EMPLOYMENT TRIBUNALS

Heard by Cloud Video Platform

First Claimant: Mr T. Steers

Second Claimant: Ms T. Fitzsimmons

Third Claimant: Ms K. Patel

Respondent: Chartwell Care Services Limited

Heard at: Nottingham Employment Tribunal

Dates of hearing and deliberations: 22 February,23 February, 24 February and 25 February 2021 and 26 March 2021.

Before: Employment Judge Broughton (sitting alone)

Representatives:

Claimant: Mr S. Harding - counsel
Respondent: Mr R. Cumming- counsel

Covid-19 statement: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The Judgement of the Tribunal is that;

The First Claimant's claim of automatic unfair dismissal pursuant to section 103 of the Employment Rights Act 1996 is **not** well founded and is dismissed.

The Second Claimant's claim of automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 is **not** well founded and is dismissed.

The Third Claimant's claim of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996 is **not** well founded and is dismissed.

REASONS

Summary

1. All three claimants are bringing claims of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996, hereafter referred to as the ERA.

2. None of the claimants had accrued sufficient qualifying service to issue claims of ordinary unfair dismissal pursuant to sections 94 and 98 ERA.

3. There are no claims of detrimental treatment under section 47B ERA.

4. Ms Fitzsimmons and Mr Steers worked together, Mr Steers was a Manager and Ms Fitzsimmons a Deputy Manager reporting directly to him, managing The Limes, an Adult Supported Living Facility. The respondent's case is that Ms Fitzsimmons' role was made redundant however both she and Mr Steers were ultimately dismissed for gross misconduct. The respondent was informed of a plan involving them to disrupt and cause harm to the respondent's business and by extension, its service users. Ms Fitzsimmons was dismissed prior to a dismissal for redundancy taking effective because of the respondent's alleged belief about her involvement in that plan. Both claim that they made protected disclosures and that this was the sole or principal reason for their dismissal. The claims are brought solely against the respondent pursuant to section 103A.

5. Ms Patel worked in a residential home, Barkby Residential Care Home as a Manager on a probationary period employed as maternity cover. The factual nexus is largely distinct from that of Mr Steers and Ms Fitzsimmons. Her employment was terminated on capability grounds according to the respondent however, she alleges the sole or principal reason was because she had made protected disclosures. Ms Patel also only brings her claims against the respondent pursuant to section 103A ERA only.

6. There is a common link between the factual background of all three claims and that is the arrival of a new Operations Manager in September 2018, Ms Keating, who was tasked with improving the service and implementing new systems.

Background – organisational structure

7. The respondent is a provider of specialist care services to adults and children with severe learning disabilities and in some cases, mental health problems.

8. At the relevant time in 2018, the respondent had a number of adult residential care homes run by different managers. There was also a separate part of the business, Barclay Services which provided supported living facilities; accommodation for those who require some support services but otherwise live independently. The respondent employed approximately 230 staff at the beginning of 2018 with a small head office team based in Leicester.

9. The Residential Care Homes were at the relevant time were; Barkby Road, Milligan Road, Barclay Street and Coach House.

10. The Adult Supported Living Facilities were at the relevant time; The Limes (6 flats for supported living),Tentercroft (a bungalow for 1 person), Oliver Street (bungalow for 1 person), Duncan Road (bungalow for 1 person) and Ethel Road (a Bungalow for 1 person). These facilities were run by Barclay Services.

Barkby Road Care Home

11. Ms Patel worked at the Barkby Road Residential Care Home (**Barkby**). This is an 11-bed care home for adult male residents with complex learning difficulties. The accommodation comprises a main building with 8 beds and two bungalows with 3 beds.

12. It is not in dispute that at the beginning of 2018 the 11 residents had all lived at Barkby for at least three years and were well known to the staff who worked there.

13. In 2017 Leicestershire County Council carried out a Quality Audit of Barkby and identified a number of serious issues.

14. A CQC inspection was carried out between 30 May and 4 June 2018, Barkby was rated as Requiring Improvement, a downgrade from the previous rating of Good.

The Limes

15. The Limes comprises six flats (one and two bedrooms).

16. The client/resident rents the accommodation from the property owner which must be a separate company from the care provider.

17. The properties are owned by a separate group property company. The care is provided by Barclay Services, a care agency which is owned by the Respondent.

18. The rent is usually paid from housing benefit. The client is assessed for the care that they require each day; this may range from a few hours to the constant support of one or even more carers 24 hours a day.

19. The supported living units are not registered and CQC has no statutory right to inspect them because the residents are living in their own home.

20. The provider of the care however must be registered with the CQC, and they are inspected, including their policies, working practices and outcomes.

Issues

21. The issues which were agreed between the parties were clarified and set out in writing on the first day of the hearing.

22. The claims had initially been identified at a preliminary hearing before Employment

Judge Heap on 27 November 2019 and had included claims of wrongful dismissal, unauthorised deductions from wages and in the case of Ms Fitzsimmons and Mr Steers, claims brought pursuant to section 104 ERA. Mr Harding confirmed however that all claims other than the 103A claims had been withdrawn.

23. The agreed issues are as follows;

<u>Ms Patel</u>

1. *Did the claimant make a protected disclosure on 15 July [1073]?*

2. *Did the claimant make a protected disclosure on 16 July [1072]?*

3. *Did the claimant make a protected disclosure on the 14 and 15 September [1252] and [1259]?*

4. *Did the claimant make disclosures in her meeting of 5 October 2018 at [1336 – 1338]?*

5. *In regard to each disclosure:*
    a) *Was there disclosure of information?*
    b) *Was there a reasonable belief that there was a contravention of the Health and Care Regulations 2008, section 12, 13, 15, 17 and 18 or a breach of health and safety?*
    c) *Was the reason, or principal reason, for her dismissal on 5 October that she made a PID?*

<u>Toni Fitzsimmons</u>

6. *Was there an oral disclosure to KK on 11 September 2018 concerning having only having one person on call for supported living and residential services. This is denied by KK?*

7. *Was there a meeting on the 21 September 2018 where the claimant raised that there had not been auditing done before complaint with QCC procedures [PD 2] and of staff recruitment of unsafe unvetted workers [QD 3]. KK denies this discussion took place?*

8. *Did the claimant make a protected disclosure on 26 September regarding staff adequacy [203]?*

9. *In regard to each disclosure:*

    a) *Wad there a disclosure of information?*
    b) *Was there a reasonable belief that there was a contravention of the Health and Care Regulations 2008, section 12, 13, 15, 17 and 18 or a breach of health and safety?*
    c) *Was it made in the public interest?*

10. *Was the reason, or principal reason for her dismissal on 23 October or 21 November that she made a PID?*

Troy Steers

11. *Did the claimant raise issues with KK on 14 September regarding:*

    i. *Auditing, 9 months of auditing was paced at the claimant's door and when he asked who was to do it, was told 'rather you than me'*
    ii. *The team leader (Dee) at Duncan Road care home had stated that they do not take the service users out into the community as a result of their disability. [TS 2-3]*

12. *KK accepts that there was s discussion (not on 18 September) with TS (after an all managers meeting) when he suggested that not all of the paperwork was being completed at Oliver street and Duncan Road?*

13. *Did the claimant raise the above concerns with KK on 3 October at a supervision meeting [TS 13- 14]?*

14. *KK accepts the meeting took place but does not agree that he repeated his comment about paperwork not being completed at Oliver Street and Duncan Road?*

15. *Did TS raise these issues with Simon Blunden and the business owner on the 4 October?*
16. *In regard to each disclosure:*

    a) *Was there disclosure of information?*
    b) *Was there a reasonable belief that there was a contravention of the Health and Care regulations 2008, section 12, 13, 15, 17 and 18 or a breach of health and safety?*
    c) *Was it made in the public interest?*

17. *Was the reason, or the principal reason, of his dismissal on 21 November that she made a PID?*

Evidence

18. The Tribunal heard evidence from the individual claimants who gave evidence and were cross examined by the respondent.

19. The Tribunal heard evidence on behalf of the respondent from three witnesses, each of whom had prepared separate statements in respect of each of the three claimants; Mr Geoffrey Lane, Finance Director, Simon Blunden, Chief Operating Officer and Katrina Keating, Operations Manager- Adult Services.

20. The Tribunal was presented with an agreed bundle containing 1550 pages, there were some additional documents added during the hearing.

21. The Tribunal additionally relied on its own notes and was presented with written and oral submissions.

Findings of Fact: Common to all three claimants

22. The Tribunal will address the facts common to all three claimants and then address those relevant to each claimant. The Tribunal will deal with the claimant's cases in the order in which their evidence was presented to the Tribunal.

Relevant Regulations

23. It is not in dispute that the respondent is regulated and has to comply with; The Care Quality Commission (Registration) Regulations 2009 ("**CQC Regulations**") and The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The relevant provisions relied upon are as follows;

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("Regulations"):

24. **Regulation 12**

Safe care and treatment

12.*—(1) Care and treatment must be provided in a safe way for service users.*

(2) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include—

(a)assessing the risks to the health and safety of service users of receiving the care or treatment;

(b)doing all that is reasonably practicable to mitigate any such risks;

(c)ensuring that persons providing care or treatment to service users have the qualifications, competence, skills and experience to do so safely;

(d)ensuring that the premises used by the service provider are safe to use for their intended purpose and are used in a safe way;

(e)ensuring that the equipment used by the service provider for providing care or treatment to a service user is safe for such use and is used in a safe way;

(f)where equipment or medicines are supplied by the service provider, ensuring that there are sufficient quantities of these to ensure the safety of service users and to meet their needs;

(g)the proper and safe management of medicines;

(h)assessing the risk of, and preventing, detecting and controlling the spread of, infections, including those that are health care associated;

(i)where responsibility for the care and treatment of service users is shared with, or transferred to, other persons, working with such other persons, service users and other appropriate persons to ensure that timely care planning takes place to ensure the health, safety and welfare of the service users.

Regulation 13:

Safeguarding service users from abuse and improper treatment

13.—*(1) Service users must be protected from abuse and improper treatment in accordance with this regulation.*

(2) Systems and processes must be established and operated effectively to prevent abuse of service users.

(3) Systems and processes must be established and operated effectively to investigate, immediately upon becoming aware of, any allegation or evidence of such abuse.

(4) Care or treatment for service users must not be provided in a way that—

(a)includes discrimination against a service user on grounds of any protected characteristic (as defined in section 4 of the Equality Act 2010) of the service user,

(b)includes acts intended to control or restrain a service user that are not necessary to prevent, or not a proportionate response to, a risk of harm posed to the service user or another individual if the service user was not subject to control or restraint,

(c)is degrading for the service user, or

(d)significantly disregards the needs of the service user for care or treatment.

(5) A service user must not be deprived of their liberty for the purpose of receiving care or treatment without lawful authority.

(6) For the purposes of this regulation—

"abuse" means

*(a)any behaviour towards a service user that is an offence under the Sexual Offences Act 2003(**1**),*

(b)ill-treatment (whether of a physical or psychological nature) of a service user,

(c)theft, misuse or misappropriation of money or property belonging to a service user, or

(d)neglect of a service user.

(7) For the purposes of this regulation, a person controls or restrains a service user if that person—

(a)uses, or threatens to use, force to secure the doing of an act which the service user resists, or

(b)restricts the service user's liberty of movement, whether or not the service user resists,

including by use of physical, mechanical or chemical means.

Regulations 15

Premises and equipment

15.—(1) All premises and equipment used by the service provider must be—

(a)clean,

(b)secure,

(c)suitable for the purpose for which they are being used,

(d)properly used

(e)properly maintained, and

(f)appropriately located for the purpose for which they are being used.

(2) The registered person must, in relation to such premises and equipment, maintain standards of hygiene appropriate for the purposes for which they are being used.

(3) For the purposes of paragraph (1)(b), (c), (e) and (f), "equipment" does not include equipment at the service user's accommodation if—

(a)such accommodation is not provided as part of the service user's care or treatment, and

(b)such equipment is not supplied by the service provider.

Receiving and acting on complaints

16.—(1) Any complaint received must be investigated and necessary and proportionate action must be taken in response to any failure identified by the complaint or investigation.

(2) The registered person must establish and operate effectively an accessible system for identifying, receiving, recording, handling and responding to complaints by service users and other persons in relation to the carrying on of the regulated activity.

(3) The registered person must provide to the Commission, when requested to do so and by no later than 28 days beginning on the day after receipt of the request, a summary of

(a)complaints made under such complaints system,

(b)responses made by the registered person to such complaints and any further correspondence with the complainants in relation to such complaints, and

(c)any other relevant information in relation to such complaints as the Commission may request.

Regulation 17

Good governance

17.—(1) Systems or processes must be established and operated effectively to ensure compliance with the requirements in this Part.

(2) Without limiting paragraph (1), such systems or processes must enable the registered person, in particular, to—

(a)assess, monitor and improve the quality and safety of the services provided in the carrying on of the regulated activity (including the quality of the experience of service users in receiving those services);

(b)assess, monitor and mitigate the risks relating to the health, safety and welfare of service users and others who may be at risk which arise from the carrying on of the regulated activity;

(c)maintain securely an accurate, complete and contemporaneous record in respect of each service user, including a record of the care and treatment provided to the service user and of decisions taken in relation to the care and treatment provided;

(d)maintain securely such other records as are necessary to be kept in relation to—

(i)persons employed in the carrying on of the regulated activity, and

(ii)the management of the regulated activity;

(e)seek and act on feedback from relevant persons and other persons on the services provided in the carrying on of the regulated activity, for the purposes of continually evaluating and improving such services;

(f)evaluate and improve their practice in respect of the processing of the information referred to in sub-paragraphs (a) to (e).

(3) The registered person must send to the Commission, when requested to do so and by no later than 28 days beginning on the day after receipt of the request—

(a)a written report setting out how, and the extent to which, in the opinion of the registered person, the requirements of paragraph (2)(a) and (b) are being complied with, and

(b)any plans that the registered person has for improving the standard of the services provided to service users with a view to ensuring their health and welfare.

Regulation 18

Staffing

18.—(1) ***Sufficient numbers of suitably qualified, competent, skilled and experienced persons must be deployed in order to meet the requirements of this Part.***

(2) Persons employed by the service provider in the provision of a regulated activity must—

(a)receive such appropriate support, training, professional development, supervision and appraisal as is necessary to enable them to carry out the duties they are employed to perform,

(b)be enabled where appropriate to obtain further qualifications appropriate to the work they perform, and

(c)where such persons are health care professionals, social workers or other professionals registered with a health care or social care regulator, be enabled to provide evidence to the regulator in question demonstrating, where it is possible

to do so, that they continue to meet the professional standards which are a condition of their ability to practise or a requirement of their role.

The Care Quality Commission (Registration) Regulations 2009 ("CQC Regulations")

Regulation 18

Notification of other incidents

18.—(*1) Subject to paragraphs (3) and (4****), the registered person must notify the Commission without delay of the incidents specified in paragraph (2)*** *which occur whilst services are being provided in the carrying on of a regulated activity, or as a consequence of the carrying on of a regulated activity.*

(2) The incidents referred to in paragraph (1) are—

(a)any injury to a service user which, in the reasonable opinion of a health care professional, has resulted in—

(i)an impairment of the sensory, motor or intellectual functions of the service user which is not likely to be temporary,

(ii)changes to the structure of a service user's body,

(iii)the service user experiencing prolonged pain or prolonged psychological harm, or

(iv)the shortening of the life expectancy of the service user;

(b)any injury to a service user which, in the reasonable opinion of a health care professional, requires treatment by that, or another, health care professional in order to prevent—

(i)the death of the service user, or

(ii)an injury to the service user which, if left untreated, would lead to one or more of the outcomes mentioned in sub-paragraph (a);

(c)any request to a supervisory body made pursuant to Part 4 of Schedule A1 to the 2005 Act by the registered person for a standard authorisation, including the result of such a request;

(d)any application made to a court in relation to depriving a service user of their liberty pursuant to section 16(2)(a) of the 2005 Act;

(e)any abuse or allegation of abuse in relation to a service user;

(f)any incident which is reported to, or investigated by, the police;

(g)any event which prevents, or appears to the service provider to be likely to threaten to prevent, the service provider's ability to continue to carry on the regulated activity safely, or in accordance with the registration requirements, including—

(i)an insufficient number of suitably qualified, skilled and experienced persons being employed for the purposes of carrying on the regulated activity,

(ii)an interruption in the supply to premises owned or used by the service provider for the purposes of carrying on the regulated activity of electricity, gas, water or sewerage where that interruption has lasted for longer than a continuous period of 24 hours,

(iii)physical damage to premises owned or used by the service provider for the purposes of carrying on the regulated activity which has, or is likely to have, a detrimental effect on the treatment or care provided to service users, and

(iv)the failure, or malfunctioning, of fire alarms or other safety devices in premises owned or used by the service provider for the purposes of carrying on the regulated activity where that failure or malfunctioning has lasted for longer than a continuous period of 24 hours.

(3) Paragraph (2)(f) does not apply where the service provider is an English NHS body.

(4) Where the service provider is a health service body, paragraph (1) does not apply if, and to the extent that, the registered person has reported the incident to the National Patient Safety Agency.

(5) In this regulation—

*(a)"the 2005 Act" means the Mental Capacity Act 2005(**1**);*

(b)"abuse", in relation to a service user, means—

(i)sexual abuse,

(ii)physical or psychological ill-treatment,

(iii)theft, misuse or misappropriation of money or property, or

(iv)neglect and acts of omission which cause harm or place at risk of harm;

*(c)"health care professional" means a person who is registered as a member of any profession to which section 60(2) of the Health Act 1999(**2**) applies;*

(d)"registration requirements" means any requirements or conditions imposed on the registered person by or under Chapter 2 of Part 1 of the Act;

(e)"standard authorisation" has the meaning given under Part 4 of Schedule A1 to the 2005 Act;

(f)"supervisory body" has the meaning given in paragraph 180 (in relation to a hospital in England) or paragraph 182 (in relation to a care home) of Schedule A1 to the 2005 Act;

(g)for the purposes of paragraph (2)(a)—

(i)"prolonged pain" and "prolonged psychological harm" means pain or harm which a service user has experienced, or is likely to experience, for a continuous period of at least 28 days, and

(ii)a sensory, motor or intellectual impairment is not temporary if such an impairment has lasted, or is likely to last, for a continuous period of at least 28 days.

Findings of Fact

Ms K. Patel: Findings of Fact - Barkby

25. It is not in dispute that there had been serious issues with the service at Barkby prior to Ms Patel taking on the role of Residential Manager. In 2017 serious management issues were identified at Barkby and with the overall management of the respondent's Adult Services. A consultancy service (TCS) had been working with the respondent to address the problems. TCS recruited an interim Operations Manager, Ms Brown and a new Registered Manager at Barkby, Ms Bassill. Ms Brown, it is not disputed had identified issues including poor leadership from the management team.

26. Concerns about some practices had been observed on a visit by the Contracts Officer from Leicestershire County Council ("**Council**") on 16 November 2017.

27. A responsibility of the Council is to assess how much care each service user requires and provide the necessary financial funding to meet that assessed need. Ms Patel accepted under cross examination that a good level of care should be able to be provided with the Council's assessed level of care and if it is not, then something is wrong with the provision of the service.

28. On 27 November 2017, the respondent appointed Simon Blunden as Chief Operating Officer (COO) to manage all the day to day aspects of all operations in the respondent's business. He had three direct reports; Ms Brown, Operations Manager – Adult Services, Ms Fabusuyi, Operations Manager – Childrens Services and in March 2018 he appointed an experienced Business Development Manager, Sarah Holmes.

29. At a contract management meeting between Mr Blunden, and the Council on 5 January 2018 it was agreed that a period of 4 weeks would be acceptable for the respondent to evidence progress on rectifying the serious issues identified. The Contracts Officer visited again on the 13 February 2018 and found that some of the non-compliant practices had not been addressed.

30. An action plan was created by Ms Brown and Ms Bassill assisted by a new Deputy Manager, Mr Whittle.

31. A further validation visit was made by the Council on 7 March 2018 and the respondent was informed that as some of the non-compliant practices had still not be addressed, the service was found to be in breach of the core contract terms.

32. Mr Blunden recruited Ms Weaver as maintenance manager at the beginning of May 2018.

33. Ms Bassill left in May 2018 to start a period of maternity leave. Ms Brown shortly thereafter resigned. Mr Blunden needed to recruit a new Manager for Barkby and a new Operations Manager.

29 May/ 4 June 2018 inspections

34. The CQC carried out an inspection of Barkby on 29 May 2018 and 4 June 2018. The draft report was dated 27 July 2018 and included the following findings **(p1110);**

"*At this inspection we found the service had deteriorated and rated 'inadequate'. Therefore, improvements were needed"*

"…found the high use of agency staff working at the service meant staff often lacked the specialist knowledge and skills to care and support people safely"

"Care plans and risk assessments did not always reflect people's current needs as they were not reviewed and updated regularly."

35. The report recorded other findings including that staff training was not adequate, there were examples of poor management and leadership, the safe temperature of where medicines were stored were not being safely monitored, people were not always supported with activities they wished to participate in and not supported to live fulfilling lives. The service was not deemed safe due to insufficient staff available and staff were not being deployed appropriately to meet need. **(p1113).**

36. The service was considered inadequate and placed into 'Special Measures' however this was not consistent with the Requires Improvement rating and following a challenge by the respondent, the final report on 6 September was amended to reflect a Requires Improvement rating.

37. The report included actions the respondent was required to undertake **(p1130 – 1131).** The report set out which regulations were not being met;

Regulation 9 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (HSCA RA Regs): People not provided with the care and support they were assessed as needing

Regulation 12 HSCA RA Regs: medicines not always stored as correct temperature, low staff numbers meant people did not always receive care in a safe manner and low stimulus environment not created for one client.

Regulation 15 HSCA RA Regs: Premises not maintained adequately and repairs of poor quality.

Regulation 18 HSCA RA Regs: significant amounts of time where people were left on their own with no staff support. Staff team expected to complete additional tasks such as cleaning.

Appointment of Ms Patel – 18 June 2018

38. The part time Finance Director, Geoffrey Lane was engaged from 2015 to Chair the board meetings, assist with business strategy and funding, oversee IT strategy and quality management. It is not dispute that he has considerable experience in turning around businesses within the care sector. His undisputed evidence is that the respondent's other care homes in the area had good Managers and good CQC ratings, they had lower agency use and better staff retention with the same pay structures, training and same recruitment policies, than Barkby. He was of the view therefore that the key problem at Barkby was a failure of leadership from management.

39. Ms Patel was employed by the respondent from 18 June 2018 as the Manager of Barkby. It is not in dispute that the intention was to re-deploy her as a Manager at another unit on the return of Ms Bassill from maternity leave. It is not in dispute that she was employed initially on a probationary period and that she inherited many problems with a facility in crisis. As an illustration of the problems; some of the service user's care plans were at least 1 year out of date.

40. On 18 June 2018 tasked with working on the improvements required by the CQC, Mr Blunden who had not been able to recruit a new Operations Manager (a candidate has accepted but then not joined) he asked Ms Holmes to assist the Deputy Manager at Barkby in the interim.

41. Ms Holmes stayed on after the appointment of Ms Patel to assist with the action plan. Ms Patel accepted under cross examination however that as Manager of Barkby she was ultimately responsible for the day to day management of Barkby and accepted that on taking up the role, a significant improvement was required and that Barkby was in a serious situation.

Notice to Remedy – 27 June 2018

42. The respondent was issued with a "*Notice to remedy breach of the core contract*" by letter dated 27 June 2018 from the Council **(p 997- 1010).** The letter detailed the actions to be taken by **23 July 2018.** The actions to be taken were set out in detail but generally included issues around the administration and record keeping related to giving medication, awareness of and reporting of safeguarding issues , maintaining care records and documentation relating to residents, risk assessment, recording of incidents and handover information between shifts, employment, evidence monitoring checks and effective evaluation of the service, training of staff with training records and follow up competency assessments and support for residents to accessed meaningful activities and for residents to be treated with dignity. A significant number of matters which required immediate attention and improvement.

43. The breaches were referred to as 'substantial' and the respondent was informed by the Council that it believed any additional placement of residents at this time would increase pressure on the current resources and may hinder the ability to properly address the current concerns. The respondent agreed to an informal voluntary suspension of all placements from 13 April 2018 and the suspension was to remain in place until '*the council can be assured the health and safety and wellbeing of current placements is not compromised and positive outcomes for individuals can be met'.*

44. The letter referred to clause 30 of the contract for the provision of service which provides that where there is a Fundamental Breach, the Council is entitled to terminate the Core Contract; *"immediately."*

45. The result of not rectifying the breach, was the closure of the Barkby. Ms Patel accepts that Barkby was by this stage in the '*last chance saloon'*.

46. Ms Keating who would later join as the new Operations Manager in September 2018, accepted under cross examination that Mr Blunden who had been covering her role while carrying out his substantive role as COO had probably *dropped the ball'* a bit in terms of some areas of Barkby including the lax medication process that was in place in that not all the staff, and those working the nights shift in particular had not had the necessary medication training, and were as a result reliant on the on-call Manager.

47. An agreed and updated action plan was finalised on 3 July 2019 **(p.1011 – 1022)** and Ms Patel began working to implement it. The actions that needed to be implemented were assigned mainly either to Ms Patel, her Deputy Manager Jamie Whittle, with some tasks relating to the provision of training including the development of an online training academy, assigned to Mr Blunden. The tasks specifically assigned to Ms Patel under that action plan including effective team working and care planning to ensure that appropriate numbers of staffing were on rota to ensure service users can access the community and enjoy activities outside of the home.

Board of Directors

48. Mr Matthu is the sole statutory director of the respondent. The Board is comprised of Mr Matthu, and those with the title Director; Mr Blunden and Mr Lane. Senior Managers are also invited to attend the Board Meetings to report on the business, including; Mr Silver, Group Financial Controller, HR, Ms Keating and Ms Holmes.

Staffing – agency

49. The evidence of Mr Lane was that there were 47 staff at Barkby when Ms Patel took over who had worked there for over 12 months and only 6 staff who had been there for less than 3 months. No conflicting information about the length of service of staff was put forward by Ms Patel and therefore on a balance of probabilities the Tribunal accept the evidence of Mr Lane.

50. There was however concern about the number of agency staff being used at Barkby. There was also concern about the quality of staff provided by the staff agency which had been used for some time; Care Staffing. Ms Patel accepted in cross examination that unfamiliar carers in Barkby can, because of the nature of the challenges those service users have, lead to increased problems with the behaviours of the service users, who find it difficult to cope with unfamiliar people. On taking up the role Ms Patel accepts that she was informed by Mr Blunden that there was a problem with the high use of agency staff.

51. Mr Silver emails on the 4 July **(p. 1027)** informing Ms Patel, Mr Whittle and Mr Blunden that; "*we should be working towards getting rid of agency usage*

altogether, which will be easier said then done… The issues described below [the issues identified by Mr Whittle on 3 July*] are what I would summarise as the risks of using agency, a lack of control and accountability*." (**p. 1027**)

First Putative Protected Disclosure

52. Ms Patel sent an email on **15 July 2018** timed at 15:10 to Troy Steers, the Supported Living Manager, Mr Blunden and Mr Whittle about concerns over the staffing cover at Tenercroft care home, a home for which she was not responsible however they had they had shared staff under a rota system. Tenercroft is an Adult Supported Living Facility,a bungalow for 1 service user **(P 1073);**

    "*Just to make everyone aware I have received a numerous [sic] calls from tenercroft staff to support with cover for nights and days.*

    I was under the impression Barkby was no longer involved [sic] in the Rota as off [sic] Friday.

    Could I have clarity of [sic] what is happening.

    As everyone is aware Barkby is under breach and we are working towards an action plan.

    ***Barkby have been down on staff due to sickness over the weekend and they have also received calls from staff demanding cover for tenercroft**."*

53. The claimant refers to Barkby being down on staff and Tenercroft requiring cover however, the email does not make reference to this situation putting the health and safety of staff or residents at risk. The email does not expressly state that regulation 18 of the Regulations(or any other regulation) is not being or as had not, been complied with but it does imply that there were less staff than the rostered or normal number of staff at both Barkby and Tentercroft.

54. The claimant's first putative disclosure was responded to by Mr Blunden who replied on 16 July 2018 at 08:50 **(p.1072)** stating that he had spoken to a support worker at Tenercroft on Saturday evening, they had two agency staff on nights and that all they had been asking to do was to swap a permanent staff member in return for an agency staff member, he referred to this as a reasonable request from a neighbouring Chartwell service. Two-night staff at Barkby had called in sick however and therefore in the event Barkby had only two permanent staff left on the night shift.

55. Mr Blunden referred to Ms Patel liaising with Mr Steer to firm up that the rota had ended and staff at Tentercroft will not therefore be providing cover for Barkby; "*on a Sunday when [X] goes to his Mums for the day…*".

56. Mr Blunden's response was not dimissive, he had responded promptly and had himself contacted Tenercroft about the request. His evidence is that he considered this to be a minor operational issue, he did not consider it to be a whistleblowing disclosure. Under cross examination he gave evidence that he had never investigated a whistleblowing disclosure during his time as the COO with the respondent and that had had little experience of whistleblowing prior to

joining the respondent because was recent experience was in business development.

Second Putative Protected Disclosure

57. Ms Patel then sent another email the following day on 16 July 2018 timed at 09:24 which she alleges was second protected disclosure **(p.1072);**

"Ashley called me crying on the phone, stating she felt unsupported and was really tired.

She also stated she tried to call the supported living on call and no one was answering.

To my knowledge the Tentercroft staff have not attended to support Barkby on Sunday when [X] visits his mum. This has been the case for many weeks.

I will call Troy today and discuss the rota, ***and ensure both services are safe****."*

[Emphasis Added]

58. The reference to Ashley, is to a senior care support worker who worked at Tentercroft.

59. The reply from Mr Blunden that same day, only about half an hour later on 16 July at 09:57 was;

"*Ok thanks Kay. I'll discuss with Troy. We should definitely make use of the Tentercroft staff at Barkby on Sunday…"*

60. The claimant alleges that she 'feared' that the respondent's staff were at risk due to them being constantly overworked and this was putting the respondent's service users at risk as well however, this is not what she states in the emails and she relies upon the email exchanges only. Within this email, she refers to one support worker feeling unsupported but does not elaborate. She does not comment whether she feels that the complaint is legitimate or comment on what if any risk that presents to other carers or service users. Ms Patel also refers checking that both services are safe, she does not state that they are unsafe or that she considers that there is a likelihood that they will be unsafe.

Progress Report

61. On 23 July 2018. Mr Blunden sent a progress report to the Council **(p.1095-1097)** in which he stated;

"*The new Manager of Barkby Road, Komal Patel started in post on 18th June 2018 and* ***she is already making a huge difference to the care home.*** *She is being supported by the existing Deputy Manager, Jamie Whittle and since 2 July 2018 we have added a supernumerary Team Leader into the staffing complement at Barkby Road in order to support delivery of the Action Plan to the*

front line.
[Emphasis Added]

62. Under cross examination Ms Patel accepted that what Mr Blunden had said in this email about how well she was doing and what she was achieving, was information either she had provided to him or came from Ms Holmes. It is not disputed that Ms Patel had been involved in the decision to ask for an extension of time to meet the action plan in discussion with Ms Holmes, and specifically what period of an extension was required. Ms Patel also accepted that there was no further extension requested beyond that date, she had not requested a further extension to give her more time to meet the action plan.

63. Mr Blunden asked the Council, considering the progress on the action plan, that a validation visit did not take until after 13 August 2018 when the respondent hoped to be closer to achieving most of the required actions. The Council agreed to delay the validation visit to the 21 August 2018 on that basis **(p.1106)**

<u>August 2018</u>

64. In August 2018 Barkby was ‘flooded’ with agency staff according to the evidence of Mr Blunden under cross examination, which created problems with the resulting behaviours from service users, with ‘massive’ care hours increasing to 1800 hours per week. Mr Blunden accepted however that he was busy with the CQC reports and did not address this directly with Ms Patel. While Ms Patel is criticised for the ongoing high use of agency staff, it is not in dispute that Mr Blunden agreed a few weeks later on 13 September 2018, to fund up to 1500 of staffing hours, up to 30 September (**p.1240**) because he recognised a need at the time for staffing hours over and above core hours. Mr Blunden’s evidence is that while he considered additional funding was required, this was not to the levels that was being reached i.e. to 1500 not 1800.

65. Mr Lane’s evidence is that in June and July 2018 he received copies of the action plan and Mr Blunden’s letter to the Council, and it had been his perception from the comments made to the Council that Barkby was in the process of being turned around. In June and July he therefore it his evidence, felt positive about what Ms Patel was achieving however in August he became concerned. The Council carried out weekly visits and were flagging up safeguarding incidents that had not been reported and medication errors. He thought that Ms Holmes appeared to be doing most of the work on the action plan. The care hours report for the week ended 19 August 2018 showed total staff had increased from 1350 hours per week in April and May to 1800 in August. These additional 450 hours repented 12 extra staff a week and were costing in excess of £7,000 per week. The extra staff were all agency staff. It is not in dispute that introduction of strangers to those with learning disability and autism can cause anxiety and result in extreme behaviours.

66. The evidence of Mr Lane is that he was sent copies of the new action plan on 11 September by Mr Blunden. He authorised funding of 150 additional care hours per week over and above those funded by the Council but expressed concerns that audits showed that changes were not being implemented or not being continued.

67. The further validation visit by the Council took place on 20 August 2018 and

found that, as set out in the email from the Contract Manager, Ms Wykes-Robinson **(p.1209)** sufficient progress was not being made;

"…Barkby Road Service ***remains in breach of the contractual terms across all areas of the original NTRB.*** *As outlined in the original NTRB and in the contractual terms the next stage of the breach process has been implemented which is to issue a Fundamental Notification to Remedy a Breach (FNTRB)" [Emphasis Added]*

68. The Council required the respondent to submit an initial action plan no later than 10 September 2018 and provide weekly updates. The decision was taken with the respondent's agreement to extend the voluntary suspension of all placements.

69. Ms Patel accepted that part of the need for agency staff arose from the level of sick leave of permanent staff. At a department meeting on 22 August 2018 **(p.1181)** the minutes (which are not disputed) comment on the level of sickness;

"Our target for this is 3% and we need to manage sickness down to this level. Managers need to understand the cause of their unit/dept sickness and be sympathetic to those individuals with a genuine illness but let's bear down on casual sickness using the Bradford score…"

<u>Pre- Authorisation Agency – August 2018</u>

70. On the 23 August 2018 Mr Lane emailed Mr Blunden **(p.1183)** referring to the cost of agency staff and with respect to Barkby stating that permanent staff hours are now sufficient to meet funded hours and agency hours need to be 'slashed very quickly'. The email was copied into Ms Patel and emboldened at the foot of the email was the following;

*"Having discussed this report with the Board yesterday, going forward agency at Barkby must be pre – authorised by either Simon [*Mr Silver*] or me before staff are booked…I attach the form that must be completed to approve agency."*

71. Ms Patel was taken to a graph prepared by Mr Lane **(p. 624.1)** in cross examination which shows the funded hours per week for Barkby (1350 per service user) ; after Ms Patel became the Manager she accepted that the data showed that hundreds of hours' of more care was provided than the Council had agreed/ assessed as funding. Ms Patel also accepted that the data showed that from about 29 July 2018, there was a dip in permanent staff and about 500 hours per week was carried out by agency staff, far more than at any stage before on the chart. (which started from January 2018). Ultimately under cross examination Ms Patel accepted that the funded hours at Barkby were 1350. She accepted that permanent staff providing that level of hours would meet the funded needs of the users however the heavy reliance on agency staff who were more expensive, meant the care could not be delivered within the funded hours. It is not disputed that two permanent members of staff were pregnant and agency staff were required to cover their positions.

72. Mr Lane gave evidence that the reason for implementing pre- authorisation for agency staff was to require Ms Patel to engage with Mr Blunden and later Ms Keating, and explain to them why agency staff were needed and see if staff

could be re- assigned from another service unit. His evidence is that this was implemented on or around 11 September 2018 and he believes Ms Patel did complete the form for the week commencing 18 September but finance would not report on the staff used until week commencing 25 September i.e. they worked one week in arrears. Therefore, it would not have become apparent until the first week in October that there had been no later requests for authorisation. He believed this issue fell 'between *the cracks'* during the handover from Mr Blunden to Ms Keating in September 2018.

73. It is alleged by Mr Blunden and Mr Lane that Ms Patel did not follow the requirement to pre- authorise agency staff. Mr Blunden accepted under cross examination however that he did not remind or address with Ms Patel the failure to obtain pre-authorisation because he was so busy covering the Operations Manager role and it was not his job to manage the service day to day.

74. Ms Patel's evidence under cross examination on the issue of pre- authorisation was vague, she could not recall whether she had always obtained the necessary authority from 23 August before taking on agency staff or not.

75. The Tribunal prefer the evidence of Mr Lane who gave a thorough and convincing account of the pre- authorisation process and the extent to which Ms Patel had complied with it and the Tribunal find on a balance of probabilities that although she completed one pre- authorisation form she did not continue to comply with the process.

76. In response to questions from the Tribunal, Ms Patel explained that it was not that Barkby did not have enough hours for staff but that the agency staff they were sent were not experienced and further, that it was not clear how to split the hours funded by the Council between the service users because there was no hard copy of the care plans when she became Manager, hardly any staff files, no management of the finances and no audit trial. In response to a question from the Tribunal, Ms Patel alleged that she raised this issue with Sarah Holmes and Mr Lane but not with Ms Keating. However, although Ms Patel addresses the issue of quality of agency staff in her evidence in chief she did not allege that she had reported that she was unaware of how to split the funding and she only made this allegation in response to questions from the Tribunal. This alleged lack of information about not understanding how funding was split between service users was not raised in her final probationary meeting on 5 October 2018 (**p. 1336 – 1340**), further this allegation was not put to Mr Lane in cross examination. Ms Patel also did not identify any email she had sent or other communication around the issue of how funding was split, despite communicating on the issue of staffing on numerous occasions. It was not put to Mr Blunden in cross examination that Ms Patel raised this with him.

77. On a balance of probabilities, the Tribunal find that Ms Patel did not raised with Mr Lane or Ms Holmes that she did not have information about how funding was split but even if she did , there is no evidence she took further steps to obtain this information.

78. If information about how much care each service user received in funding was not available, there is no evidence that Ms Patel was raising this as a concern. The Tribunal find that it is more likely than not that this information was available

and if it was not available, it is concerning that Ms Patel who considered this was a factor in her ability to manage her staff and hours properly, did not take further steps to obtain this information.

79. In terms of managing staff and in particular their absences from work; Ms Patel's evidence under cross examination was that there were not many staff files, they were kept at head office and therefore getting hold of staff when they did not attend work was difficult. The staff were casual workers, working 2 or 3 days per week. Ms Patel's evidence was that she did know what days all the permanent staff were contractually required to work and she alleges she raised this verbally with Mr Blunden. It seems quite remarkable that Ms Patel managed those staff for 4 months without knowing the terms on which they were employed and how to contact them. She alleges she raised this on unspecified occasions and only verbally. This allegation was not put to Mr Blunden or Ms Keating. Ms Keating in response to a question from the Tribunal however gave evidence that Ms Patel had never made her aware that she did not have information about the contractual terms of permanent staff. Ms Keating did give evidence that Ms Patel mentioned that she had only the addresses not telephone numbers for some staff absent on long term sick leave. Ms Keating's evidence is that she had discussed an action to get the files up to standard and that Ms Patel write to those on long term sick leave for whom she did not have telephone numbers. If Ms Patel did not have this information for staff, she did not identify any communications were she raised this as a problem with head office or indeed raised it with anyone prior to Ms Keating's arrival, which was 3 months after she had been the manager at Barkby.

<u>Tracker - PCS</u>

80. To address the problem of adequate records not being kept, being difficult to read and completed at the end of shifts when staff were tired and wanting to go home, Mr Lane had taken the lead in implementing real time electronic care recording; Person Centred Software (PCS). It is not in dispute that Mr Lane introduced this in 2017 into the respondent.

81. The PCS system involved a carer carrying a handheld iPod which would enable them to create electronic care plans and track precisely what support was being provided to each service user in real time; tracking precisely the support each service user needed/was receiving. It also meant staff could see the care plans and enable full details of the care to be given on a shift handover. It also allowed more accurate records to be kept of behaviours of service users and what the triggers were for behaviours, to allow them to be analysed and new staff to become familiar more quickly with information about the service users.

82. The PCS had, it is not disputed, been successfully introduced in other units within the respondent; the Coach House, Milligan and Barclay. It had been introduced at Barky by the previous Care Home Manager, Ms Bassill in early 2018 however use had declined after the arrival of Ms Patel.

83. On 28 August 2018 it is not in dispute, that training was arranged at Barkby to refresh staff on the use of the PCS system. There were sessions in the morning and afternoon. Mr Lanes' evidence is that Ms Patel did not attend the morning session and the afternoon session had to be abandoned because Ms Patel did not understand the app or that she would have to use it. There is an email from

the trainer **(p.1239)** relaying this information and how as a result of Ms Patel not understanding the PCS; "*the afternoon session which she attended was very difficult and badly organised."*

84. Ms Patel complains that when she arrived at Barkby all the handheld devices had been stolen however she also alleged in her evidence that she did not have the log on details to use PCS. Her evidence was vague under cross expiation in that she alleged that she had to ask for the details but could not "*really remember"* if she was given the details or not. However, she then conceded when taken to an email from Mr Blunden to her on 22 June 2018 **(p.991**) that the log in details had been supplied. There is also email evidence that Mr Blunden confirmed to Ms Patel on 28 June 2018 that he had ordered 3 new iPod devices for the Barkby, he had collected two broken ones for repair from Ms Patel and was asking her to confirm how many out of the original 20 supplied to Barkby were remaining. Ms Patel could not recall whether she had requested more handsets or not. Ms Patel stated in cross examination that when she joined the Barkby the "*priorities were different - it was to keep service safe*" and she conceded that the real reason why PCS was not used was because she did not feel she had the time to implement its use. She accepted that PCS was a helpful management tool.

85. Mr Lane referred in his evidence to data showing that PCS was used at Barkby before Ms Patel took over as manager **(p. 972/973/978)** but by 30 September 2018 there was no recording of PCS (**P. 1306)** at Barkby. The PCS recording was a tool which would have assisted Ms Patel dealing with staffing needs in that it identified what staff were doing with each service user every hour of the day. Mr Lane robustly refuted the assertion that implementation was due to a lack of handsets and pointed to the absence of any email from Ms Patel raising this as an issue. Although the data produced was only for January 2018, Mr Lane referred to being able to show continued use. On a balance of probabilities with no evidence to support that PCS continued to be used and the admission by Ms Patel, the Tribunal accept the evidence of Mr Lane that under the previous Manager the PCS was in operation and it continued to be used until a couple of months after Ms Patel started, following which it was no longer in use. He concluded that Ms Patel had told staff not to use PCS hence there was not a single recorded use of it towards the end of August. The Tribunal find that the use of PCS was important to the respondent and its implementation was not supported by Ms Patel and on a balance or probabilities either she expressly told staff not to bother with it or her behaviour indicated that she was not enforcing or supporting its use; either way Ms Patel was responsible as the Manager for its lack of use.

Other issues- breaches

86. Ms Patel accepts that under her management other issues/breaches were identified by the Council. On the 7 September 2018 (**p.1231)** the Council wrote regarding two further breaches relating to Care/Support Planning and Risk Assessments and a major health and safety non-compliance issue with relating to a fire alarm.

Deputy Manager

87. The Deputy Manager at Barkby left in the beginning of September 2018, Ms Patel however still had the support of Ms Holmes and Mr Blunden. A new Deputy Manager, Ms Jenkins, was recruited with the assistance of Ms Keating and started before Ms Patel had left in October. A new Team Leader and 4 new support workers to replace those who had left, were still going through induction at the date of her termination. Ms Keating did not accept however that the absence of 4 support workers meant that the Barkby was short staffed.

Appointment of Ms Keating

88. Ms Katrina Keating was employed from 10 September 2018 as Operations Manager of Adult Services, responsible for three residential homes and four supported living properties and the Responsible Individual for the purposes of the respondent's registration with the CQC. The Supported Living Facilities and residential homes came within her registration with CQC. Prior to joining the respondent, Ms Keating was a Regional Manager of 12 residential homes across the East Midlands, involving the management of 12 manages and over 350 staff and 110 service users.

89. On the 11 September 2018 in an email **(p.1234.1)** Mr Blunden refers to the new action plans one for the County Council and one for City Council (as both had served notices to remedy contract breach) and informed Mr Lane that that;

    "We need enough staff in the service otherwise Kay [Ms Patel] and Jamie [Mr Whittle] will end up supporting on the floor and these actions aren't going to get completed".

90. Mr Lane refers to the number of actions plans there have been commenting;

    "*…the problem is we have either not completed the tasks at all or not properly so that haven't stuck. We need to rigorously check that when the managers involved tell us they have completed something we need to verify that-* ***we have no second changes. I suggest you get your new Ops manager or your children's Ops manager to audit what we are being told. They have no baggage****."*
    [Emphasis Added]

91. Mr Lane then agrees to resource up to 1500 hours up to 30 September and then review. He also states; "*We absolutely need to address the leadership at Barkby – even recently we have been told that meds have been sorted we are still seeing mistakes on the floor…"*

92. In terms of Ms Keating's first impressions; Ms Patel conceded under cross examination that someone coming in and looking at Barkby would see that PCS was part of Ms Patel's task under the action plan, that it was not implemented and that the trainer had feedback that Ms Patel had not known what was going on when she attended the afternoon training session and she accepted it would not have filled someone coming into Barkby looking at the situation, with a great deal of confidence in her as a Manager.

14 September 2018

93. It is not in dispute that on the 14 September, Ms Keating issued instructions to

managers on new medication administration. There is an email (**p.676**) to Ms Patel amongst others, attaching a new medication administration assessment form to be completed with the individual after they have completed their on-line medication training. The Manager or Deputy Manager is to complete it every 6 months. The undisputed evidence of Ms Keating is that all the Managers reporting into her implemented this process apart from Ms Patel. It is not in dispute that the process was intended to reduce risk to the service users of having medication administered by unqualified staff and from medication errors.

94. Ms Keating also requested that Ms Patel ensure all her night staff were medication trained, otherwise the on-call manager had to come out to the home to administer medication which could cause a delay in administration of medication.

95. Ms Patel accepts that she did not complete the forms because she asserts she was not in a position to do so. She asserts that she did not have time, she was working on the action plan and none of her staff had had online training.

Third Putative Disclosure –
a.14 September 2018 email timed 18:05 [1252]
b.14 September 2018 email timed 20:41 [1242/ 1248]
c.15 September 2018 email timed at 21:57 [1259]

96. Ms Keating's undisputed evidence is that Mr Blunden would continue to oversee Barkby for about ten days until Ms Keating became familiar with the other services; she referred to being shocked at what she found and the "*disarray*" at Barkby.

97. It is not in dispute that Ms Keating did not become the Nominated Individual for the respondent until January 2019

a. 14 September: [1252/1249] email

98. Ms Patel sent an email on 14 September 2018 timed at **18:05** to Mr Blunden, Sarah Holmes and Katrina Keating headed; "*Low number of staffing at Barkby" and she asserts that this was a further protected disclosure* **(p. 1252 / 1249);**

"HI

[x] has had a behaviour and is currently in a safe hold

Other staff have had to be pulled off from service users to support with the safe hold as it has required 3 staff members

The service is not safe

We are leaving vulnerable service users without support yet again

We need to look at the staff numbers again. ***This is an ongoing issue and staff just can not [sic] cope any longer***

Today[x] has experienced a behaviour PRN was administer

[x] currently in a behaviour and has been administered PRN
[x] has been agitated this afternoon shouting at the home.
[x] has been agitated today
[x] has been extremely agitated and emotional
[x] had a behaviour this morning which resulted in breaking fire door glass".

[Emphasis Added

99. There is a clear expression of concern in this email about the safety of the service users.

100. Mr Blunden responds on 14 September 2018 at 19:04; "*sorry to hear this Kay".* He went on ask; "*Have we not agreed to some additional staff*?" He refers to needing to discuss safe holds with the in-house trainer the following week and asks Ms Patel to inform the team on the weekend shifts that they can contact him if they are not able to contact the on-call team. He invites Ms Patel to contact him if she needs to discuss this further. It was a concerned and to a degree a supportive response, however it is surprising that given the serious tone of the email, he left it for Ms Patel to contact him rather than call her himself.

101. The claimant alleges that she had tried calling Mr Blunden but that he had failed to answer her calls. Mr Blunden denies being called. There is no reference to any calls not being taken within their email communications and Mr Blunden does remind Ms Patel he can be contacted, she does not reply complaining that she had attempted to do so. The Tribunal notes that in the 5 October 2018 meeting which would subsequently take place, Ms Patel complained about lack of response to emails from Ms Keating and Mr Blunden and that she had been emailing them at 10pm from her bed **(p.1339**) at night because "I *don't have time to contact you through the day"* which would appear to contradict her allegations of attempts to call Mr Blunden. The Tribunal do not find on a balance of probabilities that Mr Blunden failed to take her calls.

b.14 September 2018 email timed 20:41 [1242 – 1244/1248]

102. The claimant sent a further email to Mr Blunden on 14 September 2018 (**p./12421248)** copying in Katrina Keating and Sarah Holmes timed at **20:41.** Within this email she states;

"Some of the agency staff are not helpful. And are not comfortable with dealing with behaviours the services users pose.

Today I asked an agency worker what training she had completed and she told me all online training. She didn't have a clue what breakaway was. We have yet again had new staff from agency without profiles I have emailed Miley three times this week. Still no response at all.

The team leader and staff have told me many of [sic] times they have to be mindful when agency staff are working as they have told protect the agency staff

as well as the service users.

Putting in the 130 hours will cover 3 out of the 7 nights for [x] to have his 121-night staff
And one staff for each day at each shift

The staffing numbers we are dealing with are not safe *even with the additional hours for the day. I have been out most of the day supporting the floor and supporting my team. And making sure behaviours are dealt with safely. Kyne who is a trainer for eccr had to use the panic alarm as him and another staff members were struggling with [x] in a safe hold. He needed more back up with staff to support him.*

Dave was with [x] as could not leave due to the recent safeguarding issue and only having permanent staff supporting [x].

I'm still trying to maintain a quality of life for my service users. [x] behaviour this evening was with regarding to him not accessing the community he wanted to go out for dinner and sadly we couldn't accommodate this as two other service users were out in the loaned van.

I couldn't even supply a taxi for them either due to short staffing levels as he is 2.1 in the community.

It has saddened me today"

[Emphasis Added]

103. Ms Patel's evidence is that she was disclosing that the respondent had again been hiring agency staff without any profiles, failing to check their backgrounds and what training had been completed and that staffing numbers were not safe.

104. Mr Blunden's evidence under cross examination was that he did not consider these emails to be a whistleblowing disclosure but an ongoing situation about staffing which they addressed in the follow up emails.

105. Ms Keating was only copied into that email because Mr Blunden by this stage was still overseeing Barkby, while Ms Keating was transitioning into the Operations Manager role. Her evidence was that she did not however identify this as whistleblowing either, her undisputed evidence is that she discussed the concern over inadequate staffing with Mr Blunden, that she asked to see the hours of staff and timesheets. Her evidence was that she was of the opinion that there were sufficient hours and over time she considered the problem was with Ms Patel's lack of skill and that the hours which were being funded were over and above the commissioned hours. Despite there being a whistleblowing policy, no one appeared to consider that this may be a whistleblowing disclosure despite the reference to the service being unsafe. However, this reaction the Tribunal consider, was not necessarily reflective of an indifferent attitude to health and safety but rather because during this period, the respondent knew there were serious issues with the service, breaches and action plans were in place to address safeguarding and safety issues and there was an ongoing discussion about staffing and the use of agency workers. This was not an isolated concern but part of an ongoing picture of a struggling service.

106. Mr Lane did not accept that the disclosures were whistleblowing either, his evidence was that by the time the emails of 14 and 15 September were sent out Ms Patel had 'lost the plot' and' couldn't cope', the Deputy Manager who should have been working on the floor was doing he believed all the rotas and timesheets

.

c.15 September 2018 email timed at 21:57 [1259]

107. The claimant sent a further email which she alleges was a protected disclosure on 15 September 2018 timed at 21:57 **(p.1259)** to Mr Blunden copying in Ms Keating and Ms Holmes;

"I have had so many calls from staff due to ***Barkby being unsafe***

I can't not make this any clearer Barkby is unsafe!! And it is an accident waiting to happen

I was not able to go in today as I have been unwell myself with sickness

Stacey d went in this morning as we have had a medication error and Laura could not give medication. She locked herself in the office and was crying to me as she couldn't help. We have struggled today and we have had to call more staff in.

This is an ongoing issuing [sic] which needs addressing as a matter of urgency
I am so disappointed in the way everything has been handled by Chartwell. This is not my first email highlighting these issues"

[Emphasis Added]

108. The email attaches with it an email Ms Patel has been sent from a Team Leader at Barkby concerning the weekend shift in which she refers to the Saturday late shift being "awful". She sets out the staff who were on duty and states that although this may seem enough staff, a service user was in a highly anxious state as well as others and makes the following comments (**p.1260**);

" This was such an unsafe shift tonight, as I just did not have the staff whilst the service users were having behaviours [x] attacked [x] by pulling her hair this required 3 male staff being Richard, Tony and Chris , this happened whilst [x[was attacking staff so myself went over to Aaron and Martin however they needed another male so Tony had to go over as well, meanwhile this is leaving all agency on the floor with the other services users and [x[…."

" I cannot stress enough how unsafe this shift was…";

109. Mr Blunden responds to this email on 16 September 2018 at 11:19am **(p.1259)**

“ *Hi Kay, sorry I’ve only just seen your emails.*

I said I am happy to take calls to help with the situation, I haven’t had any missed calls this w/e. I need more information in advance so I can help you. If you can, please call me so I can discuss what is needed to make the shifts safe tonight. ***We are still dealing with historic and cultural issues not of your or my making****. You have got some good momentum behind the team leaders* ***and have led them well since you start, but I am worried about the tone of their emails and the concerns they are expressing.*** *I have not been made aware of [x] displaying such prolonged anxiety in the time I have been there. We clearly need to keep recruiting, but then we would only be bringing more inexperienced new staff on the shift. We need to have an urgent summit meeting with Care Staffing… I will ask Kat to arrange to meet with them Mon or Tues if possible.* ***But Sokhi has made it patently clear to me that we need to continue working with them and no other agencies,*** *in the meantime, please feel free to call me.”*

[*Emphasis Added]*

110. Ms Patel complains that Mr Blunden’s response was extremely unhelpful as she had already stated that more staff members were required immediately.

111. Mr Blunden’s evidence is that Ms Patel was not in work on that shift and the Deputy Manager was on annual leave and thus it was not surprising that she was receiving calls from staff that evening. He also refers to a safe hold not requiring more than 2 staff and one of the service users being given 1 to 1 care when this was not funding provided by the Council and this level of care should not therefore have been provided. He did not however address any of this in his response to her email at the time. Mr Blunden’s evidence is also that he referred to historic complaints to try and encourage Ms Patel and had concerns about Ms Patel and the levels of anxiety being shown by the service users which he had not experienced before.

112. Ms Patel’s case is that she believed the putative disclosures were all in the public interest because it involved providing safe staffing for the residents.

18 September 2018

113. On 18 September Ms Keating instructed the managers to complete a new weekly monitoring report to track key performance indicators. The weekly reports were attached and sent out to managers including Ms Patel by email (**p. 679).** This report was important in identifying safeguarding incidents, an issue identified by the Council and CQC art Barkby.

114. Ms Patel could not recall whether or not she had provided even one of them during her employment but under cross examination her evidence was that she did not have the time to do the reports. On a balance of probabilities, the Tribunal accepts the evidence of Ms Keating that Ms Patel did not complete even one of these forms and that other managers did comply with her instruction.

115. Ms Keating’s evidence was that she was also shocked to find out that no one

was using the PCS at Barkby. Ms Keating was also aware of the training on PCS which has not been successful at Barkby with Ms Patel and saw this as a sign of her not prioritising the use of this in the home.

116. Ms Keating does not dispute that she did not visit Barkby until about 20 September, prior to that she had been told to take more of a 'back seat' while getting up to speed and Mr Blunden was still overseeing Barkby. Her evidence is that she visited Barkby about 5 times between then and 28 September, speaking to Ms Patel on 4 of those occasions. Ms Patel complains that Ms Keating attended Barkby only twice.

117. Ms Patel volunteered under cross examination that she was tired and stressed in her role and would cry in managers meetings and complains of a lack of support from Ms Keating when she was present when she saw her in tears.

118. The Tribunal accept Ms Keating's evidence that there were other occasions she attended when Ms Patel was not present. There is no evidence to confirm how many times Ms Keating visited Barkby when Ms Patel was present, it was either or somewhere in between 2 and 4 occasions however, it is not in dispute that Ms Keating was present to see Ms Patel crying in managers meetings.

Ms Keating – reporting on Ms Patel's performance

119. In the last week of September 2018, Ms Keating reported to Mr Lane that she felt that Ms Patel lacked the necessary leadership skills to turn Barkby around. That she find Ms Patel rude and according to Mr Lane, she told him that Ms Patel had refused to implement new medication assessments and a weekly monitoring report, which we find was the case.

120. Mr Lane's undisputed evidence is that he advised Ms Keating to write a report to the Board for consideration.

121. The report was sent to the Board on 28 September 2018 **(p.1295 – 1299).** Within this report Ms Keating referred to having; examined the actions plans created by Ms Patel, reviewed all emails sent by Ms Patel over the last few weeks, reviewed progress on implementing PCS, looked at her response to new policies and forms Ms Keating had implanted, visited Barkby and listened to feedback from staff.

122. Ms Keating referred to a number of findings which she referred to as the main areas of complaint;

- That the new medical assessment form had been implemented at other Homes but 'ignored' by Ms Patel
- That Ms Patel had been reminded to send the new weekly report, but she had 'ignored' that request and to date; "*no weekly reports have been received which is very frustrating …"*
- With regards to PCS training, the feedback from the trainer was that the Ms Patel did not attend any of the sessions and Ms Patel did not understand the care app.
- Ms Patel had not got pre- authorisation to use agency staff during Mr

Blunden's absence on annual leaves.
- Ms Patel has now shown leadership and had detrimental effect on morale.
- Ms Patel has been rude in emails, and resists improvement and polices.

123. Her conclusion was that;

*"KP has a good relationship with the service users and with some staff, but she is , in my opinion, completely unable to manage Barkby to the standard that Chartwell and the valour external agencies require**. I feel she is out of her depth and her attitude leaves plenty of room for improvement"*** and

"I feel that we need to urgently terminate her probation and replace her with managers who can get the job done."

[Emphasis Added]

124. The report is damning and although Ms Keating alleges in her evidence that she approached the probationary review with an open mind, willing to listen to what Ms Patel had to say, the damning comments and unequivocal recommendation to the Board is not consistent with someone who has retained an open mind. It would be difficult the Tribunal consider, after such a damning report and robust conclusion for Ms Keating to have done anything other than see her recommendation through.

125. Ms Keating refutes that the reason or principal reason for the decision to dismiss was that Ms Patel had made the putative protected disclosures, her evidence is that everyone knew of the issues at Barkby and she welcomed issues being raised but that urgent action was needed and she felt Ms Patel was out of her depth.

Board meeting – 1 October 2018

126. The Board held a meeting on 1 October 2018. Those in attendance were the owner of the business, Mr Mattu, Mr Blunden, Mr Lane and Ms Keating. The evidence of Mr Lane was that Ms Keating expressed the view that Ms Patel was very good with service users but like many managers who had been promoted from support workers her management skills were limited. Mr Lane felt Ms Patel had not made much progress on the action plan.

127. The Board asked Ms Keating to meet with Ms Patel and make a decision on a review of her progress.

<u>Issuing of contract of employment – 1 October 2018</u>

128. It is not in dispute that Ms Patel was issued with her contract of employment on 1 October 2018, some 4 months after she started in the role. It was sent to her by Mr Blunden by email on 1 October **(p. 1309).**

129. The contract of employment **(p.856-874)** includes a probationary clause which provides that her employment is subject to a probationary period of 6 months.

Performance meeting – letter 2 October 2018.

130. The day after the contract of employment was issued to Ms Patel, Ms Keating sent a letter dated 2 October 2018 **(p.1329)** to Ms Patel on 3 October 2018 in which she was invited to a probationary meeting with Ms Keating and Mr Blunden on 5 October 2018;

" *This is not a disciplinary hearing in accordance with the company's disciplinary procedure but as we shall be discussing your future employment you have the right to be accompanied at this meeting…*

I must point out that if your performance has not met with our standards then your employment with Chartwell Trust maybe terminated".

131. It cannot be coincidence the Tribunal find that the contract was issued the day before a letter was prepared inviting Ms Patel to this meeting. The Tribunal find that on a balance of probabilities, Ms Keating had made the decision, given her report to the Board that Ms Patel's contract was to be terminated or likely to be, and had issued the contract so that the probationary period was confirmed in writing.

Fourth putative protected disclosure

Probation meeting – 5 October 2018.

132. The report prepared by Ms Keating (**p. 1332**) was the Tribunal find, not provided to Ms Patel until the morning of the hearing. Ms Keating conceded that under cross examination there had not been much notice of this hearing but that she considered the situation was 'dire'. That the situation for Barkby was dire is not in dispute.

133. Ms Patel complains that she asked to adjourn the meeting as she had only received 2 days notice and did not feel prepared however, this was refused.

134. Ms Patel was scored on a number of factors; Attendance and Timekeeping, Ability to work on own initiative, Relationship with staff, Appearance and Honesty but had not been informed prior to the meeting that she would be scored.

135. *Attendance and Timekeeping*; there was discussion that none of the night staff were medication trained. Ms Patel did not dispute this but argued that due to being short staffed the staff had not been able to carry out medical competency training. The decision was taken that this criteria was not satisfied and that Ms Patel had failed this part of the probation.

136. *Ability to work on own initiative*; there was criticism of Ms Patel's management of staff in that a number of staff had periods of absence without leave and sickness and that she had not addressed these issues properly. Ms Patel argued that there were no staff records when she joined Barkby and that she had been building them up. Ms Patel was deemed to have not passed this element of her

role.

137. *Relationships with staff*; This was rated as good and Ms Patel was deemed to have passed this however, there was criticism that she had not managed staff sickness absence and incidents reports had not been completed by staff.

138. *Appearance and Honesty*; Ms Patel was scored as good although Ms Keating raised issues with her conduct including that Ms Patel had on occasion refused to close her laptop to speak with Ms Keating, that she was hostile towards the PCS tracker, and that her new Deputy Manager has reported that the atmosphere was negative.

139. Ms Keating informed Ms Patel that they did not have time to give her extra training and were terminating her employment.

140. Ms Keating wrote to Ms Patel on 8 October 2018 informing her that; *"I did not think that you were of a standard that was acceptable to us."*

141. Ms Patel under cross examination accepted that she did not allege in this meeting that she believed she was being dismissed because of the putative disclosures because she was "*under pressure"*.

142. Mr Blunden's evidence under cross examination was that Ms Keating drove the probation review, but that she was a 'fresh pair of eyes' on the situation and he supported her decision that Ms Patel was out of her depth.

143. The undisputed evidence of Mr Blunden was that Ms Holmes left the respondent's employment on 26 October and was off work sick for a period prior to that until he resigned. There was no disciplinary or performance issues raised with her although Mr Blunden indicated this may have been a possibility but had not been explored prior to her departure.

144. It is clear that it was Ms Patel was held culpable for the failure at Barkby to implement the action plan and rectify the breaches, she was however the Manager and she accepted that she was ultimately the one responsible for the day to day running of the home.

<u>Disclosures</u>

145. Ms Patel alleged she made protected disclosures during this meeting however, she failed to actually identify within her evidence in chief what wrongdoing she alleges that she disclosed.

146. Within the original claim form it alleges that Ms Patel had during this meeting, explained that due to staff shortages and being too stretched she had not been able to carry out the medical competency training with staff. That is the extent of how this part of the claim is pleaded.

147. In response to questions from the Tribunal, Ms Patel gave evidence that she had disclosed about being short staffed, being overstretched and that staff have

no time to complete t paperwork because they are so busy, that incidents forms are not completed, that she had to spend time with the residents on the floor and that it was either feeding the service users or filling in petty cash.

148. The notes of the meeting record Ms Patel being asked about the night staff not having medication training and in response she states; *"We have been very short staff, and we have been trying to train the staff in the new Biodose system and we have been overstretched."*

149. When asked about the monitoring report not being completed Ms Patel states; *"I highlighted the staff have no time to complete these- the floor is too busy".*

150. In response to the allegation of a failure to manage staff absences Ms Patel states;

"The numbers have been pulled so I am spending more time on the floor.

I have been starting work at 9am and finishing at 12 midnight. I am stressed and tired."

And;

"the incident forms have increased and I have a choice to do the petty case form or feed the service users."

151. With respect to incident reporting; *"…but if I take staff away from the service user…to do their paperwork this will likely trigger a behaviour".*

152. Ms Patel also refers to a lack of safeguarding reporting system in place when she joined Barkby;*." there had not been a process in place. The staff had not understood the ABC reporting etc when I arrived at Barkby."*
And;

"We *have had a large turnover of staff and for some English is not their first language. The inspectors did not pick up that some of the reporting terminology is not acceptable.*"

153. It is clear that Ms Patel mentions throughout this meeting issues with shortage of staff, the impact this is on the ability to provide staff with the medication training and complete the necessary reports including incident reports which is a CQC requirement.

154. Although Ms Patel does not make express reference to a the welfare of residents being endangered or breach of any specific regulations, it is obvious from the information disclosed that what she is referring to is a failure to be able to provide safe care in term so staffing and training.

155. Ms Patel was not given a right of appeal. As the decision was the Tribunal find, taken before this hearing, it was not a fair process.

Post Termination

156. It is not in dispute that following the claimant's departure,, on the 28 and 29 October 2018, the CQC inspected Barkby and were not happy with the lack of progress on a range of issues and felt the quality of care had deteriorated in many areas. Barkby was given a rating of Inadequate.

157. During Ms Patel's management of Barkby she accepted that the rating had deteriorated, not improved.

158. Ms Patel stated under cross examination, that she had been "*set up to fail*" because she did not receive sufficient support however, that complaint is not really consistent with her claim that she was dismissed for making whistleblowing disclosures in July and September.

159. Ms Keating accepted in her evidence that the decision was taken quickly that Ms Patel did not have the relevant skill set and she did not have the time to support her but had Ms Keating started earlier, perhaps in June, she may have time to do so.

160. Ms Keating introduced a new internal quality audit and it is not in dispute that following an inspection on 12 December, Barkby was rated by it as 70% complaint and by the end of January 2019 it was 89% compliant.

161. Mr Lane's evidence was that for him there were three main issues with Ms Patel; 1). She had not completed the actions plans and this 'blew' their credibility with the Council and the CQC 2). She filled the home with strange agency staff and those who have worked with autistic service users know that to place so many unfamiliar staff in the unit would create problems 3) She considered PCS ' incidental' but this showed a lack of understanding and experience of running a residential home which is very different to managing Supported Living Facilities.

Comparator

162. Ms White was the Registered Manager of Barclay Street, another residential home. In February 2019, Barclay Street received a CQC inspection rating of Requires Improvement following a rating of Good in March 2017. Ms White, unlike Ms Patel was not dismissed and Ms Keating was cross examined over the difference in treatment.

163. The undisputed evidence of Ms Keating was that Ms White was put on a performance development plan and she was given 3 months to turn the service around however she is no longer employed by the Respondent, following her resignation. Ms Keating's undisputed evidence is that there were differences in their respective situations, in that a lot of the problems at Barclay Street were concerned with maintenance of the property. It is the case that in the detailed report about Barclay Street **[p.369]** the first comments are concerned with how well the property and bedrooms were maintained.

164. Ms Keating's evidence was that Ms Patel was not put on a development plan

because she would have required considerable training to even get her to an acceptable Deputy Manager standard.

165. Ms Keating gave evidence that her view of Ms Patel's abilities was reflected in the decision taken by the CQC to put Barkby into special measures 3 weeks after Ms Patel had left. That Barkby was put into special measures was not disputed.

166. The Tribunal accept the undisputed evidence of Ms Keating about the circumstances surrounding Ms White's situation and therefore accept that Ms Patel's situation is not comparable to Ms White's

167. There is a CQC report **[p. 1411]** arising from an inspection on 29 October 2018, a few weeks after Ms Patel had left, which gives Barkby a rating of Inadequate and includes the following comment within the findings **[p.1412;**

"*This provider's action plan had set deadlines for when the improvements would be achieved.* ***We found at this inspection that none of the deadlines had been met."***

[Emphasis Added]

168. By January 2019, Ms Keating had prepared a report rating Barkby as now Adequate.

169. There is a follow up CQC report following an inspection in April 2019 which rated the service as Requires Improvement with a Good rating in 3 out of 5 areas. **(p.1458).**

170. The Tribunal find that whatever measures were put in place after Ms Patel had let, there had been a significant improvement as far as the CQC were concerned.

171. It is compelling evidence that Ms Patel accepted under cross examination, that the service had indeed deteriorated during her time as Manager. Further, although Ms Patel complains that she had no support from her Managers, she does not dispute that she was the only Manager who had been allocated someone like Ms Holmes to provide her with additional support.

<u>Ms Toni Fitzsimmons</u>

172. The Tribunal now turns to the findings of fact in relation to the second claimant; Ms Fitzsimmons.

173. Ms Fitzsimmons began her employment with the respondent on 4 April 2018. She was employed as a Deputy Manager within the Supported Living Care Services (SLCS) at The Limes, a facility which comprised 6 flats for supported living. There were two Team Leaders reporting into her; Katie Hardy and Iman Ali.

174. The Limes at the relevant time, although having 6 flats only had 3 residents. Two of those residents required 2 to 1 care 24 hours a day, the other required 1

to 1 care for 5 or 6 hours per day. The SLSC of Barclay Services also included the Tentercroft home where 1 resident lived who required 2 to 1 care 24 hours a day, and Oliver Street and Duncan Road, both bungalows for 1 person.

175. Initially Ms Fitzsimmons' responsibilities covered only The Limes but later she began to take on some duties in respect of Tentercroft. There were about 30 support workers covering those two residences and Team Leaders. A total at the relevant time of 4 residents. The staff work shifts and therefore each resident requiring 2 to 1 cover, requires 6 staff per day (early, late and night shifts).

176. Ms Fitzsimmons reported directly into Mr Tony Speers, who had been the Deputy Manager at The Limes but had been promoted to Manager on the appointment of Ms Fitzsimmons.

177. In June 2018 The Limes had a new resident (X). The plan had been for two further client's to move into The Limes however, due to the severity of the behaviours displayed by X, those further two clients were put on hold. A bungalow was purchased for X to move into however it required a lot of maintenance work before he could move into it. The issues at Barkby diverted some resources from this project. Rather than the planned 5 clients, The Limes therefore continued to operate with only had 3 residents (the sixth flat was to remain vacant as an office for staff). The Limes was therefore operating below full occupancy throughout the employment of Ms Fitzsimmons. None of this is in dispute.

178. Ms Keating was then appointed on 10 September 2018 and as Operations Manager became Mr Steers direct Line Manager.

179. Prior to Ms Keating's appointment, Mr Blunden who had been temporarily covering the Operations Managers role as well as his own role as COO, had been acting as Mr Steers Line Manager. His evidence was that in retrospect, he had allowed Mr Steers too much latitude under his line management.

180. The evidence of Ms Keating is that on joining the respondent she identified a number of issues with The Limes; the use of agency staff remained high, there was a high attrition rate amongst the staff, there were complaints about the noise made by resident X, the PCS system had not been implemented, training records were not complete, supervisions not happening with staff and only half of the self-contained flats were occupied and resident X was likely to be moving out into a self-contained bungalow, leaving another vacant flat.

181. On 11 September 2018 Ms Fitzsimmons emailed Ms Keating to introduce herself and to find out when Ms Keating would be able to help with managing on call services **(page 173);**

"Unfortunately, we haven't met yet, I am the Deputy Manager at The Limes/ Barclay Services. Simon has updated me that you will be helping with on call for Barclay services. Our Team leader is currently completing rotas and has reminded me that I haven't informed her who is on call in October.

I don't expect you to know right away, but if you could let me know if there are

any weekends you cannot do that would be a fantastic help to help us plan ahead…"

First Putative Disclosure: 11 September 2018 oral putative disclosure

182. Ms Fitzsimmons alleges that following her email of 11 September 2018, she spoke to Ms Keating in person on 11 September and raised concerns about only having one person on call for SLCS and residential services.

183. Ms Fitzsimmons does not allege that she referred to any specific consequences or risks that she believed this situation presented. Her evidence in chief consists of the following detail;

*"Following my email, I spoke to Katrina in person **where I had raised my concerns** about only having one person on call for **supported living and residential services**." [W/S para 3]*

[Emphasis Added]

184. Prior to Ms Keating starting, the on-call rota for SLCS was not shared with residential services, this meant that the management team for SLCS were on call more frequently. Ms Keating would introduce a system whereby the on-call rota was shared with residential services and SLCS, thus reducing the occasions when the managers needed to be on call.

185. Ms Keating denies that there was any conversation on the 11 September with Ms Fitzsimmons about the on-call rota or indeed any conversation. The allegation of a discussion on the 11 September following the email does not appear consistent with an email Ms Keating sent the following day, on **12 September 2018 [p.173]** in which replying to the 11 September email, Ms Keating states;

"Only just been able to log on to my emails. I will look into this today and come back to you".

186. There is no reference in that 12 September email to any oral discussion on 11 September and the Tribunal find that the email of the 12 September is clearly a response to the 11 September email.

187. Ms Keating not only does not accept that any conversation took place on 11 September, her evidence is that Ms Fitzsimmons would have had no knowledge about the new on-call policy on 11 September 2018 because Ms Keating did not communicate this until **12 September**. It was put to Ms Keating in cross examination that what Ms Fitzsimmons had been raising was problems with the old system and not the new system however the Tribunal do not accept that this is consistent with Ms Fitzsimmons' own evidence. Firstly, Ms Fitzsimmons in her witness statement refers to the new on call rota system i.e. the rota for supported living **and** residential services and further, her case is that she later set out the concerns she had raised in a review document **[p.1545],** (the authenticity of which the Tribunal will address in due course). Within that review document it makes no reference to 'whistleblowing' about the existing rota system in place on 11 September, it states;

"*On- call Toni doesn't feel she has had the correct training to be able to give advice regarding* ***residential service****.* …"

[Emphasis Added]

188. Under cross examination, Ms Fitzsimmons confirmed that her allegation about raising concerns about the on-call system on 11 September, was about the new system. She accepted that she did not find out about the new system until 12 September and gave evidence that perhaps she had therefore got her dates wrong. She did not however proffer a possible alternative date when she made the disclosures.

189. Ms Fitzsimmons was represented by counsel and made a correction to a date of another disclosure at the start of her evidence in chief (which the Tribunal addresses later in this judgment), however she did not at the start of her evidence seek to correct this date.

190. Ms Fitzsimmons would later appeal the termination of her employment in December 2018 **[p. 355]** and allege that her dismissal was because of her 'whistleblowing'; "***since 21/09/18".*** Ms Fitzsimmons, does not within this appeal, allege any disclosure before 21 September 2018 and failed to make reference to any alleged conversation on 11 September 2018 (or on any other date about the new on-call rota system).

191. Ms Fitzsimmons did not provide any details about what she is alleged to have disclosed/ raised concerns about the rota in her evidence in chief or indeed within her claim form, other than a general reference to raising concerns about having one person on call and it posing a health and safety risk – she does not explain why she believed there was a health and safety risk. The claim form refers to [**p.17**].

192. It was only under cross examination that Ms Fitzsimmons gave evidence that it was; " *about not knowing the service users, how could I advise staff members if I didn't know the residents – I was familiar with the residents in supported living- it's a big thing being on call – lot of pressure if you don't know the residents*". Ms Fitzsimmons went on under cross examination, to refer to not knowing which residents in residential services would need PRN (medicines administered when required). None of this detail about what she alleged she mentioned/disclosed was contained in her evidence in chief or her claim form and there was no attempt to explain its omission.

193. The Tribunal did not find Ms Fitsimmons to be a credible witness, in the sense that it did not find her to be a reliable witness of fact. Her evidence with regard to this first alleged disclosure was unconvincing and for reasons which the Tribunal will come on to, there were other concerns with respect to her credibility as a witness.

194. On a balance of probabilities, the Tribunal find that this alleged conversation with Ms Keating about concerns with the new on-call rota system did not take place and the evidence of Ms Keating, whose evidence was consistent with the documentary evidence, is preferred. The Tribunal do not find as a matter of fact

that the claimant made a disclosure to Ms Keating on or around 11 September about alleged wrongdoing arising from the new on call rota or indeed, the existing rota. Even if the Tribunal had accepted her evidence, the Tribunal do no find that her own case as presented in her claim and evidence in chief would support a finding that objectively she held a reasonable belief that the information she alleges she disclosed tended to show that the respondent had, was or was likely to fail to comply with a legal obligation and or that the health and safety of the service users had been, was being or was likely to be endangered.

Changes

195. During her first week Ms Keating introduced a number of changes; the introduction of weekly monitoring reports (to identify issues including training needs and behaviours allowing greater safety for staff and service users), a new on call system (so that rather than each unit making their own arrangements there was a standard system so that managers would then only be on call every 7 weeks), a new medication system and managers and deputies to keep their weekly calendars up to date.

196. Ms Keating had also been tasked it is not in dispute, with ensuring PCS was introduced across all units. Ms Keating's primary remit was to drive up standards and improve efficiencies. This the Tribunal find, was on a balance of probabilities, not received well by Mr Steers whom Ms Fitzsimmons reported.

197. In an email on the 19 September 2018, Ms Fitzsimmons and Mr Steers, were informed by Ms Keating that they were required to attend PCS training to be carried out by Michelle Cox the Registered Manager of another SLCS, called the Coach House, arranged for the 26 September 2018 [**p,180**];

"Please make the most of your session as Michelle has a lot of work to be getting on with as she has CQC due any day. So please make sure you make the most of it."

198. Ms Fitzsimmons emailed Ms Keating on the morning of the 20 September 2018 informing her that she could not attend the training because she had to attend a staff meeting, this is despite the obvious importance Ms Keating had placed on this training session **(p.180];**

"*sorry but I can't do Wednesday 26 as I have another meeting.* ***I can do the 27*** *though if this can be changed"*

[Emphasis Added]

199. Ms Keating replied during the afternoon of the 20 September **[p177]** confirmed that the training had been changed to the 27 September. However, about quarter of an hour later, Ms Fitzsimmons replies to Ms Keating sending a short response;

"*Myself and Troy* [Mr Steers] *cannot go on the 26th as we have an MDT and we cannot go on the 27th due to staff meetings midday at the Limes"*

200. Ms Keating replied informing Ms Fitzsimmons that she will have to reschedule

the staff meeting as the PCS training takes precedence. There then follows a further email with Ms Fitzsimmons setting out the difficulties of rearranging the staff meeting as she is off work on 28 September and Mr Steers on annual leave the following week. Ms Keating however is insistent they rearrange the staff meeting and on 20 September 2018 at 13:32 replies as follows **[p.177]**

"*With the greatest of respect, you both need to attend the training and this is not up for discussion. So, if this means postponing this months or changing the date then please do."*

201. Ms Keating is polite but firm in her email.

202. Mr Steers replies a few minutes later **[p.186]** now copying in Mr Blunden;

"Unfortunately, we will not be able attend this month. We will have to attend in October when I return from annual leave".

203. A reasonably objective view of this response from Mr Steers the Tribunal find is that Mr Steers is challenging the authority of Ms Keating, his response which is curt, presents as a direct challenge to her authority. The Tribunal shall deal with this issue further when dealing with the evidence in respect of Mr Steers however, the Tribunal consider that it was understandable that Ms Keating felt frustrated and undermined, by the responses she was receiving from them both, when she had stressed the importance of their attendance at this training.

204. Ms Keating was then compelled to send yet another email which becomes, understandably, exasperated in tone and more forceful;

"I'm not going to make this anymore clearer Troy, as I am now sending several emails over this subject. You need to attend, this is not a choice…"

205. Mr Lane then intervenes and sends an email on 20 September 2018 to enforce the importance of PCS and the support Ms Keating has from the Board to drive it forward [**p.184]** which includes the following comment from him;

"*The Limes has been open over 12 months and we have not yet implemented PCS, which is a major failure…"*

206. This early exchange is relevant in that, from the outset the Tribunal find, there was a friction which developed early in the working relationship between Ms Keating and in particular Mr Steers, and to a lesser extent Ms Fitzsimmons.

Second Putative Protected Disclosure: meeting [21] September 2018:

a. Auditing

207. The undisputed evidence of Ms Keating is that there were weekly management meetings at Head Office every Thursday however the first one after she joined on Monday 10 September, (which would have been Thursday 13 September 2018) was cancelled therefore the first one would have actually taken place pm Thursday 20 September 2018. However, she did have an impromptu short meeting on 18 September with the management team from The Limes,

namely Mr Steers and Ms Fitzsimmons, following a training session (on facial recognition). These events are not in dispute.

208. Ms Fitzsimmons alleges within her witness statement that she attended a supervision meeting with Ms Keating on 21 September 2018 **[p.195 – 197].** However, when giving her evidence in chief before the Tribunal she stated that this was not correct, the supervision meeting had actually taken place with Mr Steers on 21 September and she does not rely upon any alleged disclosures she made within that meeting. Ms Fitzsimmons alleges that she had a meeting with Ms Keating which was not a supervision meeting but she said she was unable to the date of the meeting.

209. Under cross examination Ms Fitzsimmons then alleged that the meeting was actually the same discussion which Mr Steers refers to in his statement and which he alleges took place on 14 September. Ms Fitzsimmons does not refer in her witness statement to Mr Steers being present at the meeting where she alleged she made this second putative disclosure and thought it had taken place perhaps on the 18 September.

210. Ms Keating's evidence is that the Facial Recognition training was to take place on the 18 September 2018 and that this is when the discussion about auditing took place. There is an email dated 17 September 2018 **[p.678.1]** referring to the Facial Recognition training taking place at Head office the following day. The Tribunal find on a balance of probabilities that this is the actual date the conversation took place with Mr Steers and Ms Fitzsimmons about auditing.

211. Ms Fitzsimmons alleges that at this meeting on an unspecified date in September with Ms Keating, she made a protected disclosure namely that she;

"…raised *my concerns regarding what they were required to do with regards to the* ***auditing*** *which had* ***not been completed by other Deputy Managers****. I had already asked Katrina previously that I was not sure whether it was my responsibility with Troy Steers or whether Becky and Rachel's responsibility to ensure the auditing was completed.*"

[*Emphasis Added*]

212. It is alleged that Ms Keating replied; "*rather you than me*" regarding the auditing.

213. Ms Fitzsimmons alleges that this was a disclosure that auditing had not been carried out which is a CQC legal requirement. She does not allege that she mentioned the CQC or specifically made reference to the potential breach of a legal requirement.

214. Ms Keating accepts that there was a discussion with Mr Steers and Ms Fitzsimmons following IT training at Head Office, on 18 September 2018 (w/s para 11). The plan was for Mr Steers to take over the other SLCS facilities and she accepts that Mr Steers asked her if she knew when he would be taking over all those facilities and that he mentioned to her that he did not think all the required paperwork/auditing was being completed by the Managers who were

looking after Duncan Road and Oliver Street. It is not dispute that the auditing was an important regulatory requirement. It is also not in dispute that Ms Fitzsimmons asked whose responsibility it was to do the auditing and that Ms Keating's evidence is that she said it was the Managers currently in charge of those facilities; Jyotee Madhub who was managing Oliver Street and Becky White, who was overseeing Duncan Road at that time.

215. Ms Keating denies that Mr Steers, had alleged that 9 months of auditing had been 'dumped' on him, which is his allegation. Ms Keating gave evidence that there is a SLCS office at Head Office with archive storeroom and there would be no need to leave the auditing at his office. Ms Keating did not dispute that if there had been 9 months of auditing as alleged which had not been done that would have been a serious issue but denies that this is what she was told but that in any event, she still treated it as a serious issue and hence looked into it. Ms Keating denies making the comment "*rather you than me".*

216. Ms Keating's undisputed evidence is that she agreed to speak to the Managers at Duncan Road and Oliver Street and that this was the end of the conversation. The evidence of Ms Keating is that she then followed this up and spoke to the Managers concerned, Jyotee Madhub and Becky White and the Deputy Manager from Barclay Street, Rachel Carter who met her at Head Office and went through the Duncan Road paperwork with her that same day in the archive room . She also met with the Deputy Manager at Oliver Street who informed her that no one had been to Oliver Street (including Mr Steers) to inspect the paperwork.

217. The Tribunal accept Ms Keating's evidence that she checked the care plans for the residents at Duncan Road had been completed, the risk assessments and all necessary paperwork and that she was assured all the auditing had been completed and that Ms Keating sent the Managers and Deputies a pro forma report to complete and send to her and Mr Blunden weekly. There is an email dated 18 September timed at 14:15 attaching the weekly report pro forma **[p.679] which is supportive of Ms Keating's evidence regarding the investigation she carried out and the follow up actions.**

218. The agreed list of issues provides that Ms Fitzsimmons raised the failure to do the auditing and complained about the recruitment of unsafe, unvetted workers. Ms Fitzsimmons evidence in chief however was confusing and unclear on what she alleges was discussed, with whom and when. It was only clarified under cross examination that her allegation was that during the discussion which she thought may have been on 18 September, she raised an issue about auditing; " *I didn't think they were auditing, not documenting, it is a breach of company polices and CQC as well, I was generally raising legal requirements of auditing and what to do.*" She did not go on to make any reference under cross examination about mentioning unsafe recruitment. Ms Keating's evidence is that on the 18 September, the only issue raised with her was auditing and she took steps to investigate that.

219. The evidence from Ms Fitzsimmons is confused and inconsistent. The Tribunal prefer the much clearer account and recollection of the conversation provided by Ms Keating, namely that there was a discussion on the 18 September (not the 14th September) and that the only issue raised was a concern about auditing, she denies that any staffing issues were raised on this occasion

by Ms Fitzsimmons.

220. Ms Fitzsimmons does not allege in her evidence that she and Mr Steers also raised during this conversation that a Team Leader (Dee) at Duncan Road had stated that they do not take service users it in the community as a result of their disability, this is an allegation Mr Steers makes but which is not supported by Ms Fitzsimmons evidence and which Ms Keating also denies.

221. On a balance of probabilities the Tribunal find that both Mr Steers and Ms Fitzsimmons mentioned orally to Ms Keating on 18 September, what Ms Keating considered to be a serious issue about auditing not being completed. Ms Keating accepts this was a serious matter and she checked and was assured the care plans, risk assessments etc had been done. Ms Keating does not allege that Ms Fitzsimmons or Mr Steers had been deliberately providing false information about the auditing.

222. Ms Keating would the Tribunal find, have known without being told, that a failure to complete the required paperwork/auditing was potentially a breach of CQC requirements.

223. Ms Fitzsimmons did not in her evidence address whether and why she considered the disclosure to be in the public interest. It may seem obvious, that the disclosure about the adequacy of the care and safeguarding of vulnerable adults is in the public interest however the particular facilities concerned housed only one resident each. This was not a situation where the failings related to a larger number of vulnerable adults in a residential care facility. That is not to say however that the Tribunal consider there is no public interest in the care of those who are vulnerable in our society unless it affects a certain size of group and it is not for this Tribunal to substitute its own view. The task of the Tribunal is to consider whether Ms Fitzsimmons believed the disclosure served that public interest and whether that belief was reasonably held. Although Ms Fitzsimmons addressed the issue of wrongdoing in her evidence, she did not give evidence about whether she considered the disclosure to be in the public interest. The claimant has been legally represented from the presentation of the claim form through to representation by counsel at the hearing. The only evidence about public interest was a brief reference in the claim form which merely stated that all the disclosures were; "*made in the public interest due to the health and safety risks and failure to comply with legal obligations under CQC requirements*" (para 33) .

224. Ms Keating alleges that she had been told that no one had checked on the auditing and therefore this gives rise to the issue of whether Ms Fitzsimmons genuinely held a belief about the auditing. However, had Ms Keating considered that Ms Fitzsimmons and Mr Steers had lied about those concerns, this was not raised with them at the time. It was also not an issue raised as part of the disciplinary process which Mr Steers would be subject to and the various concerns raised later by Ms Keating about his conduct [**p.747]**. The Tribunal do not consider there is evidence to support a finding that Mr Steers and Ms Fitzsimmons made up their concerns about auditing and had no reasonable belief that there had been a failure to complete that paperwork.

Supervision meeting: 21 September

225. Ms Fitzsimmons had a supervision meeting with Mr Steers. Part of her original claim was that this meeting was with conducted by Ms Keating and that she made disclosures to her during this meeting. However, as established during her evidence in chief, the meeting was with Mr Steers and she does not rely upon any putative disclosures she made to him in this meeting.

226. The forms relating to this supervision meeting held by the respondent appear in the bundle **[p.195 – 196 and 197- 201].** Those forms are unsigned. Ms Fitzsimmons alleges that there are another set of supervision forms, updated by Mr Steers shortly after the supervision meeting, with her comments which appear in the bundle **[p.1545 – 1549]**. It is not alleged by Ms Fitzsimmons (or indeed Ms Steers) that the respondent had these second set of supervision forms and failed to disclose them. Although Ms Fitzsimmons does not rely upon what she said to Mr Steers in this meeting, the Tribunal consider that these forms are relevant principally with respect to the credibility of both Mr Steers and Ms Fitzsimmons.

227. The respondent does not accept that these second set of forms were created at the time of the supervision meeting or shortly afterwards as is alleged, but the respondent's case is that those amended forms with additional comments were created/ amended for the purposes of these proceedings. For the reasons set out below, the Tribunal find on a balance of probabilities that Mr Steers and Ms Fitzsimmons were complicit in creating this amended version of the forms for the purposes of these proceedings. The Tribunal does not accept that they were created shortly after the supervision meeting and this causes the Tribunal significant concern regarding the way in which Ms Fitzsimmons and Mr Steers have conducted these proceedings and generally their credibility and reliability as witnesses of fact.

228. There is an email dated **25 September 2018** from Mr Steers to Ms Fitzsimmons attaching the supervision forms after the meeting. Within this email Ms Steers asks Ms Fitzsimmons to "add *anything I have missed."* It is not disputed by Ms Fitzsimmons that the forms at **[p.195]** are the original, unamended version of the forms which she was sent.

229. The second, amended copy of the notes **[p.1545 – 1549]** are signed by Ms Fitzsimmons and Mr Steers and are dated **24 September 2018**.

230. The date the amended forms are signed therefore predates the email from Mr Steers asking Ms Fitzsimmons to check that he has not missed anything out in the original version of the forms.

231. The additions to the forms are significant and include the following additional comments;

"*Also concerns that a few weeks ago I asked Kat with troy [sic] present, what do we do with the auditing that had not been completed by other deputy managers. I asked Kat a few weeks ago at Head Office because I didn't know whether that was my responsibility with Troy or whether that was Becky/Rachel responsibility. Kat responded, "rather you than me" I feel like I **whistleblew** that the auditing hadn't been done which is a legal requirement by CQC and Kats response was*

unhelpful. I still do not know who is responsible for auditing this information and do not want to fail my tasks if I do not complete this."

[Emphasis Added]

232. It seems quite remarkable to this Tribunal that such important detail, which included an express reference to whistleblowing was completely omitted from the original forms by Mr Steers.

233. Given the express reference to whistleblowing it could reasonably be expected that Mr Steers as the Line Manager, would escalate these concerns or at least discuss with Ms Fitzsimmons the application of the whistleblowing policy. Ms Fitzsimmons confirmed in response to a question from the Tribunal that she was aware of the whistleblowing policy but could not recall whether Mr Steers asked her about the policy even asked her whether she wanted her concerns investigated under the policy.

234. In the unsigned version of the forms, there is under the column "*Not working"* a reference to '*recruitment and training'*, this was recorded as the extent of Ms Fitzsimmons' answer, with no further detail. In the amended signed forms the following additional comments now appear under that heading;

*"I have **whistleblew** to Kat about what hasn't been completed in files. I **whistleblew** to Kat when she started and emailed her my excel document with everything that is missing I think it was the 14th September, it was a Friday. Kat came to the limes for the first time and asked me how I'm finding things. I said to her that I get frustrated with Recruitment and **whistleblew** that I did not like their process. I said we have staff starting without a DBS, no references. I said I have been auditing files and there are so many mistakes. I told Kat that they don't have a proper process and it puts the service at risk because if we have staff working without DBS or references we are at risk ourselves as we are responsible for putting them on the rota. I did not get any good feedback from Kat and didn't feel that she wanted to offer me advice. Kat shrugged her shoulders and said that she was checking some email"*

[Emphasis Added]

235. In another section which in the first version of the forms, had only stated; *"lack of support from new senior management"*; **[p.1548]**, the amended version now includes'

*"I feel that because I have **whistleblew** about recruitment the first day I met Kat, she may dislike me."*

[Emphasis Added]

236. There is no email from Ms Fitzsimmons sending back the amended document to Mr Steers, in response to his email of the 25 September. Under cross examination Ms Fitzsimmons alleged that she had responded to Mr Steers in person and that she had spoken to him on Monday after the supervision meeting had taken place the previous Friday. Ms Fitzsimmons alleges that Mr Steers typed in the amendments as she stood with him giving him her comments and he

sent it to Head Office. Mr Steers allegedly was able to produce if for the purpose of these proceedings, however it was not disputed that the respondent has no record of this amended version existing on their system.

237. The signed amended document is littered with detail and references to whistleblowing and yet the unsigned, original document which was saved to the respondent's HR system inexplicably includes none of that detail. The only innocent explanation is that Ms Fitzsimmons never mentioned this in the supervision meeting or she did, and Mr Steers failed completely to record any of it.

238. Further, although there are numerous references to whistleblowing in this document, the claimant gave evidence under cross examination that she had not alleged that she had 'whistleblown' during the subsequent redundancy consultation process, because she '*may not have been aware'* that what she had done was whistleblowing. Quite frankly her explanation makes little sense. She is vociferous in this amended version of the supervision meeting about whistleblowing and yet only a few weeks later allegedly she fails to appreciate that she may have whistle-blown.

239. Ms Fitzsimmons was unconvincing in her explanation and the Tribunal do not accept her explanation as credible.

240. Despite the serious allegations and numerous explicit references to whistleblowing; there was no escalation of those concerns at the time by Mr Speers. Ms Fitzsimmons failed to explain what the purpose was behind allegedly raising and documenting those concerns given the apparent failure by her to want them dealt with and the apparent total failure by Mr Steers to address them.

241. Mr Steers in his evidence in chief failed to comment at all on this supervision meeting or the report. Under cross examination when asked what steps if any he had taken to comply with the whistleblowing policy in terms of the alleged disclosures in that meeting, he then alleged that they were waiting for the Ms Keating to report back on the auditing issue, who had completed it and so forth and that they were going to wait until that time however, this he accepted was not recorded in the supervision record and Ms Fitzsimmons did not give this evidence.

242. Quite frankly the firm impression the Tribunal has from the evidence and how it was delivered, was that Mr Steers and Ms Fitzsimmons were making up their evidence in respect of the creation of the second set of supervision documents, on the 'hoof'.

243. Nowhere within Ms Fitzsimmons witness statement does she deal with the creation of this second version of the supervision report indeed, she attempts in her evidence in chief to allege that it was actually Ms Keating who conducted the meeting with her and that she made these disclosures direct to her. That this was a simple error, also lacks credibility given the existence of the amended forms which she and Mr Steers produced and which were signed by Mr Steers.

244. Despite the allegation that Ms Fitzsimmons raised numerous allegations of whistleblowing and alleged that Ms Keating may not like her because of it in her supervision meeting with Mr Steers, he fails to make any reference whatsoever

to this being reported to him in his evidence in chief. There is absolutely no reference to any such complaint being raised to him by his only direct report. Mr Steers has been legally represented throughout these proceedings making this omission even more difficult to understand in the context of his owns claims and allegations.

245. The Tribunal find on a balance of probabilities, that the amended copy of the supervision record (which includes numerous references to whistleblowing) was created for the purposes of these Tribunal proceedings. The document was created the Tribunal find on a balance of probabilities, in a cynical attempt to add weight to the allegations against Ms Keating.

Third Putative Protected disclosure: 26 September 2018

246. On 26 September 2018 Ms Fitzsimmons sent an email to Ms Keating which she alleges was raising her concerns about the recruitment of agency staff being recruited **[p.203].** She alleges that this posed health and safety risks to the respondent's service users;

"*4 x new recruits were due to start on 1 October. Their inductions were booked for 19th October, cancelled and rearranged for 21st and then cancelled again.* ***The reason these were cancelled was because I was told they hadn't completed their online training****. I was later informed they hadn't been sent their online training which takes 30 hours to complete until the day before planned induction. I am not sure when these 4 people will start, I believe 2x full time and 2 x part time (one waking night). Once these are on the rota I will be able to reduce some agency.* ***For us to facilitate the floaters for on call we need the two staff Saturday and Sundays. Troy is going to send recruitment a breakdown of what we require so they are up to date.*** *Currently I believe there is only 1 x staff member recruited for Ethel which is David (awaiting induction)"*

[Emphasis Added]

247. Ms Keating does not ignore the email, she forwards the email on to Erin O'Donnell, Recruitment Manager on 1 October for her thoughts **[p.203].** The undisputed evidence of Ms Keating is that she was on annual leave between 24 September and 1 October 2020.The email from Ms Fitzsimmons is not marked urgent, the subject header is; "*agency use/staffing levels".*

248. Ms Fitzsimmons does not allege that not having an immediate response she felt the need to escalate it to Mr Blunden. She does not allege that she took any action.

249. Ms Fitzsimmons does not refer to any health and safety risk to the service users or breach of the Regulations within this email and Ms Keating's evidence is that she understood the email to me an update and that recruitment, induction and training are the responsibility of the unit management. The email sets out what agency staff they forecasted they would need for October. Ms Keating did not consider that it was a serious situation and that people can work overtime to cover the hours.

250. Ms Fitzsimmons alleges in her evidence in chief that inductions were "*not being carried out which resulted in the staff not being trained adequately which posed health and safety risks to the Respondent's service users*" (w/s para 9). However, this implies that the staff had started work without appropriate training, but this is not what her email states. What appears to have happened according to what the Tribunal find to be a reasonable interpretation of the information contained in this email, is the staff did not start because they had not completed the training, not that they had started without the necessary training having taken place. The email also does not on any reasonably objective reading of it, complain about insufficient staff in October, it seeks to explain in September how Ms Fitzsimmons has worked out what agency staff will be required for October.

251. The Tribunal also note that Ms Fitzsimmons also does not mention in the email, the alleged comments she had made previously to Ms Keating about staff starting without appropriate DBS checks and references. Despite only allegedly two days before signing the supervision document in which she alleges she had whistle-blown about this orally to Ms Keating.

Redundancy – at risk

252. The evidence of Mr Lane is that following the appointment of Ms Keating, a review of all services was carried out.

253. The undisputed evidence of Mr Lane is that within the residential services the cost of each client's care package includes the cost of the management of the home itself and the cost of running the property, if there is a high occupancy the business recovers all of its costs. In SLCS, the fee the respondent is paid is based on the number of care hours plus a small allowance for administration and unless occupancy is very high the amount over care hours, does not cover management costs and other expenditure.

254. By September 2018 it is not in dispute that only 3 of the flats at The Limes were still occupied. X was due to move out to a single person bungalow (Ethel Road). There were no active referrals for The Limes and it looked therefore likely that occupancy would remain below 50%. The Tribunal accept this undisputed evidence of Mr Lane.

255. During the first 8 months of 2018, agency staff who are more expensive and had provided between 25% - 45% of the total care hours at the Limes. That figure was not disputed. Mr Lane's evidence is that this was due to a failure to recruit and retain permanent staff at The Limes.

256. The consistent evidence of Mr Lane and Ms Keating is that the financial performance of The Limes was reviewed and the decision made to make savings and that a Manager, Deputy Manager and Team leaders was not a sustainable model where the facility only had 3 clients. The Team Leaders provide the care to the clients and a Manager was still required and therefore the Deputy Manager was identified as a role which could be removed. The issue was not discussed at Board level because according to Mr lane there was a 'pressing need' to make this change.

257. Ms Fitzsimmons accepted under cross examination that preparing the bungalow for X to move into was a long process as it requirement adaption and that there was no prospect of increasing the occupancy at The Limes at this time. Ms Fitzsimmons did not dispute the accuracy of the email from Mr Lane on 1 November 2018 **[p. 300];**

"*In respect of other potential new admissions, whilst discussions have taken place with several funders we have nothing concrete in place. "As you are aware from the pint of assessment and financial agreement with funders to actual admissions can take 2- 3 months. As of today's date we have no completed assessments or fees agreed for any additional clients, therefore the business is not forecasting any increase in occupancy at The Limes until sometime in the first quarter of 2019."*

258. The claimant it is not in dispute attended a meeting with Ms Keating on 5 October 2018 **[p.210 – 216].**

259. Ms Fitzsimmons denies having received a letter by email inviting her to this meeting **[p. 204.1].** At this meeting it is not in dispute that it was explained to Ms Fitzsimmons that the respondent is considering an internal restructuring of its Supported Living Management, to streamline the management structure and match it to the size of the current service. In her statement Ms Fitzsimmons states that it; *"…turned out to be my first redundancy consultation meeting"* which implies that she had no idea of what the purpose of the meeting was.

260. The letter explains that the respondent is considering whether there is still a requirement for Ms Fitzsimmons role and of the possibility of the termination of her employment because of redundancy.

5 October 2018 meeting

261. Ms Fitzsimmons does not dispute the respondent's notes of the meeting of the 5 October.

262. At the start of the meeting Ms Fitzsimmons is informed that the meeting is because the respondent is looking at a redundancy situation and when asked whether she wanted to bring someone to the meeting, she replies that she had not brought anyone with her because;

"It was short notice, I was considering re- arranging the meeting, but I am happy to go ahead, I have met with an employment law consultant which is why I have notes so I do not forget anything and I have sought advice from Acas so I am happy, I am fine".

263. Ms Fitzsimmons reply is not consistent with someone who has been invited to a meeting in circumstances where she has no idea what the purposes of the meeting is.

264. Ms Fitsimmons accepted under cross examination that she had received an email from Ms Keating about the redundancy situation and that she was not surprised by the nature of the meeting.

265. Ms Keating explains in this meeting that the The Limes has not developed as quickly as the respondent had hoped and the respondent does not consider it cost effective to have a Deputy Manager.

266. Ms Fitzsimmons mentions in this meeting that when she joined as Deputy, Mr Steers was promoted to Manager and at that time she was recruited to work only at The Limes but now covers all the SLCS so questions why her role is no longer required. She also raises that she is a Deputy Manager and has the same training as other Deputy Managers who work not in SLCS but in the respondent's residential homes and questions why those Deputy Managers have not also been placed at risk. Ms Keating does not address the issue of pools but rather answers by explaining that the funding situation is different in residential homes and hence they those roles are not at risk.

267. It is not in dispute that there was only one Deputy Manager in SLCS, namely Ms Fitzsimmons and three in Residential Services. Ms Keating's evidence is that the respondent considered whether to pool the Deputy Managers however the other Deputy Managers were established and been in their roles quite a while and it made no sense to do so; that decision however is not documented.

268. Ms Fitzsimmons alleges however that she had raised concern about the new on call system which would require her to be on call for the residential homes because she was concerned that she was unfamiliar with the residents including their medication needs.

269. Nowhere within these notes of the meeting is there any reference to whistleblowing, to previous complaints raised or concern that this proposed redundancy is either a sham or that the real reason behind it are the putative disclosures.

Second consultation meeting: 15 October 2018

270. The claimant is then invited to a further consultation meeting with Ms Keating on 15 October 2018 **[p.227 – 228].**

271. Ms Fitzsimmons under cross examination alleged that she had challenged the notes of one meeting but did not produce the email with her comments. There is an email from her to Ms Keating on 15 October 2018 asking for the notes **[p.230],** an email later that day from Ms Keating referring to attaching the minutes and a follow up email from Ms Fitzsimmons **[p.229]** thanking Ms Keating for clarifying a query over trials periods and the notice requirements, she makes no reference to not being happy with the 2 page set of notes she had been sent almost a couple of hour before. On balance of probabilities, the Tribunal find that the notes are an accurate summary of what was discussed during that meeting.

272. Ms Fitzsimmons complains in her evidence in chief that there was a Deputy Manager recruited into residential living from SLCA during her consultation period and that she asked whether she could take over that role. Ms Fitzsimmons confirms that she had not worked in residential homes for a long time; "but *I feel I could easily learn and do that".* However, under cross examination Ms Fitzsimmons did not identify who this alleged Deputy Manager was and the

Tribunal accept Ms Keating's evidence that there was no Deputy Manager of SLCA moved into any of the residential care homes during this period.

273. Ms Fitzsimmons also alleges that the decision to make her role redundant and terminate her employment is because she has raised 'whistleblowing' concerns. However, not only does she not raise this concern during this meeting, she neglects to mention entirely within her evidence in chief that she was offered an alternative position as Head Team Leader of Ethel Road (a supported living bungalow), full time.

274. Ms Fitzsimmons clearly, the Tribunal find on a balance of probabilities, considered that the alternative role offered to her was possibly suitable because the meeting is left on the basis that the details of this alternative post will be emailed to her. That she was offered an alternative role which she may have considered accepting, is not consistent with Ms Keating wanting to use the redundancy situation as an excuse remove her from the business.

15 October 2018 – suspension Mr Steers

275. On the 15 October 2018 Mr Steers was suspended.

19 October 2018 – rejection of Head Team leader role

276. On the 19 October 2018 **[p.240]** for reasons which she does not explain at the time, Ms Fitzsimmons rejects the offer of alternative employment and enquires about gardening leave for the duration of her 3 months' notice rather than come into work. Ms Fitzsimmons does not allege that this was not a genuine offer of alternative employment and she confirmed under cross examination that she was receiving employment advice throughout this time. The documented communications the Tribunal find remained cordial between her and Ms Keating during this process. Ms Fitzsimmons does not raise a grievance at this stage about the redundancy situation or any alleged conduct by Ms Fitzsimmons.

277. When asked by the Tribunal about the role, Ms Fitzsimmons' evidence was that the salary was £3- 4,000 per annum less and that she rejected it because she did not want to accept the change in salary, she also referred to not being 'comfortable' working with the company but that : " *I was happy to decline the position."* She did not allege that she did not consider it to be a genuine offer.

278. The claimant is then asked to work at Head Office during her notice period, her request for gardening leave is declined. It is this requirement to work at Head Office which the Tribunal find triggers the appeal and not the decision to make her role redundant.

279. Ms Keating's' evidence is that she decided to move Ms Fitzsimmons to Head Office so that the new manager arrangements in Supported Living Services could be established and Ms Fitzsimmons could perform tasks better performed at Head office (including recruitment of new staff to reduce the reliance on agency staff). The Tribunal consider that explanation to be objectively a rationale and reasonable explanation.

280. The claimant complains in her evidence in chief that she felt she was being "demoted" from her position as Deputy Manager by being sent to Head Office purposely and that the respondent was making her situation difficult as they did not want to work her notice period and hoped she would resign. None of this however was alleged in the appeal which she would present by letter of the 20 October.

25 October 2018 – appeal

281. The claimant sent an email to Ms Keating appealing the decision. [**p.257.1 – 257.1**]. There is no reference within this appeal to believing the redundancy situation had anything to do with the alleged whistleblowing or any concerns that the offer of other work was not genuine. Ms Fitzsimmons gave evidence that she did not raise her concerns about being dismissed because of the alleged protected disclosure because Ms Keating was hostile, however the Tribunal find that this is not a credible explanation in circumstances where she is assertive with regards to her contractual rights under her contract of employment and requests compensation for travel to Head Office.

282. Attached with the email is a detailed one-page letter **[p. 257.1- 257.2].**

283. The sole issue raised in the appeal is about being required to work at Head Office during the notice period.

284. Ms Fitzsimmons refers to having taken legal advice and yet no mention is made about the legitimacy of the redundancy process or any issue raised about concerns that the decision is because she has made putative protected disclosures.

285. On the 29 October, Ms Fitzsimmons sends in an email to Ms Leskovska copying in Mr Blunden and Mr Taylor asking for her appeal to be heard by Mr Taylor rather than Mr Blunden because; *"I will be putting in a grievance regarding Katrina Keating.*". The claimant refers to believing Mr Taylor will understand the operational running of the service better.

Response to appeal

286. The claimant received a response to her appeal on 29 October 2018 from Mr Lane **[(p.260].**

287. The claimant was advised that the possible grounds for appealing the decision to make her role redundant are either because she considers that she has been unfairly selected or a fair process has not been followed. She had not raised either as a ground of appeal. Further, Mr Lane informs her that had she has not been employed for the requisite period (she has less than 2 years' service), she does not have the right to appeal. The evidence of Mr Lane is that he did not consider it unreasonable to ask Ms Fitzsimmons to travel only 8 miles to the Head Office during her notice period.

288. The claimant is informed that she is required to work at Head Office from 5 November 2018. Mr Lane denied in cross examination that he was aware of the putative disclosures to Ms Keating on or around 14 September, it was not put to

him that he was aware of any of the other putative disclosures and that he rejected the appeal because of those and further it was not put to him that he was influenced to reject the appeal by Ms Keating.

Grievances

289. The claimant then wrote by letter of the 8 November 2018 making a grievance against Mr Blunden and Ms Keating. The Tribunal find on a balance of probabilities, that given the timing, Ms Fitzsimmons raised this grievance because she was frustrated and annoyed that she was still required to work from Head Office during her notice period.

290. The grievance against Mr Blunden [**p.319**] is a detailed 2-page letter and relates entirely to a conversation she had with Mr Blunden on 8 November 2018 in which she alleges he accused her of discriminating against a member of staff in the allocation of hours where agency staff were being used. She alleges in this letter that if the employee is making this allegation of discrimination he is deliberately and falsely accusing her and that Mr Blunden is giving the employee "more leeway" **because** the employee and Unison are "*discussing discrimination* claims and that Simon [Blunden] *is under tremendous* pressure from this." Ms Fitzsimmons does not allege that this allegation was put to her because of any putative whistleblowing disclosures.

291. Mr Lane responded to the allegations against Mr Blunden by the letter of 14 November 2018 **[p.328]** refuting the allegation that Mr Blunden had accused Ms Fitzsimmons of discrimination and that if he had, it was a matter that should be dealt with under the disciplinary policy. However, he informed Ms Fitzsimmons that if Mr Blunden appeared distracted, his mother had recently died and suggested the better way to resolve the situation would be for Ms Fitzsimmons to meet with Mr Blunden so that he could clarify what his comments.

292. Ms Fitzsimmons does not address in her evidence whether she did take the step of discussing this further with Mr Blunden and in the absence of any evidence that she did attempt to resolve this with him, the Tribunal find that she did not. The Tribunal infer from this that Ms Fitzsimmons was not seriously concerned about the conversation with Mr Blunden otherwise she would have taken steps to speak with him about it as directed. The grievance policy **[p.1497]** does refer to employees in the first instance trying to resolve the concern informally and the Tribunal find that Mr Lane's response was in line with the terms of the grievance policy in this respect.

293. The separate grievance against Ms Keating is a detailed letter running to almost 3 pages **[p.321- 323**]. The Tribunal accept the undisputed evidence of Ms Keating that Mr Lane asked her for copies of emails between herself and Ms Fitzsimmons as part of the investigation process, and she disclosed those to him. Ms Fitzsimmons complains that she is being bullied by Ms Keating.

294. Nowhere within this lengthy letter of complaint however does Ms Fitzsimmons state that she believes that the termination of her employment on the grounds of redundancy or the treatment of which she complains, is because of alleged whistleblowing disclosures or that the offer of alternative employment was not a genuine offer.

Text messages

295. Within the bundle are Whatsapp messages Ms Fitzsimmons has sent and received from a Team Leader at The Limes, Ms Hardy who reported directly into Ms Fitzsimmons [p.**267-297]**. The messages include comments about Ms Keating and some of them are not only unprofessional they are profoundly disrespectful and derogatory about Ms Keating. The following is an exchange on 15 November 2018;

*Ms Hardy: "**What a twat!!!"***

"I really hope this new venture of Troys takes off. I need out of there x"

*Ms Hardy: "She has **no fucking clue** does she x. "*

"It's so worrying"

Ms Fitzsimmons: "She had no idea x"

And;

KH: "I wonder how Kat has gotten through her professional life being so disorganised and to be honest…dumb"

[Emphasis Added]

296. The messages are sent early to mid-November 2018. Ms Fitzsimmons does not deny they are messages she sent or received. The following is an exchange which the respondents allege evidences that Ms Fitzsimmons was by November 2018, during her notice period, taking steps to undermine the respondent's business;

Ms Fitzsimmons: "***Leave her to it.***
Kat has no clue"

Ms Hardy: [smiling emoji]

*Ms Fitzsimmons: "now you can just complete your usual tasks **don't go beyond that**"*

Ms Hardy: *I don't intend to ! She can sort the pcs etc…*

Ms Fitzsimmons: "***Exactly"***

[Emphasis Added]

297. It certainly appears to this Tribunal that Ms Fitzsimmons was actively undermining Ms Keating to Ms Hardy and encouraging Ms Hardy not to offer support or assistance beyond her normal duties. It evidences to this Tribunal a hostile attitude toward the respondent and in particular toward Ms Keating. Such conduct during her notice period, would the Tribunal find amount to a serious and fundamental breach of the implied term of mutual trust and confidence if not an

express term of her contract and potentially justify summary dismissal.

298. There is a reference in the exchange on 15 November 2018 to "*new venture*", the respondent's asserts is a plan by Mr Steers to set up a competing business;

Ms Hardy: "*I really hope this new venture of Troy's takes off. I need out of there x*"

299. Under cross examination Ms Fitzsimmons was unconvincing in her alleged inability to recollect what this 'new venture' was. She accepted that this was a reference to a new job in the '*pipeline*' but could not recall what it was but did not categorically deny it was a competing business stating merely that she did "*not think so."* The Tribunal was not impressed with Ms Fitzsimmons as a witness and did not find her evidence on this issue credible. On a balance of probabilities the Tribunal find that this was an exchange about what Ms Fitzsimmons understood to be a new venture that Mr Steers was involved with in which he planned to be competing in some way with the respondent.

300. It is important to make clear that Ms Hardy was not called as a witness to these proceedings and has therefore not had the opportunity to comment on the messages she sent and her reasons for sending them. The Tribunal's finding that the messages were sent from and to her, is based on the evidence presented on a balance of probabilities.

301. Ms Fitzsimmons under cross examination really had no explanation for the messages she exchanged with Ms Hardy and merely asserted that it had not been her intention to agitate Ms Hardy or encourage her to ' work to rule' however, it is clear to this Tribunal that any reasonable interpretation of those messages is that she was doing precisely that. As Ms Fitzsimmons confirmed, she had not been told that she was no longer the Deputy Manager of The Limes and thus she remained in a position of authority over Ms Hardy and with responsibility for ensuring the care and wellbeing of the service users at The Limes. Such behaviour within an industry which cares for vulnerable individuals is cynical and irresponsible and Ms Fitzsimmons expressed before this Tribunal when faced with those messages, not only no satisfactory explanation but no contrition and no insight into her own behaviours.

302. There is also a text message from Ms Fitzsimmons to Ms Hardy on 12 November 2018, stating: "*No news on Troy although Kat and [sic] told the others they'll be an announcement this week but Troy has had no correspondence for two weeks!"*

303. Mr Steers in his evidence under cross examination denied having contact with Ms Fitzsimmons during his suspension, other than to inform her he could not be in contact, he denied knowing what the reference to the 'new venture' was or her comment about the respondent having had no contact with him for 2 weeks.

19 November 2018: Whistle-blower

304. On the 19 November 2018, Ms Keating reported to Mr Lane that a senior maintenance engineer employed by the respondent, Mr Freer had raised allegations against his Line Manager Ms Weaver, Ms Fitzsimmons and Mr Steers about a conspiracy to discredit Ms Keating and respondent. Mr Lane instructed

Ms Keating to meet with Mr Freer.

305. Ms Keating's evidence is that she had had a quick conversation with Mr Freer on 19 November 2018, informing her that his direct line manager, Ms Weaver was involved with a small group of disgruntled managers to discredit the respondent and get Ms Keating dismissed. Mr Freer was she said, unwilling to get involved at this stage. This conversation was not recorded by Ms Keating. She then notified Mr Lane. She denies that this was 'concocted' or manipulated to look as worse as possible to remove Ms Fitzsimmons because of fear of further disclosures.

20 November 2018

306. On the 20 November 2018 Ms Keating held a further meeting with Mr Freer. The undisputed evidence of Ms Keating is that the HR Manager took the notes of that meeting **[p.340]**. The copy of the notes in the bundle are unsigned, Ms Keating's evidence is that there exists a copy of the notes signed by Mr Freer however a copy was not contained in the bundle. Mr Freer is recorded as giving evidence that he had been told by Ms Jill Weaver to take photographs of water buckets at Barkby and he was told that she wanted them because she, Mr Steers and Ms Fitzsimmons; "*were gathering information to send to somebody called Mark Brooks in order to discredit the Company*."

307. The text messages between Ms Hardy and Ms Fitzsimmons (referred to above) also include a reference to Mark Brooks who Ms Fitzsimmons informs Ms Hardy is happy to be called about concerns; "*as he also refers to the limes etc and he told Simon things need to improve already. Jill rang him too*" **[p.275].** Mr Brooks is a social worker. The mention of Mr Brooks and to Jill also contacting him, is consistent with the evidence from Mr Freer.

308. Further, at no point was it put to the respondent's witness that Mr Freer had a possible ulterior motive for making these allegations. That Mr Freer may have motivated by any malice and improper motive was not alleged by Ms Fitzsimmons or Mr Steers.

309. Mr Freer also record his evidence that during the call was from Ms Jill Weaver on 13 November he heard Ms Steers in the background telling her to get the photos. He also alleged that Ms Weaver had been asking him for several weeks not to attend Barkby and complete jobs there and that this made him uncomfortable as he knew how important the repairs were to the welfare of the residents who live at Barkby.

310. Mr Freer also alleged that Ms Weaver told him on several occasions to leave jobs unfinished a Barkby to "*make the Home look worse*" and that Ms Weaver had booked him to take some holiday he had not asked for and he believes this was done to delay him completing repairs but he ignored her and worked anyway.

311. Mr Freer also made the following allegation to Ms Keating in this meeting;

"[*Ms Weaver] told me that Toni, Troy and her have been working together for weeks to undermine and discredit you, She told me Toni is the mole who has been feeding information to Troy and her. She told me that Toni had sent her a*

copy of the email that was sent around about her on Friday."

312. Within the text messages between Ms Hardy and Ms Fitzsimmons are copies of internal work emails to and from Ms Keating Ms Fitzsimmons has disclosed to Ms Hardy which Ms Hardy had not been copied into.

313. Although the respondent was unaware of the text messages between Ms Fitzsimmons and Ms Hardy in November, the Tribunal consider that the allegations raised by Mr Freer are consistent with the hostility shown by Ms Fitzsimmons. The way in which she is encourages Ms Hardy in those text message not to go beyond her normal duties to support the respondent in the support of the home and its residents, is relevant to the credibility of Ms Fitzsimmons as a witness (and also potentially to whether it would be just and equitable to award compensation in circumstances where her claim is found to be well founded).

314. It is important to stress that Ms Weaver did not give evidence and appear before this Tribunal to give her account of events. The findings of this Tribunal are based on the evidence presented to it and on a balance of probabilities.

20 November 2018

315. By letter of the 13 November 2018 **[p.327]** Ms Fitzsimmons was called to a grievance hearing on 20 November 2018. Ms Fitzsimmons complains that Mr Lane ignored her complaints about Ms Keating and accused her of making up lies and of being malicious. She also alleges that he gave her 24 hours to give him information about Mr Steers and Ms Weaver or she would be dismissed however, Mr Lane denies this although he accepts that he did ask whether she had had any contact with Mr Speers and Ms Weaver. The Tribunal prefer Mr Lanes account of this meeting. There is not only no evidence to support the accusation by Ms Fitzsimmons of the threat issued by Mr Lane, that is not consistent with the time he invested in this meeting in discussing her grievance.

316. The notes of the grievance hearing are lengthy **[p.331 – 339].** Nowhere within that meeting does Ms Fitzsimmons refer to any of the alleged putative whistleblowing disclosure or allege that she believes the decision in respect of the removal of her, has anything to do with any putative disclosure.

317. Mr Lane's undisputed evidence is that the grievance meeting lasted 2 hours and he went through the emails and text messages provided by Ms Fitzsimmons in support of her complaint against Ms Keating. It was Mr Lane's view that those did not support a complaint of bullying and harassment. His evidence under cross examination is that what he got during this hearing was 'vagueness' and 'obfuscation'. His evidence is that he sat for 2 hours with her going through all the correspondence and text messages between her and Ms Keating to identify any alleged hostility, but she could not identify anything and he felt at the end she was 'playing games'. He was, he conceded, aware by the time of this meeting that Mr Freer had made some allegations but denied knowing the details. Even if he had been influenced by the allegations of Mr Freer in how he approached this meeting, that would not be because of the putative disclosures.

Board Meeting

318. After the grievance hearing with Ms Fitzsimmons, Mr Lane attended a meeting of the Board on 20 November 2018. The minutes [**p.343- 345**] include the following entry;

"KK *reported that she had met with [Mr Freer] a whistle-blower who had provided evidence that [Ms Weaver] Try Steers and Toni Fitzsimmons were involved in a conspiracy to discredit the Company with Commissioners to undermine KK and get her dismissed.*

The notes of the meeting with CF were circulated to the Board and the members expressed their shock at this behaviour. It was agreed that all three individuals should have their contracts terminated by the quickest method. SM said that he was disgusted that three managers would put the welfare of dozens of service users at risk to further their own aim.

GL said that he would terminate JW as she was still on probation. He added that he would ask Chris Silver and Chris Johnstone (employment legal adviser) to meet with TS and TF as soon as possible to terminate their contracts."

319. Mr Lane agreed to handle this and instructed Mr Silver, who had responsibility for HR to handle the termination of Ms Fitzsimmons' contract of employment.

Termination

320. A meeting was held with Ms Fitzsimmons on 21 November by Mr Silver, Group Financial controller, with Mr Johnstone an Employment Law Specialist and Ms Leskovska of HR present, Ms Fitzsimmons was informed about the information the respondent had received about her collusion with several colleagues in an attempted "*commercial sabotage*" and dismissed. The decision to terminate was then confirmed in writing on 30 November 2019 **[p.348].**

321. Mr Lane's evidence was that he accepted Mr Freer's allegation, that he was not someone who would 'run' to make whistleblowing allegations against managers and that the Board decided it had to act decisively and take these employees out of the company. He pointed out that Ms Weaver who had not made any alleged whistleblowing disclosures, was treated the same way and dismissed.

322. It was put to Ms Keating that the only evidence of what Mr Freer had said or that a meeting took place at all with him, was her evidence, in the absence of signed notes of the meeting. The Tribunal accept on a balance of probabilities however that the meeting with Mr Freer took place and that he gave the evidence as alleged. Other than an absence of signed notes there was no evidence to support the assertion that Ms Keating had invented this evidence. If she had, she would have risked a member of the Board checking with Ms Leskovska or indeed Mr Freer that what she was alleging she had been told was correct. Further, in terms of the credibility of Ms Keating's evidence, the Whatsapp messages are supportive of what Ms Keating alleges she was told by Mr Freer. Ms Keating presented as a forthright and credible witness and the Tribunal accepts her evidence regarding what she was told by Mr Freer.

Appeal

323. Ms Fitzsimmons appealed the termination of her employment. **[p. 355]** and for the first time now mentioned that she believed that the dismissal was because of her whistleblowing;

*"unfair dismissal resulting in suffering detriment after asserting my statutory right of Whistleblowing. I feel I have been treated unfairly and my dismissal is following whistleblowing under CQC regulation 17: Good governance since **21/09/18**".*

[Emphasis added].

324. Ms Fitzsimmons, did not within this appeal, allege that she had made any protected disclosures before 21 September 2018. She does not identify what the putative disclosures are. She also goes on to allege that the dismissal was also 'following assertion of a statutory right to submit a grievance'.

325. Ms Fitzsimmons complains that she did not collude to cause harm to the respondent and complains about not having had the chance to understand the allegations and respond to them.

326. Mr Silver responded on 4 January **[p.359]** refuting the allegation and reaffirming the reason for dismissal was for gross misconduct. There is no appeal hearing.

327. Under cross examination, Ms Fitzsimmons evidence was inconsistent; she accepted that she was friends with Mr Steers outside of work but asserted that she could "*not recall*" whether or not she communicated with him during his suspension, she later under cross examination alleges that she had not contacted him but then conceded that there must have been some contact because she had informed Ms Hardy that Mr Steers had not had any contact from the respondent for two weeks during his suspension **[p.270].** She also alleged that she had not disclosed her WhatsApp communications with him during this period because she had a new mobile phone. Given the impending Tribunal proceedings, she did not explain why she had not copied those messages before disposing of her phone in light of the serious allegations of collusion during this period.

328. The process which was followed was not fair, in that it did not comply with the Acas code of practice or the respondent's disciplinary policy. Ms Fitzsimmons was not given the opportunity to respond to all the evidence in respect of the alleged misconduct and there was no appeal hearing. However, the Tribunal find that the allegations were made by Mr Freer as alleged and that the Board was profoundly and genuinely concerned.

329. The Tribunal accepts the evidence of Mr Lane and Ms Keating that the Board gave instructions to terminate their employment. Further, Ms Fitzsimmons does not rely on any putative disclosures after 26 September and after this date although the respondent sought to terminate her employment on the grounds of redundancy, she was offered another role which is not consistent with the respondent wanting to remove her from the business. What changed in between

the decision to make her role redundant and the decision to terminate her employment for gross misconduct were the allegations made by Mr Freer which resulted not only in the termination of Ms Fitzsimmons' employment and Mr Steers but the summary termination of Ms Weaver's employment who had not made any alleged protected disclosures.

Post termination

330. The undisputed evidence of Ms Keating is that on 21 November 2018 she received a call from a social worker responsible for a female client at The Limes complaining that Ms Fitzsimmons had shared confidential information about her client with a family member. As clients in SLCS are independant, information cannot be disclosed without their consent. The evidence of Ms Keating is that this would have resulted in a disciplinary process and absent a good explanation would "likely" have resulted in dismissal however under cross examination her evidence was that she would not have been dismissed for that incident alone.

331. Ms Fitzsimmons accepts that she shared with a resident's brother as the next of kin, an update from the social worker following concerns the brother had raised and that she "*could have*" shared with him the results of blood tests. Within her evidence in chief she states; "*If I shared anything with [resident's] brother that I shouldn't have I can only apologise."*

332. Given the claimant's admission and Ms Keating's evidence, the Tribunal find that Ms Fitzsimmons did share information about a resident to a family member without consent including it would appear, medical information which is sensitive personal data. The Tribunal accept the evidence of Ms Keating, however that this was unlikely to have resulted in a dismissal.

<u>Troy Steers</u>

333. We now turn to the last of the three claimants. Mr Steers was employed by the respondent initially as the Deputy Manager of Tentercroft from 16 February 2018, he was promoted to the Manager of The Limes in March 2018.

334. The management of Tentercroft was transferred over from Barkby to his management by August 2019. At the end of August 2019 staff were informed that Mr Steers had accepted a position working towards being Registered Manager for Barclay Services, which would involve in due course, the handover of Oliver Street and Duncan Road to him. The intention was that those facilities along with The Limes would be managed under one Supported Living umbrella. On the arrival of Ms Keating in September 2018, Mr Steers was still in practice only managing The Limes and Tentercroft, leaving the registered Managers at Barclay and Milligan to continue to manage Duncan Road and Oliver Street.

335. As set out above in this judgement, Ms Keating identified a number of issues at The Limes when she joined the respondent and set out to proactively address those.

336. One of the initiatives Ms Keating introduced was the new on call system. Ms Keating had when informing the staff, which included Ms Steers, about the new on call rota explained that all staff on the rota would be paid £50 per week for each week on the rota. Mr Steers contacted Ms Keating on the 13 September to

discuss the arrangements which were to be introduced from 1 November and then followed up the call with an email **[p.675].** Mr Steers raised a number of issues; that he considered he and Ms Fitzsimmons should have the same annual leave entitlement as Head office staff, that Ms Fitzsimmons did not get a pay rise when she took on the Deputy role, he and Ms Fitzsimmons have covered on call duties for 7 months with no pay or assistance. Mr Steers stated that he would keep The Limes and Tentercroft but was not willing to manage the other Supported Living Services. He asked for clarify on a number of issues.

337. On the 14 September 2018 Ms Keating sent by email to the Managers and Deputies, a new medication assessment form to be completed every 6 months for staff giving medication. Ms Keating was concerned that staff giving out medication were not being assessed for competence by their Manager or Deputy Manager **[p.676].**

338. On the 17 September 2018 Ms Keating asked all Managers and Deputies to ensure their weekly calendars were up to date **[p.677].**

339. Ms Keating therefore made some immediate and important changes to the management of the homes and the reporting systems of the management team.

First Putative Disclosure: 18 September 2018

340. Mr Steers alleges that he and Ms Fitzsimmons attended Head Office on the 14 September 2018 for Facial Recognition training (which in the event did not take place) and had a discussion in person with Ms Keating. As set out above, the Tribunal find that this training and discussion actually took place not on the 14 but the 18 September 2018.

341. It is alleged by Mr Steers that during this discussion with Ms Keating he raised concerns that he and Ms Fitzsimmons had about Oliver Street and Duncan Road. His evidence is that he informed Ms Keating that following a service visit on 14 September 2018 it was discovered that the solo services (Duncan Road and Oliver Street) had never been audited. He alleges that he told Ms Keating that he had 9 months of "auditing dumped outside" of his office. Under cross examination abut what he alleges he later said to Mr Blunden and Mr Mattha about this discussion, he stated that with the services he managed he had to produce monthly auditing, including for example medical charts however none of the other services "seemed" to be providing this paperwork, when the auditing was delivered to his office he wanted to know who was responsible for doing it. On his evidence the Tribunal find that here were two parts to what he alleges he raised; that other services seemed i.e. appeared, not to be doing the auditing and secondly he wanted to know who was responsible (because it had not been done).

342. Mr Steers also alleges that he and Ms Fitzsimmons had concerns about the Team Leaders' capabilities particularly their knowledge and understanding of those with severe Autism and challenging behaviours and that both he and Ms Fitzsimmons mentioned that the Team Leader, Dee at Duncan Road care home had stated that they do not take their service users out into the community as a result of their disability, that the service users make the Team Leaders tired due

to the required constant reassurance and assistance. It is alleged that Ms Keating's response was; "*rather you than me*".

343. Ms Steers further alleges that as Ms Keating walked away he then asked about the boxes of auditing and who was responsible for completing the auditing to which it is alleged she replied again; *" rather you than me*" and walked away.

344. The evidence if Ms Keating is that Mr Steers asked her if she knew who was taking over Oliver street and Duncan Road and that he did not believe the Managers who was looking after Duncan Road or Oliver Street were completing all the required paperwork. Ms Keating's evidence is that she had said she would speak to the Managers who had been looking after the homes and that this was the end of the conversation.

345. The evidence of Ms Keating which the Tribunal on a balance of probabilities, accept (see the findings in relation to Ms Fitzsimmons' claim) is that she followed up this issue about the auditing.

346. Ms Keating while accepting that the issue of auditing was raised, denies any issue being raised about service users not being taken out into the community and that she found that the service user at Duncan Road was leading a very active life when she visited.

347. Ms Steers case is that the issues he raised about the auditing and the service user at Duncan Road. amounted to protected disclosures in that when he made them, he held a reasonable belief that they tended to show that there had been , was being or was likely to be a contravention of regulation 12, 13, 15, 17 or 18 of the Regulations or a breach of health and safety.

348. Ms Fitzsimmons refers to a number of alleged issues she raised during this discussion however, she makes no mention of any concern raised about the service user at Duncan Road not being taken out into the community.

349. If Mr Steers did hold this very serious concern about the care of the service user at Duncan Road, and disclosed this to Ms Keating, he did not follow this up (despite the alleged dismissive response). It is clear from the documents that Mr Steers was not averse to documenting and escalating his concerns however he would not refer to this issue again until 2 months later in his grievance.

350. Mr Steers' evidence under cross examination is that he and Ms Fitzsimmons decided not to escalate her allegations of whistleblowing which she had disclosed to him during their supervision meeting on 21 September, until Ms Keating had come back to them about the auditing issues however, he failed to explain why he did not escalate the alleged concerns about the care of the service user at Duncan Road.

351. The Tribunal do not accept on a balance of probabilities that Mr Steers raised any concerns about the care of the service user in circumstances where; there is no evidence that he followed this up after the alleged dismissal of his concern by Ms Keating, he would go on to raise various concerns including about his own contractual situation but would not raise this until his grievance 2 months later, Ms Fitzsimmons does not support his account despite being present and Ms Keating denies such a concern was raised and the Tribunal find, she was

proactive in checking the auditing concerns and acknowledges those were raised.

19 September 2018

352. Ms Keating emailed all the managers on 19 September 2018 **[p.690]** asking them to complete a new on call file for each resident. Shortly thereafter Mr Steers emailed asking for a discussion about it **[p.681].** Mr Steers copied in Ms Leskovska, HR and Training Manager.

353. It is not in dispute that a meeting took place on 19 September 2019. Mr Steers does not allege that he made any protected disclosures at this meeting however, it is relevant because this appears to be the point at which their working relationship started to become strained. Their respective accounts of this meeting are not consistent. There are no notes of this meeting however Mr Steers refers to having wanted an informal meeting.

354. Mr Speers alleges that at this meeting he had said that he felt Ms Keating was unsupportive, unapproachable and came across as aggressive, dismissive and pulled faces or was very defensive when he asked for support or if he put forward questions.

355. Ms Keating complains that Mr Steers was incredibly rude, did not like the changes she was introducing, felt he should not have to be on call for any of the residential homes and demanded a day off in lieu when on call on a bank holiday and that if she introduced the changes, he would resign.

356. Mr Steers in his evidence makes no mention of threatening to resign if Ms Keating introduce the proposed changes. He did not set out in his evidence in chief what support it was that he had expressly asked for and which had not been forthcoming, or when Ms Keating had come across as aggressive or dismissive.

357. Mr Speers does not allege that he raised again at this meeting, his alleged concern about the care of service user at Duncan Road, (which would have been an opportunity to do so) and nor does he allege that he referred to Ms Keating having made the alleged dismissive comments about the auditing which again would have been an opportunity to raise this.

358. Ms Keating after this meeting on the 19 September 2018, emailed Mr Lane and Mr Mattu **[p.686]** stating that she wanted their advice with an issue she was having with Steers. She explains her problem in this way;

"*He has also stated that if he is made to do on call for both regions he will quit. I have asked Natalia to look at the legality around his contract and requirements that we ask of him. If you want time to be direct, I don't appreciate staff threatening to leave if they don't get their own way and feel he is stirring things up with the other managers.* ***He has a massive attitude problem****. I also don't think he has applied for his registered manager application yet".*

[Emphasis Added]

359. Mr Steers himself took some action following this meeting; he called Mr

Blunden who was on annual leave and told him that a Manager from a previous company where Ms Keating had been employed had told him that Ms Keating had been dismissed for financial fraud. That this allegation was made after the difficult conversation with Ms Keating does call into question his motivation.

360. Mr Steers evidence is that Mr Blunden responded stating that a dismissal for fraud would explain why he had received Ms Keating's reference back so quickly, that he would check her expenses forms, that he would not allow her to unpack Mr Steers hard work and that he had not agreed to any of the changes she was making.

361. Mr Blunden's account of that conversation is that he considered that Mr Speers was calling him to spread rumours, that Mr Steers was upset at being directly line managed and being held accountable and that Ms Keating was bringing fresh ideas. His evidence is that his initial response was to treat the report with some seriousness and he therefore checked the references which made no mention of any such allegations and that he now believes it to be vicious gossip. Ms Keating denies the allegations and believes they were made to discredit her. Mr Steers did not call as a witness the alleged individual who he alleges gave him this information nor has he named who it was or produced any evidence to substantiate what is a very serious allegation.

362. It seems remarkably coincidental that Mr Steers was given this information the day day after he had a meeting with Ms Keating where he raised his concerns about the changes she was making or, if this information had been passed on to him previously, it raises the question why if he considered it had any basis, he had not raised it before.

363. In all those circumstances and given the Tribunal's findings about the truth behind the steps Mr Steers would later take along with Ms Fitzsimmons, to discredit Ms Keating, the Tribunal find that on a balance of probabilities no such allegation was ever made but if it was, it was gossip and Mr Steers does not allege that he took any measures to check that this rumour had any substance to it before reporting it to Mr Blunden. The timing the Tribunal find, suggests that Mr Steers was motivated by a desire to make things difficult for Ms Keating because he was unhappy about the measures Ms Keating was taking to improve the services.

364. The Tribunal note that Mr Steers had copied Mr Blunden into his email of the 13 September 2019 when he complained about his pay and the on-call rota but Mr Steers does not allege that Mr Blunden intervened with those changes. This is not consistent with Mr Steers evidence that Mr Blunden had told him that he had not agreed to "any changes that Katrina was making". It also indicates that he was seeking the backing of Mr Blunden with Ms Keating in circumstances where Mr Blunden was no longer his direct Line Manager.

365. The evidence of Mr Blunden was that in hindsight, he probably let Mr Steers have his own way too much while he was his temporary Line Manager.

366. Mr Steers would deny threatening to resign but alleged that he wanted to have a conversation "*so I can decide what I want to do*". The Tribunal find on a balance of probabilities that Mr Steers was unhappy about the changes, resentful

toward Ms Keating and that Ms Keating was left with the impression from what he had said in the meeting, that he was threatening to resign.

367. Prior to any further putative disclosure, it is clear that Ms Keating had concerns about Mr Steers attitude and their working relationship.

Training PCS

368. Mr Steers accepted under cross examination, that he understood the importance the respondent placed on the introduction of PCS from February 2018 **[p. 970]** but that by September 2018 there was still no PCS reporting in either The Limes or Tentercroft.

369. In terms of the PCS training which Ms Keating required Mr Steers and Ms Fitzsimmons to attend on 26 September at the Coach House, in his evidence he refers to Ms Fitzsimmons informing Ms Keating of prior commitments and that when it was rescheduled to the 27 September they could not attend because there was an important meeting planned to discuss the move for X which was important given the issues with the Police, neighbours etc about his behaviour.

370. Under cross examination Mr Steers gave evidence that the MDT meeting for resident X was actually on 26 September but they planned a staff meeting on 27 after the MDT **[p.186].** He accepted under cross examination that he had not explained in detail to Ms Keating why they could not attend the training on the 26 or 27. His email to Ms Keating was brief; "*Unfortunately ,we will not be able to attend this month. We will have to attend in October when I return from leave*" **[p. 186]**

371. Given Ms Keating was a new Senior Manager and they have just had a difficult meeting, he did not pick up the telephone to explain to Ms Keating how important the meeting on the 27 September was and discuss what they could do to accommodate the PCS training, he sent short email messages which were not illustrative of someone trying to work with and support their new Manager.

372. Mr Lane then feels compelled to intervene. That however is not the end of it, even when they do attend Ms Cox who ran the session reports that Mr Steers seemed distracted and stayed for only a short period. On the 27 September 2018 Ms Cox at the Coach House, emailed Ms Keating with feedback from the training session **[p.730];**

"We covered as much as possible in the short time they had available, as they advised that they have to leave by 11:45 for a prior appointment.

From what they told me, it appears that they have not received any training at all from the person-centred software team which obviously makes it difficult. …

The difficulty I feel is that if the managers are not enthusiastic and engaged about the system then it becomes even less likely to succeed with the rest of the team"

[Emphasis Added]

373. Mr Steers' evidence is that he had been involved in a car accident on 19 September and did not have his own vehicle but hired one to take him and Ms Fitzsimmons to the training. He alleges that they had to leave as Ms Fitzsimmons had a personal appointment. Under cross examination, Mr Steers accepted that he had not spoken directly to Ms Keating about leaving the training early but had only spoken with Mr Blunden. He accepted that outside of staff at the Coach House there was only himself and Ms Fitzsimmons undertaking the training and that he was "*probably distracted* "during the training because of problems with his car.

374. The Tribunal find it reasonable that Ms Keating on receiving the feedback from Ms Cox would have felt frustrated and following their meeting of the 19 September, would have seen this as a further illustration of Mr Steers being resistant to the changes she was introducing and being uncooperative.

375. On the issue of PCS training, Mr Lane emailed the claimant on 20 September 2018 **[p.691]** expressing his clear disappointment in the progress Mr Steers had made with regards to the implementation of PCS

" …*The Limes has been open over 12 months and we have not yet implemented PCS, **which is a major failure**…*"

[Emphasis Added]

376. Mr Steers responds to Mr Lane agreeing it is a "*great tool*" but that he does not have time to attend the training and sets out reasons. In response Mr Lane expresses clear frustration, refers to The Limes and Tentercroft having a Manager, Deputy Manager and two Team Leaders for 4 residents so; "*clearly there is a problem of delegation".* Mr Lane instructs Mr Steers not to send him anything else on this subject **[p.690].** Under cross examination Mr Steers did not refute that he had failed to impress the Chief Financial Officer and commented that perhaps he should have " *elaborated in more detail,"* However, it is clear from the exchange of emails that Mr Lane was disappointed and frustrated with what he saw as unacceptable excuses for not making more progress with PCS and attending the PCS training.

Investigation

377. Mr Steers had conducted an investigation concerning a whistle-blower who had alleged that a member of staff had been abusing a service user (prior to Ms Keating working for the respondent). Ms Keating asked Mr Steers to send her his investigation report however she complains that he had sent her a scrap of paper with illegible writing. She sent him an investigation report template and asks him to complete that. The exchange of emails on this issue against illustrate what the Tribunal considers to be a lack of cooperation on the part of Mr Steers **[p.714];**

Ms Keating to Mr Steers: 20 September 2018: 13:40

"Yes I have copies of the reports but you need to complete the investigation as requested before it can be moved forward."

Mr Steers to Ms Keating: 20 September 20189: 13:47

"Unfortunately, it will not be possible in the timeframe you have given. Why do you want me to rewrite statements onto a word document when I have provided you the original statements signed by all parties and provided to the police/ safeguarding and social services"?

Ms Keating to Mr Steers: 20 September 2018: 13:52

"*So, a lot of it is handwritten and quite unclear, also it needs to in [sic] some sort of order regarding witnesses being interviewed then the final report from the staff member which has been accused. This is a more professional way to do this especially if the safeguarding teams want a copy of the final report and not pieces of paper.*

If you feel like you need more time I will pick this up on my return on Monday the 1 st October, this then gives you over a week to complete."

Mr Steers to Ms Keating; 20 September 2018: 13:56

"Thanks Kat, the police / safeguarding are very happy with our documentation having original signed documents and level of detail"

Ms Keating to Mr Steers: 20 September 2018: 14:00

*"I haven't commented on the quality of the report but how it is presented and as your line manager I am asking to put this on the new form. **I do not want to discuss this any further and expect you to carry out my reasonable request**".*

[Emphasis Added]

378. The Tribunal's impression from this exchange is of Mr Steers being resistant, uncooperative and awkward and of Ms Keating being patient, repeating her request and explaining why it is required and allowing more time for the task to be done but ultimately having to become much firmer. Ms Keating is not in the least aggressive during this exchange, unsupportive or dismissive; it does however support her account of Mr Steers continuing to be resistant to the changes she was trying to make. During the Tribunal hearing, when giving his evidence Mr Steers did not express any contrition about the manner in which he dealt with Ms Keating, he exhibited little self-reflection or personal insight into his own behaviours.

CQC Registration – 24 September 2018 email

379. Mr Lane emailed the claimant on the 24 September 2018 proposing that he defer his CQC registration to become the Registered Manager of the Barclay Services until the end of October 2018. Mr Lane refers to Mr Steers' refusal to take on the additional responsibilities of the other Supported Living Units without an enhancement in his pay and therefore his application for Registered Manager would be deferred until the end of October 2018 to give him time to understand the changes implemented by Ms Keating, address his concern over call outs and;

"*it will give you and your line manager a chance to draw a line under last week*

and build a professional working relationship".

Second Putative Disclosure: 3 October supervision meeting

380. Ms Keating was on annual leave from 24 September and returned on 1 October 2018. Mr Steers was due to go on leave from 8 to 15 October 2018.

381. On the 2 October 2018 **[p.734],** Ms Keating had returned from leave and Mr Steers had still not sent the investigation report, she therefore sent him a chasing email, in response to which he refers to sending it that afternoon. Under cross examination. Mr Steers conceded that this would "*potentially not* " have given Ms Keating a good impression of him;

382. On her return Ms Keating held a supervision meeting with Mr Steers on 3 October 2018.

383. Mr Steers alleges that he made a protected disclosure by repeating the concerns raised during the 18 September 2018 discussion ie the concerns over auditing at Oliver Street and Duncan Road and that the service user was not being taken out into the community. Ms Keating denies he raised either of these issues at this meeting.

384. Within his evidence in chief Mr Steers does not detail what he alleges he said by way of a disclosure, he simply refers to discussing in detail concerns with Ms Keating and that with respect to the notes he was sent after the meeting, he complains that not every section had been discussed with him.

385. Ms Keating's evidence is that she discussed staffing, the use of too many agency staff, training issues and raised his general attitude which she felt needed to improve and that she was disappointed by the feedback from Ms Cox about the training.

386. The notes of the meeting, [**p.741 – 745**] record Ms Keating referring to the issue with the safeguarding investigation report and his refusal to do it. The report also includes the following entry;

"*Toys [sic] attitude continues to be unprofessional."*

387. Mr Steers is given a rating of '*needs improvement'* for his communication. All the ratings are all either '*needs improvement*' or '*partially meets'*. Mr Troy is recorded as raising that he feels unsupported and when asked about the support required; "*Troy stated trying to find paperwork as there is no current standard. Not consistent. Also, that there has been no gratitude towards staff in general*."

388. Mr Steers alleges that the notes Ms Keating provided of the meeting are not an accurate record of what was discussed. Mr Steers despite alleging that he made protected disclosures, did not take his own notes.

389. There is an email from Mr Steers on 3 October 2018 **[p.736]** following the meeting, the only issue he raises is about the reference to care hours;

"*Just reading my supervision. I have a few things to raise. My care hours are not over the funded hours."*

390. At the supervision meeting Ms Keating had informed Mr Steers that that he will have to apply for the Registered Manager Supported Living Manager role, and he will be shortlisted if he does but that external candidates will also be considered and his current role will then be made redundant. Mr Steers by email on 3 October (after the supervision meeting), forwards the 24 September email he had received from Mr Lane about deferring his CQC registration to Ms Keating and asserts that he had accepted the role at the outset with a view to taking over those responsibilities in August. In a further email he refers to being told that the role of Manager he currently holds was to be removed /made redundant and replaced with the position of Registered Manager of all Supported Living Services i.e. he had not been told he would have to apply for the role.

391. Ms Keating invites Mr Steers to a follow up meeting the next day to discuss the supervision meeting further. Mr Steers agrees stating that he feels; "there *is a lot of miscommunication going on what has been said/offered etc*." **[p. 740.14]**

392. The notes of the supervision meeting refer to Duncan Road but only in the context of Mr Steers and Ms Fitzsimmons not having attended a meeting there on 28 September. Further, the numerous follow up emails from Mr Steers after this meeting, do not mention that he had repeated concerns about auditing or the service user at Duncan Road. When it was put to Mr Steers why in the follow up emails after the meeting he did not mention the absence of these alleged repeated disclosures in the notes of the supervision meeting, his evidence was that he had not done so because;

.." *I tried to make peace with Kat and build the relationship .. I had to pick my battles with her …I was trying to be amicable ….I thought best to have supervision again and go over in person*."

393. The reference to "*battles*" is the Tribunal find, illustrative of how strained the relationship had become however, Mr Steers was prepared to raise in emails after this meeting his dissatisfaction with his personal situation, even **[p.740.13]** challenging the legality of the offer of employment :

" *I have spoken to my uni rep and I have been informed that my offer legally stands…*".

394. His robust stance about his legal position does not appear to be particularly consistent with an attempt to 'make peace' but in any event, the battles he appears interested in picking are not the alleged concerns over lack of auditing and CQC compliance but his personal contractual position and no mention is made of the former.

395. Further, Mr Steers alleges that he made no mention at the 3 October meeting of Ms Fitzsimmons' alleged protected disclosures to him in the 21 September 2018 supervision meeting with Ms Fitzsimmons, because he was "*not trying to push the point",* he did not "*want to cause issues*" and wanted to give them *"room to complete it*". His evidence under cross examination was that he expected to have the outcome about the aduting when he returned from annual leave, however this is not consistent with his evidence that he repeated

his alleged disclosure about the auditing in this meeting.

396. Further, when asked by the Tribunal what he alleges Ms Keating had said at the supervision meeting about the auditing when he alleges he had raised it with her again, his evidence was that she had told him that she understood the Registered Manager and Deputy Manager of Barkby had completed all the auditing paperwork . This is not consistent with his evidence that he expected to be updated about the auditing on his return from leave. Further, when asked by the Tribunal what was unsupportive about how Ms Keating responded to the auditing concerns he had raised, Mr Steers referred back to the alleged comment she had made weeks before of; "rather *you than me*". Mr Steers evidence was inconsistent and illogical when subject to any degree of scrutiny.

397. The Tribunal do not find on a balance of probabilities that Mr Steers raised at the supervision meeting with Ms Keating on the 3 October concerns about the auditing (ie the same concerns which he had raised during their 18 September 2018 discussion) or the alleged care of the service user at Duncan Road. Ms Keating disputes these issues were raised, the notes do not record them, Mr Steers did not raise them in his follow up emails and his evidence on this issue is inconsistent and not credible.

398. What appears to be the main concern following the supervision meeting we find is the situation regarding the Registered Manager position.

399. A follow up supervision meeting with Ms Keating on 4 October 2018 did not take place and Mr Steers requested a meeting on 4 October 2018 with Mr Blunden and Mr Mattu. That this meeting took place is not in dispute.

Third Putative disclosures: 4 October 2018 meeting

400. Mr Steers alleges in his evidence in chief that at this meeting Mr Mattu referred to an email he had sent Ms Keating about other concerns regarding his CQC registration and his services users and staff being at risk. He alleges that Mr Matthu asked him; "*How do you think that would look if CQC saw this as we have a pending inspection*" and that his reply was that the Trust and services could be at risk. He alleges that Mr Blunden's response was; "*was let's hope they inspect your services*". Mr Steers does not identify the email he alleges Mr Mattu made reference to and Mr Blunden denies making any comment about hoping Mr Steers' services will be inspected.

401. Mr Steers mentioned raising a grievance about Ms Keating. After Mr Matthu left the meeting, Mr Blunden candidly accepted in cross examination that he had made the comment that if Mr Steers had any respect for him he would not be bringing his concerns to him at a time when he was caring for his sick mother, his Father in Law had passed away in September 2018 and he was living at his Mother's home to look after her while she was ill. His Mother passed away later that same month. Mr Blunden's evidence was that he had said he would raise his concerns with Ms Keating and try and resolve the differences on his return.

402. Mr Steers case is that he raised again the auditing issue and the issue of staff not taking the Duncan Road service user into the community. The Tribunal did not hear evidence from Mr Mattu but did hear evidence from Mr Blunden who presented as a thoughtful and honest witness. He accepted that Mr Steers raised

concerns about his personal situation since Ms Keating had started but that at no point did he raise any concerns about unaudited services or the service user at Duncan Road. His evidence was that Mr Steers believed there was a personality clash with Ms Keating and Mr Blunden thought Mr Steers expected him to take back his line management but that was not feasible.

403. Mr Steers refers to the 3 and 4 October meeting in his later grievance letter of 13 November 2018, which is detailed and runs to almost 5 pages **[p.759 -76]** however, his account of the 3 and 4 October meeting is vague, he does not set out any details about what the alleged concerns were he raised and which were not documented. He also makes no specific mention of repeating the disclosure about auditing or any mention of raising the care of the service user at Duncan Road at either of these meetings.

404. Further, within that detailed letter he states his reason for the grievance is because;
" …I have been victimised as a result of whistleblowing under CQC **regulation 17: Good governance** on **<u>14 September 2018</u>"**

[*Emphasis Added*]

405. Regulation 17 is about governance. The failure to take a service user out into the community and concerns about care, would not be a regulation 17 governance issue (which is about having in place systems and processes). Regulation 10 of the Regulations deals with treating servicer users with dignity and respect, regulation 11 deals with safe care and treatment and regulation 13 deals with safeguarding service users from abuse and improper treatment. Mr Steers mentions in his grievance raising the care of the service user at Duncan Road with Ms Keating back on 14 September (which the Tribunal find was a discussion on the 18 September) however if Mr Steers genuinely had concerns about the care of a service user, it would be the regulations concerned with care rather than just governance which he would also have made reference to.

406. The Tribunal do not find on a balance of probabilities that Mr Steers mentioned the auditing issue or the allegation regarding the care of a service user at Duncan Road at the meetings on the 3 or the 4 October 2018.

10 October 2018 meeting.

407. Mr Blunden decided to speak with Ms Keating about Mr Steers complaints on 10 October. Mr Blunden's evidence which the Tribunal accept, was that he was not of the view at that point that Mr Steers would raise a formal grievance. This is consistent with the fact that Mr Steers had clearly agreed to allow Mr Blunden a chance to resolve the situation and Mr Steers had not yet submitted a formal grievance at this stage.

408. On the 10 October Blunden and Mr Mattu and Mr Lane had a call with Ms Keating. There are no minutes of that meeting. Mr Lane joined the meeting by telephone. The evidence of Ms Keating supported by Mr Blunden is that she presented a document at this meeting setting out her concerns about Mr Steers, she referred to this as a 'statement of concerns'. **[p.747-748].**

409. The Statement of Concerns complained about the non-completion of requested new paperwork; that Mr Steers had only produced the new weekly reports on one occasion out of 4 weeks since implementation and that he had told Ms Keating he did not need to implement the new medication competency assessments as he had some in place. It complained about his refusal to carry out reasonable requests; his resistance over putting the safeguarding investigation into the form she had requested. She complains about his unprofessional conduct over the PCS training. Ms Keating also refers to his behaviour over the PCS training. Ms Keating referred to having requested that the PCS system and on call file were completed by 22 October but on 15 October she had been told that no PCS was completed, and he had not started on the on-call file. She also complains that requests by her to follow his outlook calendar took a while before he sent it and when she tried to access it, it was still private, and she could not see what he was doing. She complains of general disrespect and a defensive attitude.

410. The Tribunal accept the undisputed evidence of Mr Blunden, Ms Keating and Mr Lane that it was agreed that Mr Lane would take legal advice which he did from Mr Johnstone, an employment law advisor. The Tribunal accept Mr Lanes undisputed evidence that Mr Johnstone recommended suspension pending a full investigation and disciplinary hearing into these issues.

15 October 2018- suspension

411. Ms Keating met and suspended Mr Steers on 15 October 2018.

412. Ms Keating denies being aware of Mr Steers having mentioned a grievance to Mr Blunden on 4 October by this stage and only later became aware of this from Mr Lane. She was unsure when she became aware but her evidence was that this was probably before the date of his dismissal. Whether Ms Keating was, prior to putting this document together, aware that Mr Steers had raised concerns about her or not, the Tribunal do not find that on a balance of probabilities, the concerns she expressed were because of any of the putative protected disclosures.

413. The Tribunal do not find that Mr Steers raised the auditing concerns again at the 3 October meeting or at the 4 October meeting. The Tribunal do not find that he raised concerns about the service user at Duncan Road. While he raised the Tribunal find, auditing concerns on the 18 September, it was now many weeks since that issue had been raised and Ms Keating had addressed it and it was not revisited by Mr Steers. What had happened in the meantime was ongoing tension in the working relationship between Ms Keating and Mr Steers and the Tribunal find on the evidence and on the balance of probabilities, that Mr Steers resented Ms Keating's management of him and the implementation of new systems of working. The Tribunal find on a balance of probabilities that under the temporary line management of Mr Blunden he had enjoyed (as Mr Blunden reflected) much greater autonomy and had been less accountable and he did not like Ms Keating's more robust and proactive approach and this manifested itself in resistance to her reasonable and lawful instructions.

414. Mr Steers complains that the suspension letter did not arrive in the post and he had to make a formal request for it. Ms Keating hand delivered it on 16

October 2018, and he referred to this as harassment as he had not given permission for anyone to attend his home. He does not allege that Ms Keating attempted to speak with him, only delivered the letter. The Tribunal do not accept that it is objectively reasonable to consider the hand delivering of a letter in those circumstances to amount to harassment and the Tribunal consider that it is further evidence of the extent of the animosity he was feeling toward Ms Keating that he would make such an accusation against her. In any event, Ms Steers does not complaint of detrimental treatment because of the alleged whistleblowing, his complaint is in respect of the subsequent dismissal only.

415. The suspension letter **[p.745.1]** refers to an incidents which could have the potential to damage the business; "*but more importantly your alleged behaviour and conduct could have a detrimental effect on our service users"…*

416. The suspension letter refers to a disciplinary hearing rather than disciplinary investigation. Ms Keating accepted that it should have referred to an investigation. The Tribunal do not consider it reasonable to draw any inference from the fact that the wording disciplinary rather than disciplinary investigation was used, there is no dispute that what took place was an investigatory meeting. The letter sets out the following allegations;

Non- refusal of requested new paperwork on a weekly basis
Refusal to carry out reasonable tasks
Insubordination
Unprofessional conduct- several reported allegations whereby you are openly derogatory with regards to the company
Refusal to attended training on PCS, at the coach house which had been arranged for you with over two weeks' notice. Only for you to attend and then leave approximate less than two hours later.
Non – completion of PCS systems and recording of service users at The Limes and Tentercroft
Zero response to emails which request access to your calender for scheduling purposes.

Investigation

417. Mr Blunden held an investigation meeting with Mr Steers on 23 October 2018 [**p.774 – 780**]. Mr Steers was accompanied by Mr Irvine, a Union representative. Prior to the meeting, Mr Steers had on the 18 September been sent the Statement of Concerns document [**p.746 – 747]**.

418. The notes of this meeting were provided and checked by Mr Steers who made his amendments to them (highlighted). Mr Blunden put a line through the additional comments Mr Steers had made where he disputes the additional entries made and Mr Blunden added further provides his comments in the margin.

419. In this meeting Mr Steers denied not providing the weekly reports, he stated that he had personally sent one on 24 September, Ms Fitzsimmons the following week and he sent one the week after that. He stated that he had agreed to the request to carry out the medication competency assessments and would use the forms provided by Ms Keating, he denied not preparing the investigation report as

required and denied being unwilling to attend the PCS training and that he had until the 22 October to implement the arrangements and would have done so. There was no acceptance by him of any issue with his performance or conduct toward Ms Keating.

420. During this hearing Mr Steers alleges that he had 'whistle blown' to Mr Blunden and to Ms Keating regarding lack of audits being completed in breach of regulation 17 and a lack of understanding from team leaders supporting services users with complex needs. Mr Blunden's evidence is that he understood the reference in the notes to whistleblowing to him **[p.777]** to be whistleblowing to him during this meeting, not before and he does not dispute that Mr Steers had raised these issues with him at this meeting. However, Mr Steers does not rely on any alleged protected disclosure made at this meeting to support his claim.

421. The notes as amended by Mr Steers, record that Mr Steers was content to continue with Mr Blunden as investigating officer and he believed Mr Blunden would deal with the situation appropriately (this was despite his Union representative expressing some concern over Mr Blunden conducting the investigation giving he had some previous involvement in the case). Had Mr Steers been alleging at this meeting that he had made protected disclosures previously to Mr Blunden and further that this was a reason for this disciplinary investigation, it would not be consistent this Tribunal finds, which Mr Steers position that he wanted him to deal with the investigation and had trust in him to deal with it appropriately.

422. Mr Steers does not identify in the meeting (as recorded in the notes) which senior managers are alleged to have made comments about 'rather you than me' and 'let's hope they check your services'. With respect to the latter comment, Mr Steers did not say in this in the meeting that it was Mr Blunden who is alleged to have said that, indeed he refers to 'senior management' which would seem to imply someone other than Mr Blunden otherwise why would he not have reminded Mr Blunden that he had personally made this comment? He also does not refer to raising the alleged disclosures with Mr Blunden specifically at the 4 October meeting. Further, in his grievance of the 13 November, he refers only to being discriminated against because of his alleged whistleblowing on 14 September (the 18 September discussion with Ms Keating).

423. The Tribunal find on a balance of probabilities that Mr Blunden understood that Mr Steers when referring to having whistle-blown, was referring to the issues he was raising in this meeting.

424. Mr Blunden did not follow up on the meeting immediately, his mother died the following day in the early hours, and he had time off work on compassionate leave, that is not in dispute. When he returned on 31 October, his evidence is that he held an investigation meeting with Ms Keating and there are notes of that meeting [**p. 781**]. Mr Blunden stated under cross examination that he raised the auditing issue with Ms Keating however there is no record of that in the meeting notes. Mr Blunden went on to give evidence that his investigation remit was around Mr Steers insubordination and that he expected Ms Keating to have dealt with the auditing correctly.

425. During this meeting with Ms Keating her evidence which the Tribunal accept

in the absence of any evidence to rebut it, is that she checked her emails and confirmed to Mr Blunden that she did not receive the weekly monitoring report on 24 September 2018, she had received the odd one but had to chase for them. She referred to the feedback from Ms Cox about the PCS training, the issues over setting the dates and although she fixed the problem with sharing the Outlook Calendar, she believed that he had been deliberately obstructive.

426. Ms Keating recalled that at some point after the 23 October, Mr Blunden had asked her about the whistleblowing allegation by Mr Steers and she mentioned the auditing issues but that she had investigated it and her findings were that the auditing had been done.

427. The undisputed evidence of Mr Blunden was that he also got in touch with Ms White the Registered Manager at Barclay Street who was also managing Duncan Road to discuss the auditing issue and there is a report/ statement from Ms White dated November 2018 [**p.815**] confirming that the paperwork was up to date. Mr Blunden's evidence is that these were well run services and he spoke regularly to the mother of the service user at Duncan Road and had no concerns about how Duncan Road was being run.

428. Mr Blunden then produced an investigation report dated 6 November 2018 **[p.786 – 789].**

429. Mr Blunden concluded that as Mr Steers had said he had sent the first weekly monitoring report on the 24 September and not the 21 September 2018 when it was due, Ms Keating denying in any event that it had been received, that Mr Steers had failed to follow the reasonable instruction.

430. In terms of the medication report; Ms Steers had said all this staff have competency assessments and so he did not need to complete them however, the supervision record presented by him to Mr Blunden at the investigation meeting clearly showed that night staff still needed training to complete medication. He concluded that Mr Steers had displayed defiant belabour in not accepting the request of Ms Keating to compete the new formal medication competency assessments.

431. In terms of the investigation paperwork; although he eventually provided it 1 day after the extended deadline, Mr Blunden concluded that Mr Steers had showed disobedience in not completing the new format investigation paperwork.

432. In terms of the PCS training; he concluded that Mr Steers had informed Ms Keating that they could not attend staff training on the 27 September because of a staff meeting but it later transpired that Ms Fitzsimmons had booked half a day's holiday on 27 September and this was the true reason, ultimately they received only 1.5 hours training and held that he had conspired to ensure the training was not successful.

433. In terms of the implementation of PCS, he found that Mr Steers had been given until 25 October to implement it but that he had shown defiance in respect of not completing the on-call log, although he had complained that it was difficult to produce it in the time available ,all the other homes had done so.

434. Mr Blunden also found that Mr Steers had not wanted to share his Outlook Calendar with Ms Keating and been deliberately obstructive.

435. Mr Blunden also found that Mr Steers had refused to hand over his mobile work phone to have a tracking app installed but found that Mr Steers had a right to ask questions about the intended use of the app and that he did hand it over once the intended use was clear.

436. The report and its findings are objectively rationale and reasonable and Mr Steers had confirmed his own confidence in Mr Blunden to deal with the matter appropriately.

437. Mr Blunden put together his report dated 6 November 2018 **[p.786 – 789].** It recommends that the matter should proceed to a disciplinary on the grounds of 'serious disobedience'. Mr Blunden's evidence before this Tribunal is that he considered the offences amounted to gross misconduct. While he does not in his report use the words 'gross misconduct', Ms Keating had notified Mr Steers in the suspension letter that the allegations if proven would be deemed to be acts of gross misconduct. The Disciplinary Policy also refers to suspension only taking place where the conduct is considered serious enough and lists 'serious disobedience' as one of the categories. The Tribunal accept that 'serious disobedience' clearly indicates a level of conduct which falls within what may otherwise be termed gross misconduct. It is listed in the Policy along with other examples of serious behaviour, including abusive behaviour, theft and fraud **[p.745.12]**. The Tribunal accept Mr Blunden's evidence that he considered that this behaviour amounted to gross misconduct.

Disciplinary Invitation

438. Mr Steers was then invited to a hearing on the 13 November 2018 by email of the 12 November 2018 [**p.755 – 756**]. The letter explains that the outcome may result in his dismissal. It sets out the allegations taken from the investigation report prepared by Mr Blunden and includes; non-completion of requested new paperwork on a weekly basis, refusal to carry out reasonable tasks, insubordination, unprofessional conduct, refusal to attend PCS training, non-completion of PCS system and failure to respond to emails about accessing his computer calendar.

Grievance 13 November 2018

439. The Tribunal find on the evidence and on a balance or probabilities that the day after receiving the invitation to the disciplinary hearing, Mr Steers submitted the grievance letter **[p.759]** by email on the 13 November 2018 17:17 **[p.758].** In his evidence he chief he refers to raising a formal grievance and then on the same day informed about a disciplinary hearing, that is not the sequence of events as supported by the documents. In his grievance letter itself he refers to being investigated as a result of Ms Keating's complaints and being invited to a disciplinary hearing on 13 November. The Tribunal therefore find that his evidence in chief is therefore misleading on this point.

440. The grievance is raised against both Mr Blunden and Ms Keating. Mr Steers

refers to being victimised for whistleblowing on **14 September 2018** (i.e. the 18 September conversation) i.e. the first putative disclosure. He does not refer to any further disclosures.

441. He alleges in summary that Ms Keating failed to support him and subjected him to criticism about his work constantly and created an intimidating environment. He also refers to the allegations resulting in disciplinary proceedings being unfounded and that the decision by Mr Blunden to recommend a disciplinary hearing was motivated by the whistleblowing on the **14 September**, rather than evidence uncovered by the investigation.

442. Mr Steers also makes an application to postpone the disciplinary [**p.764 – 76]** until his grievance is dealt with and/or that he has not received the information pack containing the relevant documents (citing the Acas code) and that he has a statutory right to be accompanied and his union representative is not available on the 15 November 2018.

443. Mr Lane gives undisputed evidence that he was forwarded the grievance, he considered that these matters should be explored at the disciplinary hearing and that it was not made clear what the specific nature of the whistleblowing was.

444. Mr Silver responds confirming a rescheduled date of the 20 November 2018 **[p.766]**.

445. Ms Keating gave evidence under cross examination that she had been told that Mr Steers had raised a grievance about her and alleged she had victimised him for whistleblowing however she did not recall having been shown the grievance letter itself. She recalled meeting Mr Silver and HR and that the meeting was minuted, but she was not sent the minutes to agree. The Tribunal was not however taken to any minutes in the bundle.

19 November 2018 – Chris Freer

446. The evidence of Ms Keating is (as set out above in respect of the case of Ms Fitzsimmons) that Mr Freer approached her and disclosed his concerns about Ms Weaver and a small number of disgruntled managers trying to discredit the company. When she met with him on 20 November 2018, he informed her that Ms Weaver acting together with Mr Steers and Ms Fitzsimmons were involved in the conspiracy. Ms Leskovska of HR was present during this meeting and typed up the notes **[P.340 – 342].** Mr Freer had stated that during his telephone conversation with Ms Weaver on 13 November, during which she had asked him to take photographs of the home and not carry out maintenance tasks, that he had heard Mr Steer's voice in the background telling Ms weaver to get the photographs.

Disciplinary hearing: 20 November 2018

447. The disciplinary hearing took place on 20 November 2018. This hearing was not to deal with the Chris Freer allegations but the allegations by Ms Keating. Mr Steers was represented by his Union. Mr Johnstone the respondent's employment law advisor conducted the hearing with Ms Leskovska in attendance **[p.801 – 812].**

448. Mr Johnstone started the meeting by requesting information about the whistleblowing allegation. The notes record Mr Steers alleging that;

"*CQC regulation 1 , we went to home visit and there was no auditing, no finance, no communication, no ABC chart , risk with potential financial abuse , as I came back, spoke to Kat on 14th.*

On 19th I have a meeting with Kat with Natalia present as an impartial witness, as I felt unsupported, and not happy with her attitude and since these allegations, these issues started." (p.801)

449. Mr Steers in this claim however, as confirmed at the outset of the hearing, does not rely on any alleged putative disclosure made at the meeting on the 19 September.

450. Mr Irvine makes representations about adjourning the hearing because the disciplinary pack had only been received on Friday at 6pm, that they had been handed a statement from Michelle Cox that morning and they would have called Ms Cox or Ms Fitzsimmons as witnesses, however the hearing proceeds and Mr Steers continues to refute the allegations

451. The claim by Mr Steers is not that he was dismissed because it was anticipated that he was planning to make disclosures (i.e. that he was obtaining information from Mr Freer in order to make disclosures), he relies on the previous alleged putative disclosures.

452. Mr Steers is not asked about the Chris Freer allegations at this meeting, Mr Johnstone does however ask him if he has had any contact with any staff during his suspension, and that the Tribunal conclude was because Mr Johnstone was aware of the Chris Freer allegations by this stage and on a balance of probabilities was instructed to ask this question.

453. Mr Lane gave evidence under cross examination that he did not have any dialogue with Mr Johnstone before the start of the disciplinary hearing when it was put to him that Mr Johnstone had been instructed to finish the disciplinary process quickly. He denied that Mr Johnstone's minuted comment that there was "*no way I could give you more time*" to call witnesses was because of such an instruction. Mr Lane did however go on to concede that he had a discussion with Mr Johnstone on 19 November but denied knowing why Mr Johnstone had asked Mr Steers if he had had any contact with anyone from the respondent during his suspension. Mr Lane denied that this question was asked because of the Chris Freer allegations and they were 'ambushing' Mr Steers with this question during this hearing. The Tribunal find however, that on a balance of probabilities, in the absence of any alternative explanation and given the proximity in time of the allegations by Mr Freer, that this question was asked in order to try and elicit information out of Mr Steers in connection with the information provided by Mr Freer.

Board Meeting: 20 November 2020

454. On the same day as the disciplinary hearing, there was a Board Meeting

where the decision was taken after discussing the issues raised by Mr Freer, to terminate not only Ms Fitzsimons's employment but Mr Steers.

455. The Tribunal find that there was no attempt to put the allegations to either Mr Steers or Ms Fitzsimons prior to the decision being made at this Board meeting to terminate their contract of employment. According to Mr Lane; "*there was total agreement by the Board, that all the managers involved in this conspiracy to sabotage and discredit the Company must be dismissed immediately…"*

456. Ms Keating although not a director was present at the Board Meeting, and although her evidence is that it was not her decision and Mr Blunden's evidence when asked by the Tribunal , was that he didn't "*think"* she had an input into the decision, the Tribunal find that on a balance of probabilities that it was more likely than not that she expressed her opinion. The Tribunal find however on a balance of probabilities that the decision was made by the Board and that Ms Keating had no significant influence over that decision. Mr Lane was a robust witness who expressed a strong opinion about the view the Board took of the allegations made by Mr Freer and that the decision to dismiss was made not by Ms Keating but the Board to protect the business and its service users.

457. Mr Lane's undisputed evidence is that he asked Mr Silver, Group Financial Controller to speak with Mr Speers as Mr Lane was in Surrey and terminate his employment. He considered that to retain him in employment would put the business and service users at continued risk.

Dismissal

458. The decision to dismiss Mr Steers was communicated by telephone on 21 November and confirmed in a letter of the 28 November 2018 from Mr Johnstone **[p 816 – 817].** The letter confirmed that his employment was terminated with immediate effect from 21 November 2018. It referred to the decision having been take that following the hearing on the 20 November, there was "*sufficient and adequate evidence*" and that he had concluded that series acts of gross misconduct had taken place.

459. The letter went on to address the issues raised by Mr Freer;

"Subsequently as you were informed, on the 21 November 2018 during our telephone conversation, it was brought to the Company's attention that you had colluded with several colleagues, in order to commit several acts of commercial sabotage. Which had you been successful, would have impeded the Health and Safety, of not only your colleagues and peers, but more importantly and concerningly the safety of vulnerable service users. Whose safety we are charged with"

460. Mr Lane's evidence is that Mr Steers was dismissed because of the Freer allegations. In response to questions from the Tribunal about the urgency with which the respondent acted, his evidence was that to retain Mr Steers and Ms Fitzsimmons put the respondent and services users at risk, suspension would not he felt have removed that risk, they could still have access if not to emails then to

staff.

461. Mr Lane's evidence on the grievance of the 13 November, was that he had drafted a letter to Mr Steers informing him that he would investigate it after the disciplinary process but he did not send it because Mr Steers was then dismissed. He did not consider the grievance worth investigating despite it being a whistleblowing allegation because it was in his view a 'rehash' of issues about auditing which he been investigated by Ms Keating and Mr Blunden before.

Appeal

462. Mr Steers then appealed the decision to dismiss by letter of the 6 December 2018**. [p.818]**. The grounds were fourfold; that the reason for dismissal given in the outcome letter was not the actual reason, the allegations even if substantiated would not amount to gross misconduct, the respondent's disciplinary policy was not complied with (it does not specify on what grounds it does not comply) and there had been no formal response to the grievance.

463. Mr Steers does not complain that the appeal was a detriment. The claim relates solely to the reason for his dismissal on the 21 November, and not the appeal process however the Tribunal have considered that in the context of whether it is reasonable to draw any inference from how it was carried out.

464. The initial response from Mr Silver on the 4 January 2019 **[p.820]** is to refute any assertion that the contract was terminated because of the alleged whistleblowing or because he had raised a grievance. He refers to the it being clear and concluded "*beyond reasonable doubt*" that he had committed acts of gross misconduct but that the respondent had in addition received information from an "*actual whistle-blower*" of allegations relating to "*deliberate and malicious attempts by yourself and in collusion with other parties*" to bring disruption.

465. The claimant's appeal was not dealt with. Mr Lane's evidence was that they were determined to dismiss Mr Steers and Ms Fitzsimmons because they put service users in danger and they believed the evidence of Mr Freer.

466. Although aware of the allegations made by Mr Freer, Mr Steers made no attempt to respond to them in his evidence in chief.

467. The Tribunal find that the disciplinary process was not conducted fairly. It did not comply with the Acas code of practice or the respondent's disciplinary policy. It was the Tribunal find, rushed and a breach of natural justice. Mr Steers was not given an opportunity to respond to the allegations of Mr Freer at a hearing He was also not given the right to an appeal hearing.

Submissions

468. The parties produced written skeleton arguments and supplemented them with oral submissions which I shall address briefly.

Respondents submissions

469. The respondent submits that the Tribunal's task is not about determining

fairness but that each claimant's case rests upon proving the reason or principal reason was as a result of their whistleblowing. Counsel referred to the it not being enough for the claimants to prove that the whistleblowing was a material factor.

470. Counsel refers to the extraordinary conspiracy that is being alleged by the claimants namely that Ms Keating removed the claimants because of whistleblowing, referred to Ms Keating joining to resolve problems and in terms of Ms Patel, the first disclosures pre date Ms Keating joining and were not on 'her watch'. Ms Keating was not appointed as the Nominated Individual until January 2019 so he invites the Tribunal to consider why she would go to such lengths to protect the business.

471. Counsel submits that the respondent's witnesses were starighforard and credible, doing their best to assist the Tribunal in contrast to the Mr Steers and Ms Fitzsimmons. Counsel submits Mr Steers was evasive and Ms Fitzsimmons was he argues, vague.

472. With respect to Ms Patel, counsel set out the chronology and the dire situation the respondent was facing and what Ms Keating was faced with on joining. He refers to the lack of engagement from Ms Patel over the new policies and procedures she was trying to introduced and that Ms Keating understandable formed a view she was out of her depth. While there were historic problems, Ms Keating had to act on what she was facing. More training for Ms Patel may have been possible in an ideal world but that it not why they were facing.

473. Counsel did not focus on the disclosures; his submission was that whatever the stasis of them they were not the principal reason and not in the mind of Ms Keating when she proposed to terminate the probationary period of Ms Patel. However, he submits her disclosure on 15 July was merely asking questions and was not a protected disclosure and likewise the 16 July email. Counsel argues Ms Patel did not have a reasonable belief that they disclose malpractice, they were 'operational emails' about changes to the rota and nothing more.

474. Counsel argued that whether the disclosures in September are disclosures of information is borderline but he conceded it probably does cross the reasonable belief threshold but he argues there is no force in the argument the disclosures were the principal reason for dismissal given the contect of the concerns and threat of the home being shut down.

475. With regards to Ms Fitzsimmons; case counsel submits that while there are no documents recording the decision to make the role redundant, he refers to the facts however supporting the rationale for that decision and there was no sense having a pool of Deputy Managers as those in residential care had been there a decent amount of time and the Tribunal should not concern itself with ' picking holes' in the redundancy situation. There was no need for a Deputy Manager in Supported Living and she was offered another role.

476. Counsel refers to the WhatsApp messages being relevant to the veracity of the allegations by Chris Freer and the Board decisions. Ms Keating made her report to the Board, but it was their decision. Counsel accepts the disciplinary policy was not followed and if this was an ordinary unfair dismissal case the respondent would be facing a 'mountain' but Mr Lane had no ' axe to grind' and what he says Is they could not keep Mr Steers on suspension any longer, they

did not want him accessing their emails.

477. With regard to the disclosure by Ms Fitsimmons; counsel refers to the 11 September alleged discussion and that even after her oral evidence it remains unclear what she is suggesting she said to Ms Keating about the new on call rota system but it was not in place until the day after she alleges she spoke to her about it.

478. With regards to the alleged disclosure on 21 September which she now says was on 14 or 18 September, counsel argues that it remains unclear what she is supposed to have said and it would be odd if she merely repeated what Mr Steers himself raised with Ms Keating, which was the auditing. Counsel accepts that lack of auditing could be in the public interest but that Mr Steers evidence under cross examination was that he *"just wanted to know who was responsible* "and that he was "*happy to do it*". Counsel argues he was only asking a question.

479. The email of the 26 September he argues was simply an email about the rota and informing Ms Keating what agency staff she needs and is not a disclosure, she was not saying there was not enough staff. Counsel argues the first two alleges disclosures are too vague to discharge the burden of proof and the third is not a protected disclosure

480. With respect to Mr Steers, he refers to all the emails following the 3 October 2018 meeting which related to it and yet none mentioned the issue of auditing which he alleges he raised again. If he had as he alleges, been told that the auditing was being investigated it also makes no sense for him to have raised it again on 4 October. Counsel accepts the lack of appeal means that the 'best practice' was not followed but submits that this does not establish the reason for dismissal is the alleged disclosures.

Claimant's submissions

481. Counsel for the claimant submits that dismissal because of whistleblowing is rarely overt and there is always an element of inference.

482. He submits that the respondent's counsel strained into 'straw man' submissions and this is not the claimant's case. It is not submitted that Ms Keating 'concocted' concerns about Ms Patel or Mr Steers, any concoction he summits if there is any, is about the allegations from Mr Freer "*but hard to say as little evidence* ". The case is not put on the basis he submits of concoction. It may he submits be possible to point to other concerns about the claimants retrospectively that does not mean the claim must fail, just because there are conduct issues does not mean the dismissal was for that reason.

483. Counsel submits that there may have been concerns with Ms Patel, but the fault lies with others including the Board and he refers to the speed with which Ms Keating came in and moved to dismiss.

484. He accepted they have been an issue about the need for the Deputy Manager role at The Limes, but the decision was made incredibly rapidly when whistleblowing allegations were 'rattling around'.

485. Inferences he argues can be made about the failure to follow a fair disciplinary process.

486. Counsel argues that a rationale organisation does not hide whistleblowing and the explanation may be ‘panic, f ear, desire to silence them – who knows’ and that it is not for the claimants to explain the reason as the reason for such treatment ‘often defies explanation’.

487. With regards to the disclosure by Ms Patel, counsel conceded that the 15 July as a protected disclosure was ‘borderline’ and not as strong as the 14 and 15 September allegations. There was he argues enough to meet the minimum threshold but not with ‘driving force’ but that the 14 and 15 September disclosures are more significant because of the seriousness.

488. Counsel argues that it does not matter whether Mr Lane knew of the disclosures because of an ‘Iago’ situation, he knew by the 20 when the disclosures were out in the open.

489. Counsel argues that on the 5 October 2018, Ms Keating had made up her mind to dismiss but her evidence was that she had an open mind, it she had not, and it was closed because of earlier issues ‘its would matter’. The allegations on 14 and 15 were serious and he argues lends to a strong inference

490. With regards to Ms Fitzsimmons and the alleged disclosures, counsel refers to 11 September 2018 alleged disclosures and that this ; “may not be the strongest” and he accepted the reservations that her evidence was not “ wholly clear on that” but if she was a liar he argues, she would have concocted something more convincing and he conceded it was not his best point.

491. With regards to the disclosure she said she made on 21 September, counsel argues the date it not relevant, her evidence is that she made the same disclosure as Mr Steers about auditing.

492. Counsel refers to the lack of process regarding Mr Steers. Counsel submits that “perhaps Chris Freer did speak to Ms Keating – there so little evidence “.

493. Counsel submits that the second set of 21 September supervision documents were not ‘concocted’, there was no need to concoct them because Ms Fitzsimmons did not rely on them, she disclosed them for these proceedings, but they do not particularly assist her.

494. Counsel submits that there was a personality clash between Ms Keating and Mr Steers, and that Ms Keating did not like working with him. He refers to Mr Blunden not wanting to dismiss him as there is no mention of this in his investigation report. Mr Steers then puts in a grievance, there is the Chris Freer allegations and then he is dismissed.

495. Counsel summits in conclusion that the respondent alleges that the claimants are ‘shoehorning’ their claims into section 103A ERA because they do not have qualifying service for an ordinary unfair dismissal claim, but he invites the

Tribunals to consider that it is significant that all 3 are alleging whistleblowing.

Legal Principles

Automatic Unfair Dismissal

Disclosures qualifying for protection

496. The term “protected disclosure” is defined in sections 43A-43H of the 1996 Act. The basic structure of those provisions is as follows:

(1) Section 43A defines a protected disclosure as a “qualifying disclosure” which is made by a worker in accordance with any of sections 43C to 43H .

(2) Section 43B defines a qualifying disclosure essentially by reference to the subject-matter of the disclosure: I set it out in full below.

(3) Sections 43C to 43H prescribe six kinds of circumstances in which a qualifying disclosure will be protected, essentially by reference to the class of person to whom the disclosure is made.

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

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

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed

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

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

Disclosure of information: section 43B ERA

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

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

Reasonable belief

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

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

Public Interest

501. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures; see Lord Justice Underhill's comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR** 731 CA at paragraphs 27 to 30;

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

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

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

502. **In Chesterton** the EAT rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in *Babula v Waltham Forest College 2007 ICR 1026, CA*. On appeal, the Court of Appeal agreed that the test as set out in *Babula* remains relevant and made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker;

"Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026 . Two points in particular are emphasised in that case, though in truth both are clear from the terms of the section itself:
(1) The definition has both a subjective and an objective element: see in particular paras. 81-82 of the judgment of Wall LJ (pp. 1045-6). The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1). The objective element is that that belief must be reasonable.
(2) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of Babula , where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would fall within head (a) of section 43B (1) . There was in fact at the time no such offence, but it was held that the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was".

503. When considering the public interest the Court of Appeal in Chesterton made the following observations;

"35. …An approach to the concept of "public interest" which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions. It would be extremely unsatisfactory if liability depended on the happenstance of the circumstances of other employees. ..It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"; but if there were any doubt about the matter the position is clear from the legislative history. The essence of the " Parkins v Sodexho error" which the 2013 Act was intended to correct was that a worker could take advantage of "whistleblower protection" where the interest involved was personal in character. Such an interest does not change its character simply because it is shared by another person. The advantage of achieving a bright line cannot be obtained by distorting the natural meaning of the statutory language."

Reasonable belief in the wrongdoing

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

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

506. The worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*.

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

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

Endangerment of health and safety

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

Identifying legal obligation

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

Likelihood of occurrence

510. Under S.43B(1) the worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The EAT considered the meaning of 'likely' in this context in **Kraus v Penna plc and anor 2004 IRLR 260, EAT** : In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with a relevant legal obligation'. Instead, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation' (our stress).

Manner of Disclosure

Disclosure to employer

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

Dismissal

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

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

514. As Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*,** the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B . A claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it *materially influences* the decision-maker. Section 103A requires the disclosure to be the *primary motivation* for a dismissal.

Reason – causation

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

516. Court of Appeal decision in **Co-Operative Group Ltd v Baddeley 2014 EWCA *Civ 658, CA*** .In the course of giving the only judgment of a unanimous Court, Lord Justice Underhill stated: '*There was some discussion before us of whether… there might not be circumstances where the actual decision-maker acts for an admissible reason but the decision is unfair because (to use Lord Justice Cairns' language [in Abernethy v Mott Hay and Anderson 1974 ICR 323, CA]) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation — for short, an Iago situation. [COG Ltd] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct*'.

517. Court of Appeal in **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC.** On

appeal, to the Court of Appeal - Underhill LJ referred to **Orr v Milton Keynes Council 2011 ICR 704, CA** Before the Supreme Court, the unanimous decision of the Court was delivered by Lord Wilson. He also thought the case raised a question of general importance: 'In a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?'. If a person in the *hierarchy of responsibility* above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. Lord Wilson reasoned that if this is limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

518. When Jhuti was before the Court of Appeal, Underhill LJ considered four different circumstances in which it might be argued that the unlawful motivation of a 'manipulator' should be imputed to an innocent decision-maker including where the manipulator is the victim's line manager but does not have personal responsibility for the dismissal; the manipulator's motivation can be attributed to the employer or, where the manipulator is 'a manager with some responsibility for the investigation', albeit not the actual decision-maker; Underhill LJ stated that there would, in his view, be 'a strong case' for attributing to the employer both the motivation and the knowledge of the investigating manager, even if they are not shared by the decision-maker.

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

Burden of Proof

520. Where the employee has less than the requisite continuous service to claim ordinary unfair dismissal, as in the case before us, he or she will acquire the burden of showing, that the reason for dismissal was an automatically unfair reason on the balance of probabilities: ***Smith v Hayle Town Council 1978 ICR 996, CA***. EAT in **Ross v Eddie Stobart Ltd EAT 0068/13** confirmed that the same approach applies in whistleblowing claims.

Drawing inferences.

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

522. In the words of Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA:*** '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.'

523. In **Broecker v Metroline Travel Ltd EAT 0124/16** the EAT criticised the Tribunal's focus on fairness instead of the question of what was the reason or principal reason for dismissal. The employment judge's misguided approach had led him to overlook a number of important pieces of evidence that shone light on the reason for dismissal.

Analysis and conclusions

Ms Patel

<u>First Putative Disclosure</u>

Did the claimant make a protected disclosure on 15 July 2018 [1073]?

Was it a disclosure of information?

524. The Tribunal find that there was a disclosure of information, the email conveyed facts namely the request from Tenercroft for staff to support cover for the night and day shift and that Barkby was itself 'down on staff' over that weekend.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

525. There was no express reference to the Regulations or to general health and safety. However, the Tribunal conclude that objectively it would have been apparent as a matter of common sense and obvious, to the recipients of that email that her concern was that there was insufficient staffing at both Tenercroft and Barkby. Further, if there was insufficient staff it would have been obvious to the senior and management staff who received that email, that insufficient staff creates a health and safety risk not only to service users but those who are caring for service users who can display disruptive behaviours (sometimes requiring restraint) for the carers.

526. The respondent argues that there was sufficient staff however, the Tribunal accept that if Tenercroft is asking for staff there must have been a belief from the staff at Tenercroft that more staff were required. It is not argued by the respondent that Ms Patel was being dishonest in her reports of what was happening, the criticism is that she did not manage Barkby better.

527. The respondent does not accept Ms Patel was managing Barkby well and that she should have been able to manage with the staff available, however what we are concerned with is the reasonable belief of Ms Patel objectively tested of what this email disclosed. If Ms Patel could have coped but was failing to cope (which is the allegation about her capability), even if it is accepted that this situation arose from her lack of suitable management experience, it was we find a situation where she genuinely believed that insufficient staff and health and safety risks either were happening or was likely to happen, whether or not Ms

Patel was wrong. That said, objectively the Tribunal do not find that the objectively it was reasonable for Ms Patel to believe that this disclosure tended to show the wrongdoing as alleged. It raised concerns about staffing however, in day to day management issues of staffing resource will arise and there is a distinction between the logistical and otherwise practical difficulties that staffing issues may cause and a situation where the staffing levels create a risk to the health and safety of service users or staff.

528. In terms of the Regulations, the most relevant regulation would appear to be regulation 18 and the requirement to provide sufficient numbers of suitably qualified staff, skilled and experienced to meet the requirements under that part of the Regulations. However, while the email makes reference to Barkby being 'down on' staff, it does not tend to show and it would not be reasonable to believe that it did tend to show, the Tribunal conclude, that the situation had been, was or was likely to be unsafe and thus give rise to a breach of the Regulations or that it had, was or was likely to endanger the health of service users. Ms Patel does not state that there are insufficient staff or is likely to be insufficient staff as a result of the level of staff available and nor does she make that observation about Tenercroft.

529. Objectively it was not reasonable for the claimant to believe that the disclosure tended to show that the alleged wrongdoing had occurred, was occurring or was likely to occur.

Was the disclosure in the reasonable belief of the claimant in the public interest?

530. Ms Patel gave evidence that when making the putative disclosures, she believed that it was in the public interest to make the disclosures because it involved the provision of safe staffing for the residents. The Tribunal conclude that while the number of service users who reside at Barkby are small in number (up to 11 people), the Tribunal consider that objectively it would be reasonable to hold a belief that there is a public interest in those who provide such care for vulnerable members of our society, to safeguard their health and safety and further that it was objectively reasonable for Ms Patel to hold that belief. The same public interest is relied upon in respect of all the putative disclosures and the Tribunal's conclusion on this aspect of the complaint applies to all the putative disclosures and therefore this same point will not be repeated for each alleged disclosure.

531. The Tribunal concludes however, that with respect to this disclosure, it was not reasonable for the claimant to hold the belief that the disclosure tended to show the alleged malpractice.

532. The Tribunal conclude that the complaint that this amounted to a protected disclosure pursuant to section 43B ERA is **not well** founded and is dismissed.

Second putative disclosure

Did the claimant make a protected disclosure on 16 July 2018 [1072]?

Was there a disclosure of information?

533. The Tribunal find that there was a disclosure of information, the email conveyed facts namely that a colleague had called upset at being unsupported, that Tentercroft staff are not supporting Barkby on Sundays and that she is going to contact Mr Steers to discuss the rota to ensures the services are safe. The email does not contain a mere allegation, it contains facts.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

534. There was no express reference to the Regulations or to health and safety however, that is not strictly required. That said, although this email complains that a senior care worker feels unsupported, it does not elaborate, it does not identify that the alleged lack of support puts either the worker or residents at any risk or is likely to do so.

535. Ms Patel makes reference to checking that the services are safe; Ms Patel does not allege they are not safe or not likely to be safe.

536. The Tribunal conclude that while the disclosure is of information, this disclosure even if considered alongside the email of the 15 July which relates to the same set of circumstances, it does not amount to a disclosure that there has been, is being or is likely to be either a breach of the Regulations or that the health and safety of any individual has been, is being or is likely to be endangered. It is raising concerns but nothing more definitive than that.

537. For the reasons set out in respect of putative disclosure 1, the Tribunal conclude that objectively it would be reasonable to believe and it finds that Ms Patel did believe, that a disclosure about problems with care which put or was likely to put vulnerable service users in a residential home are at risk, was a matter of public interest.

538. The Tribunal conclude however that the complaint that this amounted to a protected disclosure pursuant to section 43B ERA is **not well** founded and is dismissed.

<u>Third Putative Disclosure –</u>

a.14 September 2018 email timed 18:05 [1252]
b.14 September 2018 email timed 20:41 [1242/ 1248]]
c.15 September 2018 email timed at 21:57 [1259]

a. Did the claimant make a protected disclosure by email; on 14 September 2018 timed at 18:05? [1252]

Was there a disclosure of information?

539. The Tribunal find that there was a disclosure of information, the email conveyed facts namely that a service user has been placed in a safe hold, that other staff have had to assist, that staff cannot cope and she relays the behaviour of various service users that day. Ms Patel also states that vulnerable

servicer users are being left without support and the service is not safe and refers to the need to look at staff numbers. It is not simply an allegation that the service is not safe, Ms Patel conveys facts which on a common sense reading of the email, directly relate to the allegation of the service being unsafe.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

540. There was no express reference to the Regulations or to health and safety on this occasion either however, unlike the previous emails Ms Patel sets out facts about the day's events and alleges that the service is not safe and is clearly raising a concern about staff numbers. On this occasion the email is unequivocal; Ms Patel is expressing the belief that the service is not safe, and it is obvious on reading the email that the risk relates directly to staffing numbers impacting on the staff's ability to cope.

541. Regulation 18 refers to having in place sufficient staff numbers to meet the requirements of Part 3 which set out the requirements in relation to Regulated Activities and includes Regulation 12 which includes that care and treatment must be provided in a safe way for service users. The disclosure not only expressly alleges that the service is not safe, it sets out facts from which the Tribunal find it is obvious that Ms Patel is referring to insufficient staff and a failure to provide care and treatment in a safe way.

542. Mr Blunden does not respond to this email either expressing any confusion about what she is communicating or expressing incredulity at her statement that the service is unsafe and that the belief expressed is not a reasonable one to hold in the circumstances but responds stating; "*sorry to hear this"* and goes on to ask about additional staff and that suggests discussing safe holds with the trainer. Mr Blunden's evidence was that he was trying to be supportive. Whether or not the respondent believed that Ms Patel should but was not able to cope with the staff available, the Tribunal conclude that Ms Patel was not coping.

543. The respondent's own case is that Ms Patel was overwhelmed and not capable of turning this service around, however that only seeks to support the finding that she was struggling to cope and felt overwhelmed. The Tribunal conclude that she reasonably believed that the service was unsafe and that this email was bringing that to the respondent's attention and the Tribunal conclude that the belief that the respondent had or was failing or was likely to fail to comply with its legal obligations (namely Regulation 18 and/or 12) and that the health and safety of the residents had been, was being or was likely to be endangered, was objectively a reasonable one and it concludes Ms Patel did hold this belief.

544. The Tribunal conclude that it was reasonable for Ms Patel to believe that her disclosure was in the public interest and the Tribunal conclude that the complaint that this amounted to a protected disclosure **is** well founded.

b.14 September 2018 email timed 20:41 [1242/ 1248]

Was there a disclosure of information?

545. The Tribunal conclude that there was a disclosure of information. Ms Patel was not simply making an allegation but relaying facts about the events of that day, she refers specifically to an agency worker not understanding about safe restraints and having agency staff without receiving appropriate information about them. She also refers to an incident with service user where more assistance was required and alleges that the staffing numbers are not safe.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

546. There was again no express reference to the Regulations or to health and safety, however the information disclosed on any common sense reading tends to show that agency staff are being placed in the home without appropriate checks about their suitability or training and that further, there have been incidents that evening including an incident where a service user was placed in a safe hold and insufficient staff which is making the service unsafe.

547. The Tribunal conclude that Ms Patel held a reasonable belief that the email disclosed that there had been, was being or was likely to be, a breach of regulation 18 and 12 of the Regulations of and that the health and safety of the residents had been, was being or was likely to be endangered.

548. The Tribunal conclude that it was reasonable for Ms Patel to believe that the disclosure was in the public interest for the reasons set out above.

549.

550. The Tribunal conclude that the claimant's claim that this was a protected disclosure for the purposes of section 43B ERA **is** well founded.

c.15 September 2018 email timed at 21:57 [1259]

Was there a disclosure of information?

551. The Tribunal conclude that there was a disclosure of information. There was an allegation but there can be both an allegation and a disclosure of information. The email refers to them struggling at the home and it refers to having to call in more staff. There is also an attachment with the email from the Team Leader at Barkby, the facts she sets out concerning an incident that evening where a servicer had been aggressive requiring 3 staff to attend leaving only service users on the floor.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

552. There was no express reference to the Regulations or to health and safety and although it does not expressly refer to insufficient staff being the cause of the service being unsafe, the Tribunal concludes that it is obvious from a common sense reading of the email that this was what is being disclosed; that the staffing issues are causing the service to be unsafe. The Tribunal also consider it reasonable to consider this email in the context of the email sent the day before on the same issue, this email refers to an ongoing issue. The email also has to

be read alongside the attachment which is sent with it and the incident this refers to concerning the attack by a service user. The reply from Mr Blunden is not confusion about what is being communicated nor is it dismissive of Ms Patel's concerns, he refers to her calling him to discuss how to make the shift safe.

553. The Tribunal conclude that Ms Patel held a belief that the email disclosed tended to show that there had been, was being or likely to be a breach of regulation 18 and 12 of the Regulations of and that the health and safety of residents had been, was being or was likely to be endangered and that objectively it was reasonable for her to hold that belief.

554. The disclosure was in the public interest for the reasons set out above.

555. The Tribunal concludes that the claimant's claim that this disclosure was a protected disclosure for the purposes of section 43B ERA**, is** well founded.

Fourth putative disclosure

Did the claimant make a protected disclosure in the meeting on the 5 October 2018 [1336 – 1338]

Was there a disclosure of information?

556. The Tribunal find that there was a disclosure of information during this meeting. Ms Patel set out facts about events within the home, she does not make a bare allegation that the home is understaffed, she raises specific factual issues ie that forms are not being completed because the home is so short staffed and that the home did not have sufficient staff..

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

557. There was no express reference to the Regulations or to health and safety and the way the case was presented there was a failure to clarify what wrongdoing it is alleged she believed she was disclosing however, she did clarify that it was essentially that the home was overstretched with not enough staff and that one of the consequences was that medical training was not being completed and important forms not completed. On a common sense reading of the record of that meeting, it would have been clear that Ms Patel was disclosing that in her belief there was insufficient staff and a failure to ensure that they have adequate training; a requirement of regulation 18 read with regulation 12.

558. The Tribunal conclude that these concerns were clearly expressed, in terms of the understaffing and the Tribunal conclude that Ms Patel held a reasonable belief that at the meeting that what she disclosed tended to show that there had been, was being or was likely to be a breach of the respondent's legal obligations (regulation 18 and/or 12 of the Regulations) and that the health and safety of its residents had been, was being or was likely to be endangered , in that insufficient staff were working at the home, there were inadequately trained agency staff and that training was not being carried out, and that objectively it was reasonable for her to hold that belief.

559. The disclosure was in the public interest for the reasons set out above.

560. The Tribunal conclude that the claimant's claim that this was a protected disclosure for the purposes of section 43B ERA **is** well founded.

The reason for dismissal – causation

561. The Tribunal accept that Ms Patel cared about the service users and prioritised meeting their immediate needs over other tasks which she had committed to carry out as part of the action plan. The Tribunal conclude on the evidence that Ms Patel worked hard and worried about the service users, to the extent she would become upset and emotional during management meetings.

562. The Tribunal find that there were difficulties in the service which she had inherited and she had an extremely difficult task in front of her; to run the home while trying to implement new practices and procedures to address the serious breaches which the Council and CQC had identified.

563. Barkby was in a dire situation and facing possible closure.

564. Ms Patel made disclosures and the task for this Tribunal is to consider on the evidence available to it, whether one or more of those protected disclosures was the sole or principal reason for the decision to terminate her employment. This is not a claim of detriment, if it were, the Tribunal would be also considering whether any of the protected disclosures materially influenced the decision however that is not the task before the Tribunal.

565. The Tribunal may where appropriate draw reasonable inferences from primary findings of fact, and the Tribunal is invited to draw an inference that the unfair way in which Ms Patel's employment was terminated and that Ms Keating approached that meeting with a closed mind, was because the real reason was the making of the protected disclosures.

566. The Tribunal have made a finding that Ms Keating had, on a balance of probabilities already made up her mind before that 5 October meeting what the outcome was going to be and therefore any disclosures at that meeting cannot have been the sole or principal reason for her decision to dismiss.

567. This is not of course a claim for unfair dismissal. Had Ms Patel had two years' service, the conclusion may well have been that the dismissal was unfair in that that she was not forewarned about the concerns with her performance, offered more training or support and the outcome of the meeting was predetermined. What this Tribunal is concerned with however is why she was dismissed, what was operating on the mind of the decision maker at the time. The Board endorsed the decision, but it was firmly on the recommendation of Ms Keating.

568. The Tribunal conclude that there is substance to the complaints and observations raised by Ms Keating in the report to the Board. Ms Patel's response to most of those issues was a lack of time to complete the new paperwork or implement the new systems however, the Tribunal accept that the respondent had genuine and serious concerns around her organisation and management of staff.

569. The earlier disclosures which predate 14 September, were before Ms Keating joined and were not as counsel for the respondent pointed out, on 'her watch', they were not matters for which she could be held responsible. Further, those disclosures in early September were while she was still taking a back seat hence those emails were dealt with and answered by Mr Blunden. It is not being alleged that Mr Blunden influenced Ms Keating's decision to remove Ms Patel.

570. Ms Patel was responsible for only 9 or 10 permanent members of staff and yet for reasons which the Tribunal have difficulty understanding, she failed to secure details of the teams of their employment from Head office or even their contact details. Although she sent emails complaining about a lack of staff, there is no email evidence from her requesting their contact details or complaining but not being given contact details. The Tribunal was not impressed with Ms Patel's lack of action around resolving that situation, she alleges 4 months after taking over the management post, her reason for not continuing some on long term sick leave was still a lack of contact details.

571. In terms of the credibility of the Ms Keating's view of Ms Patel's abilities; the Tribunal have taken into account how she dealt with the alleged lack of information about the funding for service users and what it finds was her failure to address that alleged deficit in the information she had to plan staffing. The Tribunal found her answers evasive to questions around the implementation of PCS; she appeared to be giving a variety of excuses from having no handsets to having no dial in details, none of which the Tribunal accept were made out. Ultimately but only when pressed on this, was she prepared to say that it was because she had no time however, the Tribunal find that PCS would have provided very useful information to help her with staff planning and understanding service users needs. It was not prioritised despite it being on the action plan which was obviously crucial document. While Ms Patel the Tribunal accept struggled to manage the time required to implement PCS, it was a tool which would then have provided her with much needed support and helped her plan her resources

572. The Tribunal also accept that now only was there an issue with the amount of agency staff, Ms Patel did not comply with the pre – authorisation process which would have made her more accountable for her staff planning.

573. Ms Patel had input on the request for an extension to meet the action plan and how long an extension was required but failed to successfully implement those actions she was responsible for and did not request a further extension.

574. Ms Patel herself admitted that someone coming in the Barkby and seeing how little progress she had made with the PCS; it would not have filled them with confidence about her management. Further, Ms Patel herself refers to her being tired and being stressed.

575. The survival of the home was at risk, it was a dire situation and Ms Patel accepts it deteriorated during her management.

576. The protected disclosures made by email on 14 and 15 September, may well have formed part of the picture of Ms Patel not coping and increasing the anxiety amongst staff, however it was the way she reacted the Tribunal conclude, rather

than the issues raised which added to the perception of her as someone who could not cope. Ms Patel's own evidence was that she would cry in management meetings, she must have presented to Ms Keating the Tribunal conclude, as someone out of her depth. In any event, the Tribunal is not considered with whether those emails influenced the decision to dismiss but whether they were the sole or principal reason and the Tribunal concludes that they were not. There were wider concerns about the failure to implement the action plan which meant that the dire situation at the home was not improving.

577. While this was clearly a stressful situation and extremely challenging, the principal reason for terminating her employment was the Tribunal because she was not considered suitable, she was considered out of her depth and unsuitable for this difficult 'turnaround' task..

578. The Tribunal accept that she felt Ms Patel genuine sense of grievance and that she was 'set up to fail'. Although she had the support of Ms Holmes, Ms Keating did not consider there was the time to try and support her further or train her. While the Tribunal accept that this must have seemed an unsympathetic and unfair way to treat her, the situation with Barkby was 'dire', and the Tribunal accept that in those unusual and extreme circumstances Ms Keating took what she considered was necessary. Ms Keating took quick action to try and prevent the closure of Barkby and secure the confidence of the Council and the CQC that the action plan would be progressed more rapidly.

579. The Tribunal do not doubt the commitment of Ms Patel however, it concludes based on its primary findings of fact, that she was considered by the respondent and in particular Ms Keating, to not have the necessary experience and capability at that time, to make the sort of changes that were needed.

580. The Tribunal conclude on the evidence, that the protected disclosures were not the sole or principal purpose for the decision to terminate Ms Patel's employment.

581. **The claim of automatic unfair dismissal pursuant to section 103A is not well founded and is dismissed.**

Ms Fitzsimmons

First Putative Disclosure

Did the claimant make a protected disclosure on or around 11 September 2018 concerning only having one person on call for supported living and residential services?

Was there a disclosure of information?

582. The Tribunal for the reasons set out in its findings of fact, do not find that any such discussion and thus disclosure took place as a matter of fact. As set out in the findings of fact, even had such a discussion took place the Tribunal do not find that any alleged belief that the information she alleges she disclosed tended to show that the respondent had, was or was likely to breach the pleaded legal obligations and/or that the health and safety of service users, had been, was or was likely to be endangered.

583. The Tribunal conclude that the claimant's claim that this was a protected disclosure for the purposes of section 43B ERA is **not** well founded and is dismissed.

Second Putative Disclosure

Did the claimant make a protected disclosure during the discussion with Ms Keating on the 18 September 2018?

Was there a disclosure of information?

584. The Tribunal find that there was a disclosure of information during this conversation in that Ms Fitzsimmons did raise a 'concern' about the required paperwork/ auditing not being complied with at Duncan Road and Oliver Street.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

585. There was no express reference to the Regulations or to health and safety, however considering the audience, i.e. Ms Keating, it was not necessary the Tribunal to identify the legal obligation. It would have been obvious that the concern was that auditing not being done could give rise to a potential breach of the Regulations and or put at risk the welfare of the service users. Ms Keating accepted under cross examination that this was a serious matter and auditing was a CQC requirement and hence investigated it immediately.

586. The Tribunal conclude that Ms Fitzsimmons did reasonably believe that the disclosure tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation (i.e. regulation 17 of the Regulations). Ms Fitzsimmons did not expressly disclose information referring to any actual harm to the service users. The information did not the Tribunal find disclose that the service user's health and safety had been, was being or was likely to be endangered. There was a risk if the correct auditing was not being done but the Tribunal do not accept that there was any express reference to there having been any harm or that it was objectively reasonable to believe that the health and safety of the services users had been, was or was likely to be endangered , although the Tribunal accept that not doing the paperwork presents a risk, it was not objectively reasonable to believe it likely on those circumstances.

Was the disclosure in the reasonable belief of the claimant in the public interest?

587. The claimant does not address in her evidence whether and why she considered the disclosure about the auditing of the paperwork was not only in the interests of the specific resident at Duncan Road or the one resident at Oliver Street (both single bungalows) but more widely why this was in the public interest . It her belief which the Tribunal must consider and whether she held this belief and if so whether it was a reasonable one to hold. This is briefly pleaded in the claim form but the claimant gave no evidence about it and did not explain the basis of her belief.

588. If an employee (**Chesterton case**) cannot give credible reasons for why she thought at the time that disclosure was in the public interest, that may cast doubt on whether she really thought so at all at the time. The significance is evidential not substantive. A Tribunal may also find that the particular reasons why the worked believed the disclosure to be in the public interest did not reasonably justify the belief but nevertheless find it to have been reasonable for different reasons, which she had not articulated to herself at the time. What matters is whether the subjective belief was held and that the belief it was in the public interest, was (objectively) a reasonable one.

589. Whether the disclose is in the public interest is not simply a matter of looking at the number of people affected by the alleged wrongdoing, it requires a consideration of all the circumstances. There are only two service users at Oliver Street and Duncan Road. However, the nature of the interest is a relevant consideration, the interests affected in such a case as this, involves the care of vulnerable adults by the institution tasked with the legal responsibility to safeguard their welfare. That is a very important interest. The allegation was in effect, a serious dereliction of duty and not a mere trivial oversight in the completion for example of one document, it involved an allegation of a failure of the auditing by those facilities.

590. Although the claimant did not address public interest in her evidence and the reasons why she felt it was in the public interest, she had pleaded this in her claim and that she did not hold this belief was not challenged in cross examination. The Tribunal accept on a balance of probabilities evidentially that she held this belief. Indeed that was not challenged in cross examination and given the sector involved, which is a heavily regulated because of the vulnerability of the individuals cared for and Ms Keating's own view of the seriousness of the issue, the Tribunal accept this belief was held and that objectively it was a reasonable belief to hold.

591. The Tribunal conclude that the claim that this was a protected disclosure regarding a lack of CQC required auditing, for the purposes of section 43B ERA is well founded.

Third Putative Disclosure

Did the claimant make a protected disclosure in the email of the 26 September 2018?

Was there a disclosure of information?

592. The Tribunal find that there was a disclosure of information. Ms Fitzsimmons was reporting in September how many agency staff would be required for October, because the new policy that she was required to comply with was to obtain prior approval for the use of agency staff. In support of why the amount of agency staffing hours she was requesting approval for was required, Ms Fitzsimmons explained about the issues they had with permanent staff i.e. some reducing hours and the start date of some new recruits being delayed due to training issues. Ms Fitzsimmons does not refer to any breach of the Regulations or any health and safety risk.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety had occurred, is occurring or was likely to occur?

593. There was no express reference to the Regulations or to health and safety and the Tribunal do not find that Ms Fitzsimmons held a reasonable belief that the information she disclosed tended to show that there had been, was or was likely to be a breach of the Regulations or that the health and Safety of the service users had been, was or was likely to be endangered . The staff who had not received the training, had not started, their induction had been delayed to allow the training to take place. The Tribunal find that the information did not tend to show that there had been a breach or that a breach was taking place or that there had been or was a risk to health and safety or that any of the situations was 'likely'. Such a belief may be reasonable had the information disclosed that new staff had started work without the required training but they had not and therefore at the time the email was sent and the disclosure made, such a risk/breach was not *'likely'* to happen.

594. The information disclosed does not the Tribunal find, reasonably tend to show that there is more than a possibility, or a risk, that the staff may have started without training or that the home will not have sufficient staff or staff who are not properly trained. The words used do not reasonably indicate that the wrongdoing is probable or more probable.

595. The Tribunal conclude that the claimant's claim that this was a protected disclosure for the purposes of section 43B ERA is **not** well founded and is dismissed.

Causation

596. Although the process that was followed terminating Ms Fitzsimmons' employment on the grounds of gross misconduct was unfair, in that Ms Fitzsimmons was dismissed without being provided with all the evidence in support of the accusations and given an opportunity to appeal, the Tribunal do not consider that it is reasonable to draw an inference from those primary facts that the sole or principal reason for the decision to terminate Ms Fitzsimmons employment, either when deciding to remove the role of Deputy Manager during the redundancy process or later to dismiss for gross misconduct, was because of any putative disclosures and in particular, the protected disclosure on the 18 September 2018.

597. As set out in the findings of fact, the Tribunal do not accept that the evidence supports a finding that there was a connection between the making of the protected disclosure (or indeed any of the putative disclosures) and the decision to terminate Ms Fitzsimmons employment. The Tribunal accept the evidence of Ms Keating that she had investigated the concern over auditing and was content that there was no failing in that regard and thus there would have been no reason for her to be concerned that this disclosure may lead to any issues with the CQC, even if the Tribunal were to accept the assertion put to Ms Keating in cross examination that some action or intervention by the CQC would have been a concern.

598. The Tribunal do not find that Ms Keating made the decision to dismiss, this is not an Iago situation. She would on balance of probabilities the Tribunal find, have expressed a view, however the Tribunal find it was the decision of the Board. Further, the Tribunal do not find that Ms Keating falsified or exaggerated the allegations of Mr Freer and there is no evidence to support that and indeed counsel for the claimant, did not press that point in submission though he explored it to a degree in cross examination.

599. The Tribunal find on the evidence that the respondent had serious concerns about the allegations made by Mr Freer and acted on them. The Tribunal also find on the evidence, that those concerns were not only genuinely held but that on a balance of probabilities, Ms Fitzsimmons was involved with Mr Steers and Ms Weaver in seeking to discredit the respondent and in particular, Ms Keating towards whom there appears to have been considerable animosity.

600. **The claim of automatic unfair dismissal pursuant to section 103A ERA is not well founded and is dismissed.**

Mr. Steers

First Putative Disclosure

Did the claimant make a protected disclosure during the discussion with Ms Keating on the 18 September 2018?

Was there a disclosure of information?

601. Under cross examination Mr Steers stated that it appeared the other services were not providing the paperwork such as medication charts and he asked who was responsible. Counsel for the respondent submits that all he was doing was therefore asking a question however, while he was asking a question, the Tribunal find that he was also raising a concern that the paperwork was not being completed and that is supported by Ms Keating's own evidence that he did not believe that the auditing was being done and that she considered this to be a serious issue.

602. The Tribunal find that there was a disclosure of information during this conversation in that Mr Steers did raise a 'concern' about the required paperwork/ auditing not being done by the management team at Duncan Road and Oliver Street.

Did the disclosure in the reasonable belief of the claimant tend to show that a contravention of the Regulations and or breach of health and safety has occurred, is occurring or was likely to occur?

603. There was no express reference to the Regulations or to health and safety, however for the same reasons as set of it in respect of this putative disclosure by Ms Fitzsimmons, the Tribunal find that considering the audience, it was obvious that this information tended to show a breach of the Regulations. Mr Steer was disclosing a concern that paperwork was not being done, even if that concern

was framed in terms that it 'seemed' to him that the paperwork was not being done, the Tribunal concludes that this meets the likelihood test threshold in that he was describing what he understood the situation to be i.e. this is how it appeared to him.

604. The Tribunal conclude that Mr Steers did reasonably believe that the disclosure tended to show that the respondent had failed or was failing to comply or was likely to fail to comply with a legal obligation (i.e. regulation 17 of the Regulations). However, the information did not the Tribunal find disclose that the service user's health and safety had been, was being or was likely to be endangered. There was a risk if the correct auditing was not being done but the Tribunal do not accept that there was any express reference to there having been any harm or that any harm in the circumstances was 'probable'.

Was the disclosure in the reasonable belief of the claimant in the public interest?

605. Although the claimant did not address public interest in his evidence and the reasons why he felt it was in the public interest, he had pleaded this in his claim.

606. For the same reasons, as set out with respect to the same disclosure by Ms Fitzsimmons, the Tribunal accept on a balance of probabilities evidentially that he held this belief. Indeed that was not challenged in cross examination and given the sector involved, which is a heavily regulated because of the vulnerability of the individuals cared for and Ms Keating's own view of the seriousness of the issue, the Tribunal accept a belief was held that this disclosure was in the public interest and that objectively it was a reasonable belief to hold.

607. The Tribunal conclude that this was a disclosure of information regarding a breach of a legal obligation, namely that the respondent had failed, was failing or was likely to fail to comply with CQC required auditing, and was a protected disclosure for the purposes of section 43B ERA is well founded.

Second Putative Disclosure

Did the claimant make a protected disclosure during the supervision meeting with Ms Keating on the 3 October 2018?

Was there a disclosure of information?

608. The Tribunal find that for the reasons set out in the findings of fact, that Mr Steers did not repeat what he had raised about the lack of auditing at Duncan Road and Oliver Street and he did not raise an issue about the care of the service user at Duncan Road, and the failure of staff to take him out in the community.

609. The Tribunal conclude that the claim that Mr Steers made a protected disclosure on 3 October 2018 for the purposes of section 43B ERA, is not well founded and is dismissed.

Third Putative Disclosure

Did the claimant make a protected disclosure during the discussion with Mr Blunden and Mr Matthu on the 4 October 2018?

Was there a disclosure of information?

610. The Tribunal find that for the reasons set out in the findings of fact, that Mr Steers did not repeat what he had raised about the lack of auditing at Duncan Road and Oliver Street at the 4 October meeting and he did not raise an issue about the care of the service user at Duncan Road, and the failure of staff to take him out in the community.

611. The Tribunal conclude that the claim that Mr Steers made a protected disclosure on 4 October 2018 for the purposes of section 43B ERA, is not well founded and is dismissed.

Causation

612. The Tribunal conclude that Ms Keating had legitimate grounds for raising the concern's which she did about Mr Steers conduct and attitude toward her, and which lead to the disciplinary proceedings against Mr Steers. While she may have been aware that Mr Steers had complained about her to Mr Blunden, the Tribunal have not found that Mr Steers made protected disclosures during the 3 or 4 October 2018 meetings when he mentioned wanting to raise a grievance about Ms Keating. The Tribunal have not found that Ms Keating raised her concerns about Mr Steer's conduct because of the protected disclosure, which was made several weeks before, on 18 September 2018.

613. Ms Keating had investigated the auditing issue and was reassured that the auditing paperwork was complete, and the Tribunal conclude, had no reason to be concerned had Mr Steers raised those previous concerns again.

614. There were the Tribunal finds grounds for Ms Keating to feel frustrated and undermined by Mr Steers and her statement of concerns was an attempt to address those after a difficult meeting with him on 3 October 2018.

615. The Tribunal find that the disciplinary process was not conducted fairly as set out in its findings, however the decision to dismiss the Tribunal conclude was determined at the Board meeting on the 20 November and was because of the allegations of Mr Freer, that the Tribunal find was the principal reason for dismissal.

616. The Tribunal do not find that Ms Keating made the decision to dismiss nor that she exerted any significant influence. This is not therefore an 'Iago' situation The allegations were serious and it was the decision of the Board to remove the threat presented by this conspiracy to discredit the business which was aimed at undermining Ms Keating and which they believed put their business and their service users at risk.

617. The dismissal was unfair and a breach of natural justice as set out in the findings of fact, however, the Tribunal conclude that it is not reasonable to draw an inference that the principal reason was the protected disclosure on 18 September because of that unfairness, in light of the Tribunal's clear findings about the reason for his dismissal.

618. The Tribunal does not consider that it is reasonable to draw an inference either from the fact that all three claimants, who cannot pursue claims of ordinary unfair dismissal are all making allegations of whistleblowing. The facts are different in relation to all three, and particularly in respect to Ms Patel. The Tribunal has made primary findings of fact from which it concludes that while the process that was followed with all three was outside what the Tribunal would normally consider a fair process, they all had short service and the Tribunal concludes that the reason for dismissing was either to do with capability in respect of Ms Patel, and in terms of Ms Fitzsimmons and Mr Steers, their conduct. The Tribunal concludes that the allegations were made as alleged by Mr Freer and further, as a fact it finds, that on a balance of probabilities not only was it reasonable at the time to accept the information provided by Mr Freer (who it is not alleged had any ulterior motive to make the disclosures), but that the Tribunal find that on a balance of probabilities, that Ms Fitzsimmons and Mr Steers did do what was alleged, which would amount to a fundamental breach of the implied duty of mutual trust and confidence.

619. In summary; the Tribunal concludes that the reason why Mr Steers was subject to the disciplinary investigation over his conduct, was because of the deterioration in his working relationship with Ms Keating which had nothing to do with the protected disclosure. Mr Blunden following the investigation upheld most of the allegations and considered that he was guilty of serious disobedience, a finding which the Tribunal concludes is supported by its findings of fact. Had Mr Steers not been dismissed in connection with the allegations made by Mr Freer, the Tribunal conclude that on a balance or probabilities, Mr Steers would have been dismissed in an any event for those offences however, the principal reason for his dismissal was ultimately the belief that he had conspired to discredit the respondent and in doing so, put at risk its service users.

620. **The claim of automatic unfair dismissal pursuant to section 103A ERA is not well founded and is dismissed.**

Employment Judge Broughton

23 June 2021

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