that the claimant was not constructively dismissed by the respondent, and there being no suggestion that he was actually dismissed, it follows that his claims of automatically unfair dismissal under section 103 A ERA and *"ordinary"* unfair dismissal under sections 94/98 ERA must fail.

Did the claimant make a protected disclosure (or disclosures) under section 43A ERA which qualified for protection under section 43B ERA?

218. We reminded ourselves of the terms of section 43B ERA and the elements of a disclosure qualifying for protection. There requires to be –

(a) a disclosure of information which

(b) in the reasonable belief of the worker making the disclosure

(c) is made in the public interest and

(d) tends to show one or more of the matters set out in section 43B (a) to (f).

219. We understood the claimant to be contending that the applicable matters in the present case were –

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

and

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

220. We reminded ourselves that giving *"information"* is not the same as making an allegation – ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38*** – although information and allegation can be intertwined. In ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436*** the Court of Appeal said (at paragraph 35) after referring to the language of section 43B (1) ERA -

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*"

221. We approached this issue by looking at each of the matters said by the claimant to have been a protected disclosure and, except where the respondent accepted that such a disclosure had been made, assessing whether it matched the elements within section 43B ERA.

222. The first alleged disclosure was the claimant's email to Ms Hardie of 21 February 2019 (277). We have set this out at paragraph 29 above. In our view, this was not a disclosure of information but a series of questions about the incident on 14 February 2019. Rather than disclosing information, the claimant was seeking it from Ms Hardie. This was not a protected disclosure.

223. The second alleged disclosure was in the course of the claimant's telephone conversation with Ms Hardie on 21 February 2019. While we were satisfied that this conversation related to the incident on 14 February 2019 and that it became heated, we did not have much of the detail of what the claimant said to Ms Hardie. The claimant's evidence was that he *"attempted to explain the basis of* [his] *concerns"* and said that he was "*duty bound to express these concerns about the 14 February 2019 incident".* He indicated he had said something along the lines of "….*that it would not matter if it was the Director of Social Work or Director of Housing I was talking to these issues need to be raised and addressed if young people were to be kept safe".*

224. We did not find that this was enough to satisfy us that there had been a disclosure of information going beyond what the claimant had said in his email to Ms Hardie of 21 February 2019. This was not a protected disclosure.

225. We understood the claimant to allege that Ms Hardie's behaviour towards him during this conversation, said by the claimant to be "*aggressive and hostile",* was a further protected disclosure. Alternatively he might have meant his reference during his telephone conversation with Ms Hardie to what Ms Whyte told him about the incident on 14 February 2019. Whichever the claimant intended, we did not have sufficient detail of the telephone conversation and so this was not a protected disclosure.

226. The claimant's fourth alleged disclosure was in the course of the claimant's meeting with Ms Hardie on 25 February 2019. While we found that the 14 February 2019 incident was discussed at this meeting, we did not have sufficient detail of the conversation to determine that a protected disclosure had been made.

227. The fifth alleged disclosure was the claimant's email to Ms Hardie of 25 February 2019 (294). We have set this out in part at paragraph 41 above. The thrust of this was related to the "*next steps"* which the respondent might take. It contained a list of questions to be raised with the staff who were involved in the incident. It was not a disclosure of information and therefore not a protected disclosure.

228. The sixth alleged disclosure was the claimant's email of 27 February 2019 (301) relating to the agency worker incident. This was accepted by the respondent to be a protected disclosure.

229. The seventh alleged disclosure was in the course of the claimant's second meeting with Ms Devine and Ms Hardie on 1 March 2019. The evidence indicated that the discussion at this meeting related to the claimant's naming of the agency worker and the distribution of his email in the context of GDPR. We did not have sufficient detail of what the claimant said at this meeting to determine that a protected disclosure was made.

230. The eighth alleged disclosure was the claimant's letter to Ms Unsworth of 11 March 2019 (321-323). This was accepted by the respondent to be a protected disclosure.

231. The ninth alleged disclosure was in the course of the claimant's meeting with Ms Unsworth and Mr Sturrock. Once again we did not have sufficient detail of this conversation to determine whether a protected disclosure had been made.

232. The tenth alleged disclosure was the claimant's email to Mr Sturrock of 25 March 2019 (332). Our view of this was that the claimant was pressing for action in response to the concerns he had raised about the 14 February 2019 incident and the safeguarding issues involved. We did not find anything in the claimant's email which was a disclosure of information. This was not a protected disclosure.

233. The eleventh alleged disclosure was the claimant's email to Ms Unsworth and Mr Sturrock later on 25 March 2019 (334). We reviewed this and came to the view that it represented the claimant pressing for urgent safeguarding action – "*This cannot wait for the findings of the wider investigation."* This was an expression of the claimant's opinion and not a disclosure of information. It was not a protected disclosure.

234. The twelfth alleged disclosure was the claimant's email to Mr Sturrock and Ms Unsworth of 26 March 2019 (335). We reviewed this and came to the view that it was the claimant setting out his views as to the steps which he believed the respondent should take immediately to address his safeguarding concerns. Again this was an expression of the claimant's opinion and not a protected disclosure.

235. It may be that the claimant's submission to the CI on 28 March 2019 was a protected disclosure under section 43F(1) ERA. However, the claimant made that submission online and we did not have a copy of this. The CI wrote to the claimant on 13 May 2019 (371-372) *"to clarify the parts of*

your complaint that are appropriate for us to investigate" and set out the three complaints detailed within paragraph 91 above. These did not contain sufficient factual content and specificity to be protected disclosures and, without more, we could not determine that they were protected disclosures.

236. We therefore found that the claimant had made protected disclosures on 27 February 2019 and 11 March 2019, as detailed above.

Did the claimant suffer detriment under section 47B ERA on the ground that he had made such a disclosure (or disclosures)?

237. We continued by looking for any detriment suffered by the claimant at the hands of the respondent on the ground that he had made a protected disclosure. We reminded ourselves of what the House of Lords said in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*** (per Lord Hope at paragraphs 35) –

"This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"."

238. We focussed on events occurring after 27 February 2019 as that was the earliest date upon which we found that the claimant made a protected disclosure. An alleged detriment could not be on the ground of the claimant making a protected disclosure if it predated the disclosure.

239. We considered firstly the claimant's treatment following his protected disclosure relating to the agency worker. In terms of his revised Statement of Claim the claimant complained about –

(a) The respondent speaking to his peers in a critical manner.

(b) Ms Devine issuing an unethical instruction.

(c) Increasing hostility, ie that refusal to comply with Ms Devine's instruction could mean disciplinary action.

240. Our view of these matters was as follows –

(a) We had no information as to what was said to the claimant's peers and so no evidence of what the alleged detriment was said to be.

(b) Ms Devine's concern was that the claimant had named the agency worker and had thereby breached the GDPR. It was arguable that Ms Devine was wrong in the particular circumstances but seeking an assurance from the claimant that he would not breach the GDPR was not an unethical instruction. It was not a detriment on the ground that the claimant had made a protected disclosure.

(c) We considered that the claimant was correct to apprehend that if he did not heed Ms Devine's instruction, he would be in trouble. However, being expected to act in accordance with an instruction from a senior manager is not of itself a detriment.

241. Accordingly, we found that the claimant did not suffer detriment on the ground of making his 27 February 2019 protected disclosure.

242. We considered next the claimant's assertion that *"the grievance and appeal were carried out in a manner detrimental to him and were effectively a sham which was causally related to him making protected*

disclosures….". We found aspects of the grievance process and, to a lesser extent, the appeal process were unsatisfactory (see in particular paragraphs 104, 203 and 207-208 above). These unsatisfactory aspects were detriments suffered by the claimant.

243. While it could be said that, but for the claimant's protected disclosure on 11 March 2019, he would not have suffered these detriments, that was not the legal test. For the detriments to fall under section 47B ERA, they had to be on the ground of the claimant's protected disclosure. In our view, the unsatisfactory elements of the grievance and appeal were because of the way in which (a) Ms Gray had dealt with the grievance and (b) Mrs Meikle had dealt with the appeal. They were not on the ground of the claimant's protected disclosure.

244. Accordingly, we found that the claimant did not suffer detriments on the ground of his protected disclosures and his claim under section 47B ERA had to fail.

Had the claimant's detriment claim been presented late under section 48 ERA? If so, had it been not reasonably practicable for the claim to be presented timeously and, if so had it been presented within such further period as we considered reasonable?

245. As these questions are rendered academic by our determination that the detriment claim did not succeed, we deal with them briefly.

246. We found that the claimant had experience of the Employment Tribunal system. He had brought a previous complaint. We understood he had done so timeously. He had access to an employment lawyer. He was represented through the grievance and appeal processes by his trade union, and had access to their advice.

247. The detriments of which the claimant complained occurred more than three months before the claimant initiated EC on 4 May 2020. The complaint under section 47B ERA was brought out of time. It had been reasonably practicable for the claimant to present this complaint timeously and it was therefore time barred under section 48 ERA.

If any part of the claimant's claim succeeded, what compensation should be awarded?

248. As no part of the claimant's claim succeeded, this question also became academic.

Decision

249. For the reasons set out above we did not uphold any of the claimant's complaints and accordingly his claim falls to be dismissed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 18 May 2021
Entered in register: 25 May 2021
and copied to parties