



EMPLOYMENT TRIBUNALS

Claimant: Ms C McFarlane

Respondents: 1) ABC Recruitment & Training Ltd & 2) Mr Clayton Barnes

Heard at: London South Croydon by CVP

On: 16-19 August 2021, the afternoon of 19 and 20 August 2021 in chambers

Before: Employment Judge Tsamados

With members:

Mrs H Carter

Mr N Shanks

Representation

Claimant: Ms F Reilly, Free Representation Unit

Respondents: Mr A Alexandrou, Consultant

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

- 1) The complaints of detriments arising from the making of protected disclosures are well founded;
- 2) The complaint of unfair dismissal is not well founded and is dismissed;
- 3) There will be a remedy hearing, if required, in due course in respect of the detriment complaints.

REASONS

Background

1. By a claim form presented on 20 January 2019, following a period of Early Conciliation from 21 November to 21 December 2019, the claimant, Ms McFarlane, presented complaints of whistle-blowing (protected interest detriments and dismissal) against UK Care Partnership Ltd ("UKCP"). At that time, the claimant asserted that UKCP was her ex-employer. A response was presented on 2 April 2019 on behalf of ABC Recruitment & Training Ltd ("ABC") asserting that it was the claimant's ex-employer and denying her claim in its entirety.
2. A closed preliminary hearing on case management was held on 18 June 2019 conducted by Employment Judge ("EJ") Martin. At that hearing, EJ Martin, with the agreement of the parties, substituted ABC for UKCP as the correct respondent to the claim. In addition, EJ Martin identified the complaints and issues and set the full hearing date for 5 days commencing 24 August 2020. She also made a number of case management orders, which required the claimant to provide additional information relating to her complaints, which had not been clearly set out in her claim form, as well as provision of a statement of remedy/schedule of loss, disclosure of documents, preparation of bundles and exchange of witness statements.
3. Thereafter, the claimant provided some further information but appeared to have struggled to comply with the case management orders. Subsequently, Ms Reilly took on representation of the case for the claimant through the Free Representation Unit. Ms Reilly made an application to amend the particulars of claim on 28 February 2020, the respondent objected on 5 March 2020, Ms Reilly made a further application to add another respondent to the claim (Mr Clayton Barnes, a director of ABC and UKCP) and for disclosure of documents on 16 June 2020.
4. A further preliminary hearing on case management was held on 17 June 2020 conducted by Regional Employment Judge ("REJ") Freer. At that hearing, REJ Freer set a further preliminary hearing for 16 July 2020 with a time estimate of 3 hours to consider the claimant's three applications. In addition, the respondent was given some time in which to submit any applications it wished to make. The matter was also referred for Judicial Mediation.
5. At some point ABC then made an application for the claimant's claim to be struck out.
6. Unfortunately, the hearing scheduled for 16 July 2020 was postponed due to lack of judicial resources and the provisional date of 11 August 2020 for a closed Judicial Mediation preliminary hearing was converted to an open preliminary hearing to consider the claimant's applications.

7. I conducted that hearing on 11 August 2020, at which the parties were represented by Ms Reilly and Mr Alexandrou as they are at the full hearing. Mr Barnes was in attendance but unrepresented.
8. The hearing was initially conducted as an open one in which I heard ABC's strike out application but refused it for reasons set out in a separate Judgment.
9. I then converted the hearing to a closed one dealing with case management and the claimant's applications. In that part of the hearing I listed the claim for the full hearing starting today, allowed the claimant's application for leave to amend her claim to include those matters set out in her amended particulars of claim and allowed her application to add Mr Barnes as a second respondent to the proceedings. In addition I set case management orders requiring Mr Barnes to provide a response to the claim as amended and for ABC to provide, if so advised, an amended response in the light of the amended claim, for production of the hearing bundles by ABC, a schedule of loss from the claimant, to be updated shortly before the hearing and for exchange of witness statements. These matters are set out in a separate record of that hearing.
10. Mr Barnes subsequently presented a response and grounds of resistance to the claim as amended.

Evidence

11. We were provided with electronic documents by the parties.
12. The respondents provided us with a bundle consisting of 615 pages including an index. We will refer to this as "B" followed by reference to the relevant page number(s) where necessary. In addition, we were provided with a separate bundle containing what were described as the missing pages from the main bundle. This consisted of 24 pages but numbered in accordance with the main bundle.
13. We were provided with additional documents during the course of the hearing, which we refer to individually where necessary.
14. We heard evidence from the claimant by way of a written statement consisting of 91 numbered paragraphs over 39 pages and signed and dated 27 July 2021 and in oral testimony.
15. We heard evidence from Mr Barnes, on behalf of the first respondent and on his own behalf as the second respondent, by way of a written statement consisting of 58 numbered paragraphs over 20 pages and signed and dated 20 July 2021.
16. We also perused Companies House records in respect of both ABC and UKCP with the knowledge of the parties. This was to establish that Mr Barnes was a director of both companies at the relevant time of the claim.

The complaints and issues

17. There was a draft list of issues within the bundle of documents but this pre-dated the amendment to the claim and was drafted by ABC's previous representatives.
18. After some discussion at the start of the hearing I went over the complaints and issues arising in each by reference to those identified by EJ Martin at the preliminary hearing held on 18 June 2019 (at B102-103) but with some refinement in light of the further pleadings. This is reduced to writing with cross references to the particulars relied upon from the claimant's amended particulars of claim (which is a document headed "Public Interest Disclosure Claim at B575-582), below:

Protected disclosure (section 43B&C Employment Rights Act 1996)

- a. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
 - i. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:
 1. 15 August 2018 – paragraph 9;
 2. 22 August 2018 – paragraph 10;
 3. 24 August 2018 – paragraphs 11-12;
 4. 26 August 2018 – paragraphs 13-14;
 5. 27 August 2018 – paragraph 15;
 6. 28 August 2018 – paragraph 16;
 7. 31 August 2018 – paragraph 17.
 - ii. Did she disclose information?
 - iii. Did she believe the disclosure of information was made in the public interest?
 - iv. Was that belief reasonable?
 - v. Did she believe it tended to show that:
 1. a criminal offence had been, was being or was likely to be committed;
 2. a person had failed, was failing or was likely to fail to comply with any legal obligation;
 3. a miscarriage of justice had occurred, was occurring or was likely to?
 - vi. Was that belief reasonable?
- b. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer and/or Mr Barnes and in respect of paragraph a. i. 2. above, the social worker?

- c. If so, it was a protected disclosure.

Automatic unfair dismissal (section 103A Employment Rights Act 1996)

- d. Was the claimant dismissed?
- e. Was the reason or principal reason for dismissal that the claimant made a protected disclosure etc?

If so, the claimant will be regarded as unfairly dismissed.

Detriment (section 48 Employment Rights Act 1996)

- f. Is the claimant a worker within section 43K and who is the correct respondent?
 - g. Did the respondent do the following things:
 - i. Paragraphs 19-29.
 - h. By doing so, did it subject the claimant to detriment?
 - i. If so, was it done on the ground that she made a protected disclosure?
19. Both representatives indicated that they were familiar with the burden of proof arising in automatic unfair dismissal and detriment claims.
20. Mr Alexandrou identified additional issues for determination, which after further discussion, I defined as follows:
- a. Does the Employment Tribunal have jurisdiction to deal with the claims against the two named respondents? The respondents aver that it does not and that UKCP is the correct respondent;
 - b. What was the nature of the claimant's contract of employment? The respondents aver that she was on a zero hours contract and was not an employee;
 - c. Was the claimant dismissed? The respondents deny that the claimant was dismissed.

Conduct of the hearing

21. This hearing was conducted remotely by video link using the HMCTS Cloud Video Platform ("CVP"). There were a number of occasions on which there were connectivity issues affecting the ability of one or more of the participants to see and/or hear each other. However, we persevered and were able to overcome these difficulties and conduct a fair hearing.
22. We spent the morning of the first day clarifying the complaints and issues and the documents provided. We spent the remainder of that morning and the rest of the day reading the witness statements and referenced

documents. We would comment that reading was made all the more difficult in terms of getting to grips with what the case was about from the disparate way the respondents presented their evidence, the blurred nature of the relationship between ABC and UKCP and as to Mr Barnes' role within each, as well as exactly what each company did, and what the claimant's employment involved.

23. We heard evidence from the claimant and Mr Barnes on the second and third day. On the fourth day we heard submissions from both representatives and in the afternoon adjourned to deliberate in chambers. We continued with our chambers deliberations on the fifth day. I would apologise to the parties for the length of time it has taken to perfect this judgment and for it to be promulgated. This was due to pressure of work and my part-time sitting pattern.

Rule 50

24. In view of the nature of the case and that it involves matters regarding vulnerable young persons and children, we indicated to the parties that we would anonymise the addresses of the homes and the names of the young persons involved using our powers under schedule 1 rule 50 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. This is set out in a separate Order.

Findings

25. We set out below the findings of fact we considered relevant and necessary to determine the issues that we are required to decide. We do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. We have, however, considered all the evidence provided to us and have borne it all in mind.
26. The claimant was employed by ABC, the first respondent, as a Support Worker from 17 August 2017 onwards. She alleges that she was dismissed on 10 November 2018.
27. The relationship and distinction between ABC and UKCP, two limited companies of which Mr Barnes, the second respondent, was a director of both, was not readily apparent. Indeed, this led to the claimant believing that she was employed by UKCP and naming it as the original respondent to her claim.
28. We understand the position to be as follows, largely from Mr Barnes' testimony.
29. ABC is an employment and recruitment agency. It was initially established to provide staff to different sectors starting with the care sector. At the time of the events in question, its only client was UKCP and it had approximately 15 staff on its books. Since then, ABC has expanded into providing staff to other sectors.

30. UKCP is an accommodation, support and monitoring organisation assisting young people transitioning from local authority full care to independence. Whilst the term young people is used, more correctly this is a reference to children aged 16 to 18. Mr Barnes referred to UKCP as providing semi-independent accommodation ("SIA"). UKCP does not employ staff directly, but staff are provided to work at its establishments (residential homes) by ABC. UKCP receives payment from local authorities for each placement of a young person. Such contracts run from week to week.
31. UKCP has a number of residential homes in which it houses young people placed by local authorities and relies on staff supplied by ABC to provide those young people with 24 hour support. Mr Barnes was at pains to emphasise that UKCP does not provide care to the young people. As such it operates homes which are referred to as "unregulated establishments" (as we were referred to within OFSTED guidance at B620-637 at B631). UKCP has two homes in Croydon (which we refer to as "Home A" and "Home B"), one in Enfield, one in Walthamstow and one in Kettering (but not one in Downham as the claimant believed). Home B closed down after the events in question.
32. UKCP holds an Independent Placement Agreement with the relevant local authority in respect of each young person, which requires it to meet certain criteria relating to the health and safety of the young person and the home staff. Each young person is required to sign a Placement Agreement which sets out expectations, such as no smoking on the premises, that they will be subject to room searches, as to health and safety and fire drills and as to everything that the staff would be doing. We were not provided with these documents. We were provided with what was said by Mr Barnes to be a risk assessment report for one of the young people, who we refer to as "CD", but headed Placement Plan and indeed does appear to be a Placement Plan albeit containing a section headed "Risk Assessment" with limited scope to set out actual risk (although the document appeared incomplete and some pages were out of sequence). This is at B333-354.
33. Mr Barnes is a director of both companies. At the time of the events in question he attended the homes in Croydon at least two days per week. Each home had a Team Leader and Support Workers (sometimes called Care Workers). The Team Leaders reported to Mr Barnes. There was also an Area Manager. In evidence, Mr Barnes accepted that he was the ultimate line manager of ABC and UKCP; the claimant reported to the management team and, as he said, "after that it is me, I am the boss".
34. At the time of the events in question the following managerial staff were in post. The Team Leader at Home A was Julie Stone. The Team Leader at Home B, until she left, was Sheila Johnson. The Area Manager was originally Paulette Blyth. She left on 13 November 2017 and in February 2018 was replaced by Michael Messiah. Mr Messiah left on 24 May 2018 and at that stage Mr Barnes was dealing with day to day operations. There were a number of Support or Care Workers who worked day and night shifts at each home by way of a rota. They worked predominantly alone unless the referring local authority stipulated the need for more than one worker in respect of a young person.

35. The staff at each home provided handover notes as to the state of mind of each of the residents for each other on finishing a shift. In addition, they provided reports, if appropriate, as to any issues arising with the residents to their social workers and/or to the police, as well as providing weekly and monthly reports, and, as appropriate, incident reports to the team leaders.
36. Mr Barnes was clearly very involved in the day to day operation of the homes, although in what capacity he attended them (either on behalf of ABC or UKCP or both companies) would not have been readily apparent, unless one had expressly been told. Indeed, on his first visit to Home A, the claimant was unaware who he was and initially did not allow him entry.
37. Mr Barnes attended the homes to move cabinets and to put up a bed. He also received copies of incident weekly and monthly reports from the team leaders. He was part of the staff rota and the team WhatsApp Groups. He took over day to day operations at Home A after Mr Messiah left on 24 May 2018.
38. The claimant has a degree in psychology and a background of working with young people. From March 2017 she was employed by Teaching Personnel as a Teaching Assistant providing 1-2-1 support for a year 1 student with emotional and behavioural needs. She worked for Teaching Personnel until July 2018.
39. In 2017 the claimant was looking for weekend work and was put in touch with what she believed to be UKCP, via Ms Blythe, who at that time was an Area Manager, on balance of probability we assume for ABC, as Mr Barnes had told us that UKCP employed no staff.
40. The claimant attended what she thought was to be an interview with Ms Blythe at Home A on 17 August 2017. However, this turned out to be her induction held by Ms Stone at which the claimant was given a contract to sign and taken through some induction topics. But after two hours the induction had not finished because Ms Stone spent much of the time talking about her experience working for charities and in catering. Indeed, the claimant had to leave before the induction ended because she had to attend another engagement.
41. The claimant's evidence is that Ms Stone told her that the young people were expected back at the property every night, that they must ask first before using the landline telephone in the home, that they were expected to tidy up after themselves and keep their rooms clean. Ms Stone showed her where the folders were, containing some information about the young people that she would be working with. However, the claimant further states that the induction focus was more on ensuring staff cleaned the house every shift that they worked. There was a checklist that Ms Stone expected staff to complete at every handover, indicating that staff had cleaned the kitchen and bathroom, swept/vacuumed the halls and left the home keys with the next member of staff coming on duty.
42. The respondents have provided documentation relating to the induction at B206-215. The claimant's position is that Ms Stone did not deal with all of

the matters indicated as covered by way of ticks on the list at B208-209 & 212. We can see from the induction attendance list at B216 that the claimant was in attendance at Home A from 11 am until 1.20 pm.

43. We have no reason to doubt the claimant's evidence as to the induction. We note that the induction documentation contains no detail as to the nature of the job, the role of ABC or UKCP or the organisational structure.
44. It was clear from the evidence that the claimant was not given a proper induction beyond what we describe as housekeeping / warden duties. This led to the claimant attending work without having a proper understanding of what was expected from her in terms of any wider duties, the procedures she needed to follow and without even any introduction to the young persons living in the home.
45. Indeed, the claimant believed, as she told us in evidence, that her role was that of a key worker to guide the young people and be an inspiring presence in their lives. We did struggle to understand how she formed this view, unless of course the role was left so vague that it was open to this interpretation or the claimant was in some way led into this belief. She was certainly unaware at the time that UKCP was acting in a non-care role so as to fall within the unregistered establishment definition which we have referred to above, and was, as ABC stated in its submissions for the preliminary hearing on 16 July 2020, at B608 paragraph (4), simply the young persons' landlord and the young persons were tenants.
46. We could find no contemporaneous documents that would have clearly explained her role and that of UKCP or ABC to the claimant.
47. The claimant was not provided with any training by either ABC or UKCP apart from online training on radicalisation. Whilst the claimant attended safeguarding training, this was provided by another organisation she worked for, called CareOnline. She was not provided with any formal supervision and we were certainly not referred to any documentation relating to such. The claimant was not provided with the rules of the homes in which she worked and again we were certainly not referred to any written rules if they existed. The claimant was not told verbally of the rules other than finding out about them as she went along.
48. Whilst at the time the claimant believed that she was employed by UKCP, she now accepts that she was in fact employed by ABC. Given the rather confusing and blurred relationship between the two companies and that some documents refer to UKCP and some to ABC, we can well understand why she believed UKCP employed her.
49. Mr Barnes' position is as follows. UKCP provides limited support and monitoring services in the residential homes in Croydon in respect of the residents, liaising as required with the local authority and in particular to the social worker allocated to each resident. For all intents and purposes the residents were private tenants with their own rooms and access to shared facilities. UKCP has no specific power or authority over them. Some of the residents come from a background of local authority care and have

emotional and/or behavioural issues. The young people did not have a key to the front door or to the garden of the homes and were provided with 24 hour support. They were required to be home by 10 pm each day. Mr Barnes was at pains to emphasise that support did not amount to care. This appeared again to be a reference to the unregulated establishment definition that we have referred to above.

50. We were referred to the following documents relating to the claimant's employment and policies: her contract of employment at B197-205; UKCP's Child Protection and Safeguarding 2018/19 Policy and Procedures at B220-235; UKCP's Health & Safety Policy at B236-240; ABC's Recruitment and Training Employee Handbook at B241-307; and UKCP's Whistle Blowing Policy Statement at B308-317.
51. In evidence, Mr Barnes stated that the Whistle-blowing Policy was in place in order for him to investigate concerns. Initially they were brought to the attention of the manager, then to him and to the Local Authority Designated Officer ("LADO"). The LADO is a designated officer to whom matters of concern relating to vulnerable adults and children have to be reported. It is fair to say that Mr Barnes did not accept that the claimant ever made any protected disclosures. Mr Barnes did accept that he was the best person to investigate concerns that come to his attention.
52. We now turn to consider the claimant's employment status.
53. The claimant had a contract of employment with ABC (at B197-205). Whilst she signed this she was not provided with a copy during her employment. The document is headed "Zero Hours Contract of Employment" but in the next paragraph is described as a statement of main terms and conditions issued in accordance with the Employment Rights Act 1996 (which at that time was an entitlement only existing for employees). It refers to her as an employee.
54. At clause 13 her hours of work are expressed as follows:

"The nature of your employment is such that your hours of work will be at the Company's discretion and will depend on the needs of the business. The Company does not guarantee to provide you any minimum amount of work in any given week or month of the year.

In addition to your normal hours of work, you are required to work any necessary additional hours for the proper performance of your duties.

You will be required to work weekends and nights as part of your normal working week."
55. The contract also contains a notice provision at clause 19 which provides for notice of termination in line with the statutory minimum entitlement for employees under the Employment Rights Act 1996, as well as references to the Disciplinary Procedure, Disciplinary and Dismissal Appeal Procedure and Grievance Procedure contained within the ABC Employee Handbook.
56. We also note that clause 9 which states:

"Your employment with the Company may in some circumstances be conditional on the approval of third parties on whose premises you may be required to work.

If the third party withdraws permission for you to be at their site, the Company will consider all alternative arrangements that can be made in order to allow your continued employment with the Company. If, however, in the sole opinion of the Company, no suitable alternative arrangements can be made, the Company reserves the right to terminate your employment."

57. The ABC Employee Handbook, at B255, states that there is a prohibition on taking on any other employment whilst employed by the Company without permission. However, from the evidence we heard it was clear that this was never enforced.
58. From the evidence we were able to determine that the claimant was subject to control by her employer, ABC, who employed all of the staff working in the homes, including the Team Leaders, as to her terms and conditions of employment, when and where she came to work and what she did, although we also determined that there was a necessary level of statutory control in any event given the nature of the work with young people.
59. There is a New Employee Form at B217 and an HMRC Starter Checklist at B219 in respect of the claimant. From her pay-slips, at B465-491, we can see that the claimant was paid monthly in arrears under deduction of PAYE income tax and employee national insurance contributions and that she worked every month from to September 2017 to 2018 although her hours of work did vary radically from month to month.
60. The evidence we were provided with as to the allocation of work was unclear and doing the best we could considering what we heard, ABC's grounds of resistance at paragraph 8 at B34-35 and the extract from the WhatsApp Group at B410, we find the position to be as follows:
 - a. UKCP maintained a WhatsApp Group for staff provided by ABC to work for UKCP, in which the staff were asked to provide their availability to work over the next two week period. From this a rota was drawn up and staff were contacted by telephone to confirm when they were expected to work. There was another staff WhatsApp group for the purposes of sharing information;
 - b. The claimant's hours of work were increased to 4 day shifts and 2 sleep-ins from the end of July 2018. This resulted from a combination of Ms Johnson, the Team Leader at Home B, leaving and ABC requiring someone to cover for her, and the claimant indicating that she was able to work additional hours during the week because her employment as a Teaching Assistant had by that time come to an end.
 - c. The claimant was employed consistently each month from the commencement of her employment onwards as evidenced by her pay-slips at B465-473 and 474-491 (with some duplication).
 - d. On 26 August 2018, after the claimant had suffered an assault at work (which we will come onto), Mr Barnes told the claimant that she need not come to work. When she reminded him about her work and hours, he told her not to worry, she would be paid for the hours that she was scheduled to work on the rota. The claimant said in evidence that

whilst Mr Barnes agreed to pay her 1 week's wages, she was surprised when in fact he paid her two weeks' wages.

61. We found it very difficult to determine exactly what a Support Worker was required to do. The evidence was unclear, because the claimant did not know and the respondents provided no clear explanation beyond the provision of support and monitoring, which was in line with the definition of unregistered establishments that we have referred to above.
62. Doing the best we could, we formed the view that a Support Worker worked alone and was required to be at the home for the entirety of their shift. Mr Barnes said in evidence that there was a lone worker policy. The young persons living in the homes did not have the front or back door keys to their home and so the Support Worker had to be onsite to provide access. In addition, the Support Worker was required to provide support albeit not care to the young persons ensuring that they behaved appropriately and did not put themselves or each other at risk or danger. The Support Worker had to clean the home and to report any incidents involving the young persons.
63. The premises at Home A had three bedrooms. The staff slept on a sofa bed in the staff office. The Team Leader was Ms Stone. Each bedroom had a lock on the door and the young persons in occupancy had a key to their room. At the time of the events in question there were two young persons living there: a female resident, who we will refer to as "AB", who was then aged 17; and another resident, then aged 17.
64. The claimant's evidence, which we have no cause to doubt, was that AB was a volatile young person and it was often the case that she went missing. The claimant believes that AB only slept at the home a handful of times and visited there even less, choosing to stay with her mother, although they clashed frequently when she was with her. Ms Stone would counsel AB over the telephone, but AB would not stay at the home, even though her social worker had requested that two members of staff needed to be present to look after her whilst she was placed there.
65. The premises at Home B also had three bedrooms. It had a small office on the first floor. Initially, at the time of the events in question, staff slept on a mattress on the floor of one of the bedrooms. Initially, at the time of the events in question, two residents lived there: a male who at the time was aged 17, who we will refer to as "EF" and a female resident who we will refer to as "CD", who at the time was a care leaver and aged over 18. When a third resident later came, staff slept on the sofa in the living room.
66. In the office at Home B was a desk, under desk drawers, a PC, CCTV monitor and a cupboard. The claimant's evidence is that there were no lockable filing cabinets in the office. Mr Barnes' evidence is that there were. The office contained files on the resident young people. The claimant accepted that these files contained risk assessments and that whilst she was instructed at the induction to read them, the documents were disorganised and she did not have time to go through them because of her duties.

67. The claimant worked her first shift on 3 September 2017 at Home A. On this day Mr Barnes turned up at the property and initially she did not let him in because she did not know who he was.
68. On 5 April 2018, Mr Barnes told the claimant that he was impressed with her work and he invited her on a tour of UKCP's other homes in Enfield and three other properties that he was considering renting to run as care homes. During the day he asked her to consider a long-term position with the company. The claimant listened to what he said but did not respond beyond stating that she was going to work exclusively for the company. In cross examination Mr Alexandrou put to the claimant that Mr Barnes had expressly offered her a job but she declined on the basis that it was too far away from her home. The claimant denied this but explained that on an earlier occasion she had indicated to Ms Stone in response to her enquiry as to whether she had considered working in Walthamstow that she preferred to work in Croydon because it was near her home. On balance of probability (given our general concerns about Mr Barnes' credibility which we come to later) we accept the claimant's evidence.
69. The claimant raised a number of concerns about security at Home A. On 3 September 2017 as to the lack of name badges or ID (arising from Mr Barnes' first visit to the property as referred to above), on 11 May 2018 as to insecure front door locks arising from a suspicious man sitting in a car outside the property (to which we were referred to the incident report at B320) and on 2 July 2018 involving an incident in which AB threatened the claimant (of which we were referred to the incident report at B327).
70. The claimant then moved to work at Home B. Her first shift was on 5 July 2018. No one was there to introduce her or provide induction. She had to ask the worker she took over from to help her out. She was not told of the house rules other than the young people were to be back by 10 pm and to report them if they were not. She was provided with keys to the bedrooms and had been told by Ms Stone whilst at Home A that workers were allowed to enter the bedrooms if there was a reason to do so.
71. On 27 July 2018 at Home B, the claimant found a machete under the living room sofa whilst she was tidying. EF had been in the room last. For safeguarding reasons she took the machete and put it in the third bedroom, tucked under a piece of furniture and she locked the door. She informed Ms Johnson of the situation via WhatsApp and sent her a photograph of the machete. We were referred to the photograph at B418. Ms Johnson advised the claimant that the police knew about the machete and had said that EF could keep it as long as he did not take it outside the house. The claimant also told Ms Stone by WhatsApp. Ms Stone told her to confiscate the machete. She sent the same message to Mr Barnes. The claimant was terrified to remove the machete because of what she thought would happen if EF found out that she had done so. She had experienced that EF could be volatile when he wanted to be and had often heard him screaming at the top of his lungs on his telephone. She believed that having a machete on the premises was a breach of the house rules and to be a genuine risk to others.

72. On 31 July 2018, Mr Barnes telephoned the claimant and asked where the machete was. She told him where she had left it. He said he could not find it.
73. Later that day, the claimant received several telephone calls from Mr Barnes and Ms Stone asking her if she could work full-time (4 days a week, 8 hours per day) and two nights (16 hours per evening). She later received a WhatsApp message at 15.22 advising that Ms Johnson no longer worked at Home B.
74. Part of the Team Leader's role was to send monthly reports to each young person's social worker. Ms Stone did not like computers and asked the claimant to do this for her whilst she was at Home A. After Ms Johnson had left Home B, the claimant was asked to write the monthly reports there.
75. On 3 August 2018, Mr Barnes asked the claimant to alter her incident report about the machete incident. The claimant had written in her report that Ms Johnson had given the machete back to EF after she had confiscated it but had been let go as a result. Mr Barnes told her to remove this reference because it made the company look like they did not know what they were doing.
76. There was some friction between EF and CD, the other resident at Home B. On 10 August 2018 EF continued to be agitated with CD because he believed that she had taken his PlayStation. He called the claimant after she had finished her shift and wanted to know where the keys to CD's room were. The claimant told him that she could not tell him that.
77. On 13 August 2018 the front door of Home B was damaged. We were referred to an email that the claimant sent to Mr Barnes on 14 August 2018 at B371. In essence, the claimant had left the property at lunch time to purchase some ingredients to bake a cake for EF's birthday. Whilst she was out, CD had returned to the home after her first day of work, found the door locked and had kicked it in to obtain access. The claimant's email also reported that the back door would not lock from the outside. Mr Barnes viewed the damage to the front door as the claimant's fault and that he said that he would be deducting the cost of repair to the locks from her wages. In evidence Mr Barnes stated that the claimant had left the property without letting anyone know.
78. On 14 August 2018, Mr Barnes attended Home B to erect a bedframe for the staff to sleep on. The claimant asked him who was replacing Ms Johnson and he told her no one was, she was a lone worker, she should sit the young people down and tell them that she was in charge and if they cause problems, then she should call the police. The claimant said that she was concerned that there might be a very violent incident in the house. Mr Barnes stated that the young people are children in state care and that calling the police was the procedure to follow. The claimant asked him if it was important that all staff working there were on the same page and had a unified approach. He responded that she just had to use her own initiative, she just had to handle it and that he had been shot at in the past and it is part of the job and he did not complain.

79. EF became more and more agitated as to the disappearance of his PlayStation. He expected UKCP to be taking some action and if not he would sort it out himself. The claimant was aware that EF had said he would get CD and sort it himself and that he would “disappear” CD. She reported this to Mr Barnes but he did not want to hear her or get involved. She was very concerned that a very serious incident could take place between the young people.
80. On 15 August 2018, the claimant telephoned CD’s social worker to tell her about her concerns for CD’s safety, stating that Mr Barnes would not be too happy if he knew she had called but she was seriously concerned. She explained that she had been told by other members of staff that there had already been fighting with knives in the home, CD was demonstrating erratic behaviour and creating unrest at the property and EF was making threats to her safety. The social worker responded “right so something bad is going to happen and I will have to find CD emergency accommodation”.
81. The claimant had also been told by CD that she had tried to kill herself by jumping out of a window in another placement. She had read more of CD’s file by this point but was often interrupted by CD whenever she tried to look through it. In addition, after his PlayStation had disappeared, EF had removed the television from the living room and locked it in his bedroom and CD was upset about this.
82. On 22 August 2018, the claimant reported her concerns to Mr Barnes regarding her lack of support and lack of training around supporting the young people in her care. Mr Barnes again told her to telephone the police if there was any issue, because “the state is their parent” and “we are not to get involved”.
83. On 23 August 2018 , the claimant slept at Home B overnight. She had lent CD her telephone charger the night before and went to get it back at 10 am the next day, after the other care worker had arrived to take over from her. She knocked on CD’s door and asked for her charger but CD responded that she was not getting it back. The claimant continued knocking, CD came to the door but would not return the charger. The claimant said that she would wait there until she did. CD then opened the door and threw out a charger, but this was not the claimant’s one. CD told the claimant to go away. The claimant said that she would call the police (as she had been instructed by Mr Barnes to do). Whilst she was attempting to contact the police, CD returned the charger and so the claimant hung up.
84. After the claimant had left the home, the police called her back to ask if she still needed their assistance. The claimant replied that she did not, but the police said that they would send someone out anyway because there had been other activity at the property and they thought it was worth having a conversation with CD. The claimant telephoned Mr Barnes and explained to him what had happened. He said she had done the right thing and now CD would know she cannot take liberties with her again.
85. On 24 August 2018 just before the claimant entered Home B, Mr Barnes telephoned her and informed her that three new young people were coming

to stay with UKCP, one at Home B and two at Home A. He explained that he had collected them from Peterborough in the middle of the night, he did not know their countries of origin or their names and tasked her to find this out.

86. The young person destined for Home B arrived later that day. The claimant thought that he was in his mid-twenties. She tried find to out where he was from but was unable to communicate with him because he could not speak English. He was allocated to the vacant downstairs bedroom which was considered to be the best room in the house.
87. When CD arrived home that afternoon she was still annoyed with the claimant about the charger incident. She saw the new young person and asked who he was. The claimant explained. CD was also not expecting a new person and was annoyed that he was placed in the best room in the house. She appeared very agitated and attempted to swap rooms and was very insistent. The claimant was concerned for her safety given what had happened the day before. She sensed that they would fall out.
88. The claimant went to the office and locked the door. CD went to her room but kept coming out and talking to the claimant through the office door. CD brought a music speaker out of her room and rapped that the claimant was a bad person, using offensive language and a personal attack on the claimant. CD was upset about the room allocation and went down to speak to the new young person. The claimant told her that he could not speak English. CD brought all of her possessions out of her room onto the landing.
89. The claimant telephoned Mr Barnes and told him what was happening. He said to tell CD that she could not move rooms.
90. CD then said she wanted to go into the back garden to smoke and asked the claimant to open the back door. The claimant believed this was just to get her attention having never seen CD smoke. CD told the claimant that she was going to lose her job today and she did not know what she was capable of. CD then telephoned another member of staff who told her to calm down. CD asked the claimant again to open the back door and the claimant replied that she was not comfortable coming out of the office. CD then went back into her bedroom.
91. The claimant believing it to be her duty to do so, then slipped out of the office, ran down the stairs, opened the back door and returned to the office but did not lock the door. She could hear CD sobbing in her room and aware of her previous attempt to commit suicide and given her erratic behaviour, she called the police.
92. Whilst she was on the telephone with her back to the door, CD forced her way into the office, grabbed her by the hair, pulling out several chunks of hair and punched her several times. The claimant dropped her phone and ended up on the floor under the desk. CD picked up her phone, called Mr Barnes and told him what she had done. She then ran to her room, the claimant started to get up and grabbed CD's hoody with her index finger.

CD got to her room but her hoody was stuck in the door. CD opened the door and handed the claimant her phone.

93. The claimant then spoke to Mr Barnes and told him what had happened. He was very apologetic and said that he would get her hair sorted out with a specialist hairdresser. He asked the claimant to send him some photographs of her hair. She did so immediately (these appear to be those at B420-422). He said did the claimant need a couple of days off and she replied no. The claimant felt in shock at this point. She left work an hour early and was picked up by a friend.
94. At 2 am she received a telephone call from the police advising that CD had been released on bail and charged with an offence and it was recommended that they both stayed out of each other's way.
95. The claimant assumed that in view of the attack on a member of staff, CD's placement would be ended immediately and she would move out on the Saturday. However, she received a call from a colleague asking who was going to be relieving her on Monday morning.
96. Mr Barnes telephoned the claimant in the morning to see how she was and the claimant told him that she was still shaken and shocked. He did not answer her concerns about CD, the focus of the conversation was about the other worker. He did say he would pay for her hair.
97. On 26 August 2018 Mr Barnes telephoned the claimant with an update on CD. He said he was meeting with her social worker about her next placement. He said it was best if the claimant took some time off. He explained that once he had met with the social worker, he would then have a meeting with the claimant the following week. He agreed to pay the claimant for her rota'd hours in the meantime. The claimant was aware that other members of staff could be at risk of violence and serious assault, as CD would continue to receive care from a sole worker. She repeated her previous concerns and reminded Mr Barnes that there was a kitchen knife kept in an unlockable drawer in the staff office, that CD had forced her way into the office to attack her and there had been previous fights between the young people, including fights with knives. Mr Barnes reacted in an angry and defensive manner and told the claimant that she was blowing things out of proportion and she was trying to blame the company for what had happened to her. He said he had been shot at whilst working with young people and that no one was to blame in such circumstances. The claimant told him that she was concerned that since CD was remaining at the property, there was a foreseeable risk of her being aggressive to another member of staff, especially as none of the staff was trained in managing these situations.
98. The claimant is aware that the social worker recommended that CD was not moved due to her vulnerability. But at no point did the respondent tell her this.
99. On 27 August 2018, the claimant sent an incident report by email to Mr Barnes which included a report of the assault by CD. This is at B379-382

and is dated 24 August with an indication that it was copied to a manager on 27 August at B382.

100. On 28 August 2018 the claimant sent an email to Mr Barnes. This is at B339. This was meant to be her agenda for the meeting that she thought they were going to have. It listed all of her concerns about the organisation and its management.
101. The claimant's position is that from this point there was a change in Mr Barnes' behaviour from one of being concerned to one of shutting her out.
102. On 29 August 2018, Mr Barnes telephoned the claimant to tell her that the Safeguarding Lead would be in touch and would be investigating the assault and that they will leave it to him. The claimant had never heard of the Safeguarding Lead. However, the claimant trusted and co-operated in the process.
103. On 31 August 2018, the claimant met with a Mr Andre Anderson in a meeting lasting approximately 60-70 minutes. Mr Anderson told her that he used to work with Mr Barnes and that they had stayed friends ever since. He explained that he was conducting an independent investigation into what had happened and would then providing a report into its policies and procedure. He did not say he was the Safeguarding Lead that Mr Barnes had referred to.
104. Mr Anderson said that the claimant was the first person that he had spoken to, but he had visited other UKCP properties and he was going to speak to Ms Stone, but CD was not going to talk to him. He asked the claimant for her perception of the company, the events leading up to the attack and what she thought were the company's failings. He told her that in the properties he had been to in North London, there had been some serious failings and that there was no structure in place. He further stated that he had some very serious safety concerns. He asked if the claimant had ever had supervision and she replied no. He told her she should have. He said he had seen serious failings at the other properties, there was no structure and no one was following the rules.
105. The claimant told Mr Anderson about her telephone call to CD's social worker. She went through her safety concerns with him as to the kitchen knife in the unlockable drawer, fighting with knives in the house, the machete, the large knife, the unsecure locks and security. She also spoke about the lack of structure and procedure to deal with safety concerns, about safeguarding, lack of security and that there were no panic alarms.
106. Mr Anderson said that he would send her a copy of his report. He also said that he had suggested to Mr Barnes that they should meet but Mr Barnes said that he did not want to. The claimant assumed this was whilst the investigation was being conducted.
107. The last thing that Mr Anderson said to the claimant was "what will happen now, what will you do next"? The claimant took this to mean, would she be reporting the company to health and safety, but she did not answer. With

hindsight she believes he was telling her that she was no longer going to be working at UKCP.

108. Mr Barnes had told the claimant not to worry about coming into work on 26 August for the following week which would take her to 2 September 2018
109. The claimant did not receive any contact from Ms Stone after the incident with CD. Before the incident they had spoken. She thought it very strange that having been attacked at work Ms Stone had not telephoned her to ask how she was. frequently and the claimant always found her very nurturing and caring.
110. Having had no contact, the claimant telephoned Ms Stone on 1 September 2018. Ms Stone said that Mr Barnes had not told her or any other workers about the attack, but she found out about it from Marissa. The claimant told her generally about what had happened but Ms Stone did not ask her how she felt. Ms Stone said she should have read CD's file. However, the claimant does not believe that this would have made any difference. She had read the file and was in the office behind a closed door but was still attacked.
111. The claimant undertook some work for CareOline on 5 September 2018. In evidence she said the following. She was awaiting the investigation report and expecting to hear something. She wanted to know what was happening next. This was why she worked for CareOline. It helped her to pay her rent that month. She felt worried about her safety generally. CareOline kept on asking her to work, but she did not feel safe or comfortable. We were referred to a schedule setting out the claimant's earnings post assault at B90 from which we can see that it was 24 hours work and was well paid.
112. The claimant sent a further email to Mr Barnes on 5 September 2018 at B399 asking what was happening about her job, pointing out that she had not been told what the next steps would be and asking if CD was still at Home B.
113. We were referred to a report dated 6 September 2018 by Mr Anderson at B403-406. At the foot of the report it states that it has been sent to the Registered manager and Responsible Individual and underneath refers to the "Acting Manager: Mr Barnes Director / Juliana Stone Manager", and the Registered Provider, UKCP (at B403-406). We were unclear if this included the claimant. However, the claimant said in evidence that she did not receive the report at this date.
114. The report sets out Mr Anderson's record of his meeting with the claimant. This includes her report of the incident with CD as well as other incidents beforehand. The report then goes on to set out Mr Anderson's record of his meeting with Ms Stone, in which she states that the claimant had behaved in an antagonistic and provocative way towards CD in the past. The report at several times refers to the claimant stating that she is "not suited to this type of work". In his recommendations, at B405, Mr Anderson states that the claimant's employment with UKCP:

"... is to cease in line with contractual terms. She has stated that she is not suited to this type of work and this is evident from her work practice".

115. It was very hard to understand from Mr Barnes' who Mr Anderson was and what his role was. He seemed to suggest that he was a designated safety lead and later that he was a senior social work independent review officer. However, we can see from the report that Mr Anderson made a recommendation to terminate the claimant's employment.
116. On 12 September 2018, the claimant sent a further email to Mr Barnes in which she queried the non-receipt of her August pay-slip and her need to check what she had been paid. The email asked for a response to this and her previous emails (at B402).
117. On 14 September 2018, the claimant sent a text to Mr Anderson (at B407). In essence the text stated that she had yet to get any response from Mr Barnes, asked if Mr Anderson had heard anything from him about her job and asked him to nudge Mr Barnes into contacting her. We can see from the top text that Mr Anderson forwarded her text to Mr Barnes later that afternoon.
118. The claimant sent a further email to Mr Barnes on 20 September 2018 (at B409). The claimant again asked as to the status of her job and the need for communication so that they could both move forward. She asked if he could let her know if she would be paid for her rota'ed hours this month as promised. She also stated that she just wanted to know what was happening with her job since the incident with CD on 24 August.
119. On 21 September 2018, Mr Anderson telephoned the claimant in response to her text. We were referred to his note of this conversation which was subsequently added to his report. The claimant did not see this note until disclosure of documents occurred as part of the case management of her Tribunal claim. This note was disclosed to us as a separate copy of the report and appeared as an additional two pages at the end. We refer to its contents below.
120. The claimant was taken off the WhatsApp rota group. She was removed by Ms Stone on 28 September 2018 (at B410).
121. The claimant received two weeks' wages in September 2018. Her last pay-slip is for September 2018 at B491. The claimant was paid on 28th of each month.
122. On 18 October 2018, the claimant received a voicemail message from Mr Barnes asking her to call him regarding the report.
123. In response, the claimant sent Mr Barnes an email on 23 October 2018 at B411. She stated that she was yet to receive Mr Anderson's report, that he tried to arrange a meeting between the three of them shortly after the incident but Mr Barnes declined. She asked for the report to be emailed to her as soon as possible.

124. The claimant sent a further email to Mr Barnes on 25 October 2018, which is also at B411. In this email she asked for Mr Anderson's contact details so that she could obtain his report directly. She noted that he had said she would be getting a copy but Mr Anderson had yet to send it. She also made reference to Mr Anderson having told her that he used to work with Mr Barnes and they had remained in touch but he would not allow any personal bias to affect his report as his own reputation was on the line and so she was surprised that he had not followed through with his promise.

125. On 10 November 2018, Mr Barnes sent an email to the claimant attaching a copy of the report (as seen at B403-406). The email is at B412 and is set out below:

*"Good afternoon Carina,
Hope all is well with you, I have spoken with the H.R regarding the report that was compiled by Andre that is attached below.*

We have tried calling you on many occasions and leave a message you (sic) to give me a callback and you have not returned my calls.

I was informed by the HR to ask you in regards to your statement in the report, what is your intention, that you think that you are made for this type of work and is that you stating your resignation this is unclear.

Please, can you be clear if you have resigned and if so please can we have it in writing.

Many thanks"

126. We assume that the reference to HR is to ABC's previous representatives, RBS Nat West Mentor, who also provided HR support.

127. On 14 November 2018, the claimant sent an email to Mr Barnes at B413. This is set out below:

"Good morning,

I have not resigned.

I asked in my email dated the 28/8/18 what measures you were taking to ensure the safety of the lone workers you employ.

I asked in my email dated 5/9/18 what was happening in regards to my job; what the next steps were.

I have had no reply to these emails.

Please can I have the contact details of André Anderson the Designated Safety Lead for UK Care Partnership as I'd like to discuss the report with him.

I am too overcome with stress at the moment to read it for myself; I am facing homelessness and serious financial difficulties if I cannot pay my rent and monthly credit card payments this month, but if it reads as you say then I need to correct Mr Anderson because his report contains errors. Maintaining my emotional and mental wellbeing is of paramount importance at this time and I fear reading the report will cause me further stress. Your email asking for my resignation sent on my birthday was already very upsetting.

I never said I was not made for this kind of work, I remember saying clearly that I didn't feel safe at work and I didn't feel like there was any structure in place to make sure as a lone worker I was kept safe and that this was proved true because now I've been attacked and it could have been much worse because there was a knife in an ununlockable drawer in the room where the attack happened.

Can I ask why as your employee I was never given the name and contact details of your Designated Safety Lead? I would have contacted him on the occasions when I raised safety concerns with you that were not responded to nor acted upon. For example with the incident report I emailed to you, the operations manager and the team leader on 19/5/18.

I look forward your (sic) response to the questions I have raised.

I appreciate your willingness to communicate. I just want to have open dialogue.

Kind regards"

128. Mr Anderson's note of the telephone conversation with the claimant on 21 September 2018 is lengthy. In essence, Mr Anderson records that the claimant asked what was happening, having heard nothing, in particular she asks what was happening about her job, he reminds her that she had told him that she was not going to continue with this type of work and the claimant denies saying this.
129. The note also sets out that Mr Anderson had asked Mr Barnes to speak to her and he had also suggested that he facilitate a meeting between them, but this was declined.
130. In evidence, Mr Barnes said that he could not meet on the proposed day because of a prior commitment and that he told the claimant as much. Mr Barnes' position is that he prefers to communicate by telephone, he telephoned the claimant on many occasions during this period but she never picked up his calls. He said that one occasion was when he was driving, after he had received the email of 5 September and that when he got home, he did try to phone a couple of times, maybe not the same day, depending on what he was doing. When pressed further, he said that he had attempted to communicate with the claimant, "many times". Mr Barnes' also said in evidence that he had responded to the claimant's emails prior to 10 November, as well as attempted to contact her by phone. When it was put to him that it was clear from the bundle that he had not emailed her in response to her earlier emails, Mr Barnes stated that the claimant used two different email addresses, but he "had been trying to contact her for the longest time". There was no evidence to support this assertion.
131. The claimant's position is that Mr Barnes phoned her twice and on one occasion left a voicemail message which she responded to by email (as set out above). She further states that there never was a proposed date for the meeting.
132. When Mr Barnes was pressed in cross examination as to how he had communicated his non-availability for the proposed meeting, he gave an equivocal answer and then stated that he had in fact passed this information to the claimant via Mr Anderson. However, this is not reflected in Mr Anderson's report or his note of the telephone conversation.
133. We found that generally Mr Barnes appeared to be an evasive witness, he repeatedly gave what appeared to be equivocal answers to questions and frequently deflected answers by referring to matters which were not relevant or were not matters that had occurred at the point in time he was

questioned on. For these reasons we found him generally to be an unsatisfactory witness and his evidence to be unconvincing.

134. On balance of probability, we find that he only attempted to contact the claimant by telephone on two occasions, one of which he left a voicemail message and that he made no attempt to arrange a mutually convenient time to meet with the claimant.
135. We would express our surprised that the respondents did not call any witnesses beyond Mr Barnes, particularly that they did not call Mr Anderson. Whilst it is a matter for the respondents to decide whether to call witnesses or not, it of course does not assist their position particularly when applying the burden of proof in respect of the detriment claim.
136. The claimant commenced ACAS Early Conciliation on 21 November 2018.
137. On 17 December 2018 the claimant sent a text to Mr Anderson expressing her surprise that having read his report it made no mention of any of the safety concerns she had raised at their meeting and setting out those concerns in some detail. She queried the objectivity of the report and invited Mr Anderson to send her a copy of the report if he felt that the one she received was not the report he submitted. This text was provided to us in three separate pdf files. We were not provided with a response to the text if any was received.
138. The respondents deny that the claimant was dismissed. Their position is that she was simply taken off the rota (which occurred on 28 September 2018). Mr Barnes' rationale for this is at paragraphs 55 and 56 of his witness statement.
139. Mr Barnes states that he was informed by Mr Anderson that the claimant told him that she was not suited to this line of work and he recommended that she should no longer work for UKCP. He then considered her Incident Reports and the negative comments from Ms Stone as to her suitability to undertake lone work and he reasonably formed the view that her secondment to UKCP was not in the best interests of the claimant, UKCP or its residents. As a director of ABC he advised the claimant accordingly but informed her that he would endeavour to secure her work from time to time with other clients which were more suited to her. The claimant's response was to reconfirm that she was only prepared to return to work if CD was removed from the premises but having discussed the situation with CD's social worker on behalf of UKCP, he was unable to make that commitment. The claimant also advised him that she would only work in Croydon. This was an immediate issue for ABC in allocating work to the claimant because at that time it did not have any clients in Croydon other than UKCP at the two homes. In the circumstances, UKCP removed the claimant from its rota so as to avoid her being wrongly allocated work within its two homes. But the claimant remained on ABC's records as an ongoing employee and had any suitable secondments materialised, even at UKCP where there may have been a change of circumstances, would have offered the same to the claimant.

140. It was not clear from the evidence when the claimant found out that her name had been removed from the rota. However, Mr Barnes asked the claimant in his email dated 10 November if she had resigned and she responded on 14 November stating no. But Mr Barnes states that UKCP simply removed her from the rota but she remained an employee with ABC and had any suitable secondments materialised, even at UKCP where there may have been a change of circumstances, these would have been offered.
141. We also note that in its response to the claim received on 2 April 2019, ABC states that the claimant was still employed (at B27). Further, in his response to the claim received on 20 October 2020, Mr Barnes states that the claimant was not dismissed but simply did not return to work (at B69-70).
142. The claimant's position is that she was dismissed on 10 November 2018 when she received Mr Anderson's report. Her ET1 does not deal with dismissal other than in passing. The amended particulars of claim do not address dismissal at all. There is nothing in her witness statement as to dismissal. The date of dismissal is only identified in her Schedule of Loss.
143. The only real construction of the alleged dismissal was raised by Ms Reilly in submissions. Ms Reilly asserted that the dismissal was by way of the respondents' conduct. She referred generally to case law authorities which state that ambiguous behaviour by an employer is open to being construed by the average person (by which I believe she meant the officious bystander) as amounting to a dismissal. She pointed to the respondents' conduct in ignoring the claimant's emails, refusing to meet with her, removing her from the rota, receiving a report in the terms it contained. From all of this she submits that the claimant was entitled to form the view that she was dismissed. She could have resigned, but the fact that the claimant stated that she did not resign does not mean that she could be dismissed, otherwise no one could be dismissed. The fact that she could not come back to work is irrelevant to the construction that she was dismissed.
144. We were referred to CD's risk assessment report carried out by the local authority. This is referred to in an email from Mr Barnes to Ms Reilly dated 14 July 2020 as part of disclosure between the parties for this hearing (at B616-617). "CF" is the claimant. This report was not disclosed by Mr Barnes but his email sets out why, what it was, and referred to extracts from its contents. We set out this part of the email below changing the references to the young person to "CD":

"The Risk Assessment Report provided by (the local authority) is confidential in nature and contains information on CF that cannot be disclosed. Nevertheless your client had access to the Risk Assessment Form from the outset and would be familiar with the same. Looking at and considering each resident's risk assessment was brought to each worker's attention during the Induction Process. The form will be available if required for inspection by the Employment Tribunal Judges should it be required. What I can say is that the report states that CD "has 4 historical offences, 3 for assault. These were care staff at previous homes. She has not shown this level of aggression since July 2016, Her last order expired in September 2017. There have been no further criminal incidents". It also states that CD's ex-partner found out her address which has compromised her safety. But that would be a reference to CD's former address. Obviously our information is limited to that supplied by (the local authority) and anything that may have occurred whilst CD resided at the property. The Report also contains a section in which (the local authority) set out Arrangements and Actions. In the

case of CD there were no arrangements and or actions needed. There was only a reference to CD needing support."

145. We were unclear what the distinction was between a Risk Assessment Report and Risk Assessment Form and what the difference was between the two. However, we formed the view that the matters in the report (certainly those that were disclosed by Mr Barnes in his email) should have been in the Risk Assessment Form relating to CD which is at B333-354.
146. In his written evidence, Mr Barnes said that CD's Risk Assessment Report (by which we assume that he means the Risk Assessment Form) did not disclose any violent conduct or any criminal report or any propensity to violence or violent criminal acts.
147. In oral evidence he stated that the Risk Assessments were available for each young person in the filing cabinet in the home and set out issues to do with mental health, risk and health and safety. In cross examination it was put to him that this was not true in respect of CD, given what the extract from the Risk Assessment Report at B618 said. His initial response was that staff are not there to provide one to one care full time to residents. Subsequently, he stated that each time a young person is placed with a care provider, the local authority has to undertake a new risk assessment and the one at B333 was the risk assessment provided previously.
148. It was put to him that he stated in the disclosure email that he was aware of CD's violent past but in his witness statement that he was not aware of it. His response was that he had submitted a risk assessment as to CD's violent past but in regards of what triggers that, he did not know. I re-put the question given that we had two contradictory documents, to allow him the opportunity to explain why his witness statement was at odds with this. Mr Alexandrou attempted to answer, but I stopped him, given that this was the witness' evidence.
149. Mr Barnes' answer was difficult to follow, but he appeared to say that UKCP asked for an up to date risk assessment each time they received a placement, the local authority provides a previous one and a recent one. The Risk Assessment at B333 was "undertaken at the time and it said (CD) does not have any immediate risk and this relates to the past and so the staff were required to read all of what happened in the past. If that answers the question". Ms Reilly responded that it does not. Mr Barnes further explained "on the day that the placement was made that section relates to my witness statement. All of this document was available to the staff and put on site. The risk assessment is in the bundle."
150. Ms Reilly put to him that the information at B618 was not in the report at B333. Mr Barnes in turn asked her "where did you get this from"? Ms Reilly replied that it was from him and he then responded that he would then have sent the risk assessment. When it was pointed out to him that whilst it was quite right he should have sent it but did not, he then appeared to blame this on his legal advisers at that time. This last part was at odds with the correspondence which indicated that the previous advisers had by this time stopped acting, Mr Alexandrou had certainly not yet come on the record as

an adviser, and that Mr Barnes had responded to the disclosure request in person.

151. We have to say that we found Mr Barnes' explanation, particularly for this omission from the Risk Assessment available to staff to be most unsatisfactory. There were assaults on care staff one to two years before.
152. We note that the claimant undertook further employment with CareOnline during November 2018 as set out at B90.

Submissions

153. We heard oral submissions from both representatives which we do not propose to set out fully within our reasons but will refer to where appropriate. However, we have taken them fully into account in reaching our findings and conclusions.

Relevant law

154. Section 43B Employment Rights Act 1996:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,*
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,*
- (e) that the environment has been, is being or is likely to be damaged, or*
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed..."*

155. Section 43C Employment Rights Act 1996:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

- (a) to his employer, or*
- (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—*
 - (i) the conduct of a person other than his employer, or*
 - (ii) any other matter for which a person other than his employer has legal responsibility, to that other person."*

156. Section 47B Employment Rights Act 1996:

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

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

- (a) the worker is an employee, and*
- (b) the detriment in question amounts to dismissal (within the meaning of [Part X])..."*

157. Section 103A of the Employment Rights Act 1996:

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

Conclusions

Employment status

158. In order to claim unfair dismissal (as well as other rights, such as entitlement to itemised pay statements, the right to written particulars of employment at this time, statutory minimum notice of termination and the ability to bring a breach of contract claim in the Employment Tribunal) a person must be employed (ie work under a contract of service). A person who is self-employed (ie working under a contract for services) is not entitled to bring a claim, although she may still fall within the definition of worker under section 230(3) of the Employment Rights Act 1996 (ERA 1996) for the purposes of a claim of unauthorised deductions from wages.
159. There is no clear guidance given by case law by which Tribunals are able to distinguish between those who are employed and those who are self-employed. An 'employee' is defined simply as someone who has entered into, or works under, a contract of employment (section 230(1) ERA 1996). A 'contract of employment' means 'a contract of service or apprenticeship, whether express or implied, and (if it is express), whether it is oral or in writing' (section 230(2) ERA 1996).
160. There is no single test which determines whether a person is employed or self-employed although there have been a large number of cases which have tried to establish the approach to be adopted to determine this issue. The usual approach taken is referred to as the multiple test which requires all aspects of the relationship to be considered and then to ask whether it could be said that the person was carrying on a business on his/her own account (O'Kelly v Trusthouse Forte plc [1983] IRLR 369, CA). The multiple test requires the consideration of a number of factors.
161. The first consideration is whether there is a mutual obligation to supply and perform work, ie is the employer contractually obliged to provide work and the person obliged to carry it out? This is the most important single factor. If no such obligation exists, then the person is not an employee (Carmichael v National Power plc [2000] IRLR 43, HL).
162. It is also a vital component that the employer has a sufficient framework of 'control' over the person, although direct supervision and control is absent in many kinds of employment today (Montgomery v Johnson Underwood Ltd [2001] IRLR 269, CA). If the person controls when, where and how she performs the work, this degree of autonomy would suggest that she is self-employed. However, if the employer has the power to tell the person when, where and how to perform, it would indicate that the person is an employee (Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497).
163. Another factor is that the other provisions of the contract must be consistent with its being a contract of service. We need to consider the purpose of the contract and what the parties intended when they formed it. It is the nature of the agreement and the actual performance of the contract which counts, not simply the label attached to the relationship by the parties. For example, just because a person is told by an employer that she is self employed does not mean that is the true legal position.

164. The method and mode of payment to the person could be a relevant factor. If pay is referable to a period of time rather than productivity, this suggests that the person is more likely to be an employee. She is also more likely to be an employee if she gets paid sick leave and is subject to the usual disciplinary and grievance procedures. However, again this is not necessarily conclusive of employee status.
165. The above assumes that it is clear what the contract terms are, but this may not be the case. When deciding what terms have been agreed between the parties, the first step is to look at any written contract. This can be a problem. People sometimes sign pro forma contracts which are designed to prevent them from being an employee, eg by stating that there is no mutuality of obligations or that they have the right to send along a substitute (see below). However, if there is evidence of the true nature of the agreement this should be considered (Autoclenz Ltd v Belcher & Ors [2011] IRLR 820, SC; Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365, CA; Consistent Group Ltd v Kalwak & Ors [2008] IRLR 505, CA; and Redrow Homes (Yorkshire) Ltd v Buckborough & Sewell [2009] IRLR 34, EAT).
166. From our findings as to the claimant's terms and conditions of employment with ABC and the arrangement between ABC and UKCP as to the provision of staff by one to the other it is clear that she was an agency worker. Agency workers may in theory be employees of the organisation to which they are assigned (the 'end-user'), in this case UKCP, or of the agency which assigns them, in this case ABC, or of course of neither. The usual tests of mutual obligation and control apply when deciding whether the person is an employee of either party. However, that is not being alleged here and furthermore the claimant has withdrawn her claim against the end-user and asserts that she was employed by ABC. In any event, the claimant had an express contract of employment with ABC and there is nothing to suggest that this is implicitly displaced.
167. In recent years there has been a huge increase in what have come to be known as "zero hours contracts". This is not a technical term but is generally used to refer to a contract where no minimum number of work hours are guaranteed. Such contracts are particularly prevalent in the care and hospitality sectors. Whether a person is an employee under such a contract is subject to the same tests as indicated above.
168. Having considered all of the circumstances in our above findings, we conclude that the claimant was an employee of ABC. She worked under a contract of employment in which she was expressed to be an employee and with terms and conditions consistent with that arrangement albeit with no guaranteed minimum hours of work. However, she worked consistently throughout the period of her employment and we are satisfied that there was sufficient mutuality of obligation to give rise to an employee/employer relationship albeit limited to those rota'ed hours she was provided with and agreed to and did work. She was under the control of team leaders and area managers employed by ABC and indeed by Mr Barnes' himself as a director of ABC, albeit working in homes run by UKCP. She was paid as an employee with deductions in respect of PAYE income tax and national

insurance on that basis. The intention of the parties, in as far as ABC issued a contract expressing the claimant to be an employee and framed in those terms throughout, was to create an employee/employer relationship. The evidence as to the day to day reality of the work relationship outside of the written contract of employment does not diminish from this.

Jurisdiction to bring the claim against the first and/or second respondent

169. Mr Alexandrou averred that the Tribunal has no jurisdiction to hear the claim against the first and/or second respondent.
170. With regard to the unfair dismissal complaint, this is against the claimant's employer and we have found that ABC was the claimant's employer. Of course, this complaint cannot be against Mr Barnes given that he was not the claimant's employer, but a director of the limited company that employed her.
171. With regard to the detriment complaint. This is a complaint that can be brought by a worker and given that the claimant is an employee she must also fall within the wider definition of worker within section 230(3) ERA 1996 (reference section 47B ERA 1996).
172. Mr Alexandrou referred us to section 43K(1) ERA 1996 and the case of McTigue v University Hospital Bristol NHS Foundation Trust [2016] IRLR 742, EAT.
173. In order to bring a complaint that they have been subjected to a detriment on the ground that they have made a protected disclosure, a whistle-blower who does not fall within the ordinary definition of a "worker" in section 230(3) ERA 1996 must fall within the extended definition in section 43K(1). In McTigue, the Employment Appeal Tribunal held that an agency worker can bring a whistle-blowing claim against an end-user client, even where the claimant is an employee or worker employed by the agency.
174. We did not fully understand Mr Alexandrou's logic in relying on section 43K(1) and McTigue. However, having considered both, we are of the view that they are simply not relevant, even if the claimant was an agency worker, because she is not pursuing a complaint against the end user, which in the arrangement before us would be UKCP. Indeed, had she not abandoned her claim against UKCP we can see that she would fall within the extended definition in section 43K and have been able to pursue her claim against them.
175. With regard to the claim against Mr Barnes, it is possible to bring a complaint in respect of any detrimental action (including dismissal) carried out by work colleagues in the course of their employment or by authorised agents of the employer. Further, employers will be vicariously liable for such actions, even if they were done without their knowledge or approval, unless they can show they took reasonable steps to prevent such actions happening. We refer to sections 47B(1A)-(1E) and 48(2) ERA 1996.

176. Mr Barnes' evidence as to his position was that he was a director of both companies. Whether he was an office holder in each capacity or an employee, we heard no evidence. But he described himself as the "boss", as he put it, at the top of the managerial line, in that the claimant reported to the management team who in turn reported to him. He had responsibility for whistle-blowing concerns under the UKCP Whistle Blowing Policy Statement which covered those providing services under a contract with UKCP, including Support Workers (at B308). He clearly acted in an executive capacity for both companies and whilst he may or may not have been employed by either, beyond his directorship, he was in the very least acting as an authorised agent of the claimant's employer, ABC.

Protected disclosures

177. This is a case involving what is commonly known as whistle-blowing. In essence this means that a worker is protected by law if s/he discloses certain categories of information and makes the disclosure to the correct person and in the correct way.
178. Under section 47B ERA 1996 a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Section 103A provides protection against unfair dismissal for employees.
179. Under section 43B ERA 1996 a disclosure must be of information that the worker reasonably believes tends to show one or more of the following has, is, or is likely to have taken place: a criminal offence; breach of a legal obligation; a miscarriage of justice; the health and safety of an individual has, is or is likely to be endangered; or information tending to show any of these has, is or is likely to be concealed.
180. Sections 43C–H set out to whom qualifying disclosures may be made and in what circumstances.
181. For there to be a "protected disclosure" under section 43 ERA 1996:
- a. The claimant must have "disclosed" "information";
 - b. The disclosure can be made orally or in writing. It need not follow any special whistleblowing procedure, even if the employer has such a procedure. The factual disputes before the Tribunal may be:
 - i. If it was an oral disclosure, what exactly was said, to whom and when? The respondent may deny it was said at all or allege that something different was said;
 - ii. If it was a written disclosure – where was it written and who received it/read it;
 - c. What "information" was disclosed? The claimant needs to identify exactly what he said or wrote amounted to the relevant "information";

- d. Does it amount to “information” under the law? Complaints, allegations and comments may or may not contain “information”;
 - e. It does not matter that the claimant was telling his employer something which the employer already knew. It is still a “disclosure of information”.
182. The information must, in the claimant’s reasonable belief, tend to show one of the following:
- a. that a criminal offence has been committed, is being committed or is likely to be committed;
 - b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
 - c. that a miscarriage of justice has occurred, is occurring or is likely to occur;
 - d. that the health or safety of any individual has been, is being or is likely to be endangered;
 - e. that the environment has been, is being or is likely to be damaged;
 - f. that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.
183. The Tribunal does not need to decide whether in fact there is a danger to health and safety (for example). It must decide:
- a. Did the claimant believe the information tended to show a danger to health and safety?
 - b. Was that belief “reasonable” for the claimant to hold?
184. The Tribunal does not usually have to decide whether the claimant’s concerns were correct.
185. The Tribunal must also consider whether the disclosure was, in the claimant’s reasonable belief, made in the public interest. Again, the question is not whether the disclosure was in fact in the public interest. The Tribunal must decide:
- a. Did the claimant believe disclosure was in the public interest?
 - b. Was it reasonable to believe that?
186. It does not matter if disclosure was also made in the claimant’s own interest.
187. The “public” can simply be other people employed by the same employer.

188. What is in the “public interest” is common sense looking at all the circumstances including:
- a. How serious was the matter?
 - b. How many people might be affected?
 - c. The identity of the wrong-doer.
189. Once the protected disclosure is identified, the Tribunal has to decide whether:
- a. the reason or main reason for the dismissal was one or more of the disclosures (section 103A ERA 1996); and/or
 - b. whether the reason or part reason for the detriments was one or more of the disclosures (section 47B ERA 1996).
190. In Kuzel v Roche Products Ltd [2008] IRLR 530, where the claimant had brought claims of unfair dismissal and automatic unfair dismissal related to a protected disclosure, the Court of Appeal effectively stated that there are no complex rules about who has the burden of proof in a protected disclosure case. The Employment Tribunal will just listen to the evidence as a whole.
191. Fecitt & Ors v NHS Manchester [2012] ICR 372 states that there is a lower threshold for causation in detriment complaints as compared to complaints of automatic unfair dismissal. What is required is that the protected disclosure materially (in the sense of more than trivially) influences the employer’s treatment of the whistle-blower.
192. The burden of proof in detriment claims is that the claimant must prove, on the balance of probabilities, that:
- a. there was a protected disclosure;
 - b. there was a detriment;
 - c. the respondent subjected the claimant to that detriment.
193. If the claimant can do that, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.
194. Turning to the protected disclosures relied upon by the claimant, which are set out at paragraphs 9 to 17 of her further and better particulars of her amended claim at B576-579. From our findings we reach the following conclusions.
195. On 15 August 2018, the claimant made a disclosure of information to a social worker, who is another responsible person under section 43C(1)(b)(ii) ERA 1996, that a criminal offence was likely to be committed.

196. On 22 August 2018, the claimant made a disclosure of information to her employer through Mr Barnes as a director of ABC and/or Mr Barnes as a director of UKCP for UKCP's legal responsibility that ABC/UKCP had failed to comply with any legal obligation and the health and safety of any individual is likely to be endangered (the duty of care owed to staff).
197. On 24 August 2018, the claimant made a disclosure of information to her employer through Mr Barnes as a director ABC and/or Mr Barnes as a director of UKCP for UKCP's legal responsibility that a criminal offence had been committed.
198. On 26 August 2018, the claimant made a disclosure of information to her employer through Mr Barnes as a director of ABC and/or Mr Barnes as a director of UKCP for UKCP's legal responsibility that a criminal act had been committed and the health and safety of any individual was likely to be endangered.
199. On 27 August 2018, the claimant made a disclosure of information to her employer through Mr Barnes as a director of ABC and/or Mr Barnes as a director of UKCP for UKCP's legal responsibility that ABC/UKCP had failed to comply with any legal obligation and the health and safety of any individual is likely to be endangered.
200. On 28 August 2018 the claimant made a disclosure of information to her employer through Mr Barnes as a director of ABC and/or Mr Barnes as a director of UKCP for UKCP's legal responsibility that ABC/UKCP had failed to comply with any legal obligation and the health and safety of any individual is likely to be endangered.
201. On 31 August 2018 the claimant made a disclosure of information to her employer through Mr Barnes as a director of ABC and/or Mr Barnes as a director of UKCP for UKCP's legal responsibility that ABC/UKCP had failed to comply with any legal obligation and the health and safety of any individual is likely to be endangered.
202. We accept that the claimant told Mr Alexander all of these things (including the claimant's conversation with the social worker) during their meeting given that she thought the meeting was held to discuss her concerns.
203. We are also satisfied from our findings that the claimant held a reasonable belief that these matters were in the public interest. They are clearly matters of public interest given the nature of the work with vulnerable young people.
204. We are satisfied that the claimant held a reasonable belief that these matters tended to show breach of a criminal offence, failure to comply with a legal obligation and that the health and safety of any individual was likely to be endangered as indicated above. She was clearly very concerned as to the implications not just for herself, but for the young people and the other members of staff.

Detriments

205. The detriments that the claimant alleges are set out at paragraphs 19 to 29 of her amended particulars of claim at B580-581.

206. Paragraph 19 alleges as follows:

"After the assault on 24th August, Mr Clayton Barnes initially told the claimant he would help her with her hair loss, namely recommending a hairdresser and stating that he would pay for a hairdresser to help her cover the baldness caused by the ripping of her hair from her head. This did not happen. What did happen was that Mr Barnes refused to meet with the claimant. The detriment suffered was this omission causing distress and financial loss."

207. This detriment is made out. Mr Barnes gave evidence that the claimant did not get back to him. There is no credible explanation for this and it is unsupported by the claimant's evidence and the emails we have seen. On balance of probability and given our general concerns as to his credibility we do not accept his evidence. The level of any financial loss and distress of course a matter for the remedy hearing.

208. Paragraph 20 alleges as follows:

"After the assault on 24th August, Mr Clayton Barnes told the claimant that if she was worried about paying bills, he could find work for her that would include outreach work and work at his other properties. This did not happen. What did happen was that the claimant was not offered any alternative employment within the organisation. The detriment suffered was this omission causing financial loss and distress."

209. This detriment is made out. Mr Barnes gave evidence that he did not have any work for the claimant in Croydon, where she had indicated she wanted to work. We found that the claimant said this to Ms Stone earlier in her employment and in a different context, she never expressed a view about working elsewhere when taken on a tour of Mr Barnes' other properties, actual and prospective, and he never asked her about this when he decided to take her off the rota. The level of any financial loss and distress is of course a matter for the remedy hearing.

210. Paragraph 21 alleges as follows:

"The claimant did not receive any call or contact from Ms Juliana Stone. The detriment was that she did not receive any support from the team leader following a violent assault and was ostracised. The detriment suffered was this act or omission causing distress."

211. This detriment is made out. In fact the claimant had to contact Ms Stone. No evidence was presented by the respondents as to why, particularly in the circumstances of a violent attack by one of the residents, Ms Stone did not contact the claimant. This appeared most odd. Particularly, when as they had previously spoken frequently and Ms Stone was a nurturing and caring person. When the claimant telephoned Ms Stone, having not heard from her, she said that she was unaware of the attack, Mr Barnes having not told her, but had found out from a colleague. This again appeared most odd. However, Ms Stone did not ask the claimant how she felt and simply told her she should have read CD's file. This again appeared most odd. Moreover, it was Ms Stone who later removed the claimant from the WhatsApp rota and without contacting her. The level of any distress caused is of course a matter for the remedy hearing.

212.

213. Paragraph 22 alleges as follows:

"On 28th August the claimant was removed from the Respondent's 'WhatsApp' group. The WhatsApp group was where the weekly rota was decided. The claimant would also use this to communicate with colleagues. The detriment suffered was this act. The claimant was removed from work-related activity and was unable to get access to the work rotas and was not able to work or to be offered work and suffered financial loss and emotional harm."

214. This detriment is made out. There was no credible explanation given for this action, certainly not without first speaking to the claimant. The level of any financial loss and emotional harm is of course a matter for the remedy hearing.

215. Paragraph 23 alleges as follows:

"On 29th August Mr Clayton Barnes told the claimant that his 'Designated Safeguarding Lead' Mr Andre Anderson would be in touch with her to ensure that all policies and procedures were up to date. The claimant is awaiting disclosure, but it appears that Mr Anderson did not work for UK Care Partnership, or for ABC Recruitment, and was not Mr Barnes's Safeguarding Lead. Secondly, the claimant's case is that this meeting was in fact part of a disciplinary process. It was an investigation into the claimant. The claimant should have been informed of this investigation. The detriment was that she was not informed as to the nature of the investigation. One detriment suffered was this omission. It is also a detriment that the claimant was investigated and that her capability was questioned. She would not have been investigated but for her protected disclosures. She should have been accompanied at the meeting. This caused further distress."

216. This detriment is made out. The evidence was inconclusive as to whether Mr Anderson was or was not employed by UKCP as Designated Safeguarding Lead. His role was unclear. The respondents' evidence as to what happened at this meeting was unsatisfactory. Indeed, they did not provide any first hand evidence. We could only go on what the claimant said and the report itself. Whilst the meeting with Mr Anderson was on the face of it not intended to be a disciplinary meeting but an investigation of the incident involving the claimant and CD, it did focus more on the claimant than on the policies and procedures that inform the practice within the organisation. Indeed, Mr Anderson interviewed Ms Stone who raised matters of conduct and capability about the claimant.

217. Nevertheless, the meeting clearly focused on the claimant in the end and Mr Anderson effectively drove a coach and horses through the procedures which one would have expected to have been the focus of such a meeting.

218. Furthermore, it does appear that Mr Anderson leapt on what, giving him the benefit of the doubt, was a misunderstanding of what the claimant said during the meeting as to being unsuited to the work, so as to make his recommendation that her employment cease.

219. There was no credible explanation given by the respondents as to why Mr Anderson's investigation and subsequent report moved from one which on the face of it was to be an enquiry into the incident with CD to one of enquiry into the claimant's ability to do her job, resulting in a recommendation, based on as we say in the very least his misunderstanding of what the claimant had said, to one that her employment should cease. This does not tally with what Mr Anderson said

to the claimant at the time of their meeting or what one would expect the role of someone held out to be a Designated Safeguarding Lead.

220. We would point out that there is no statutory right of accompaniment to an investigation meeting.

221. The level of any distress caused is of course a matter for the remedy hearing.

222. Paragraph 24 alleges as follows:

"During the meeting on 31st August with Mr Anderson, it was put to the claimant by Mr Anderson that she and Mr Barnes should meet for the purpose of discussing her concerns. Subsequently, Mr Barnes refused to meet with the claimant. The detriment was the refusal to meet with the claimant. The detriment suffered was this omission. This detriment caused distress."

223. This detriment is made out. As we have indicated in our findings Mr Barnes' evidence was less than credible in this regard. The level of any distress caused is of course a matter for the remedy hearing.

224. Paragraph 25 alleges as follows:

"Mr Barnes received the report (subject to further disclosure) on 6th October. He did not send this report to the claimant until 10th November. The detriment suffered was the withholding of the report. The detriment suffered was this omission that caused worry and stress."

225. This detriment is made out. The report was sent, according to the report itself, on 6 September. The claimant did not receive it until 10 November. There was no satisfactory answer provided for the delay. The level of any worry and stress caused is a matter for the remedy hearing.

226. Paragraph 26 alleges as follows:

"The claimant suffered the detriment of a suspension from her work from 28th August to 10th November, when she finally received the report written by Mr Andre Anderson (recommending that she no longer work for the company), without any formal process or documentation. The detriment suffered was suspension beyond the terms of her contract of employment and without reasonable grounds. The detriment caused was distress and financial loss."

227. This detriment is made out. Although the claimant was not suspended, she was initially told to stay at home given the circumstances and then it drifted, and then Mr Barnes made a decision to take the claimant off the rota (from 28 September 2018) but for both unreasonable and less than credible reasons: he says based on a mistaken understanding of the claimant's position and a recommendation in the report flowing from that and earlier incident reports raising concerns about the claimant's capability; but without speaking to the claimant. This is in the face of a clear statement in the claimant's email of 13 November which allowed him the opportunity to resile from his decision. The level of any financial loss and emotional harm is of course a matter for the remedy hearing.

228. Paragraph 27 alleges as follows:

"The claimant also suffered with stress and anxiety due to the way she was treated by the Respondent particularised in this document, after what was a vicious and shocking assault. The claimant's stress and anxiety led to depression. The claimant had to undertake counselling with the NHS and became unwell. The detriment suffered was a significant impact on mental health and well-being."

229. We accept the claimant's evidence in this regard (by reference to her email of 13 November at B413) and we find that the detriment is made out. The level of any injury to health is however more a matter for the remedy hearing.

230. Paragraph 28 alleges as follows:

"On 5th April 2018 the claimant's case is that she had been shown other properties run by the Respondent and she had been asked to consider a long-term position with the company, starting with the opportunity to be a team leader at a new location. The claimant was no longer offered any long-term opportunity with the Respondent. The detriment suffered was not getting this opportunity and suffering financial loss."

231. This detriment is made out. We found the claimant never expressed a view or said it was too far so there was no reason not to offer this again. Further we find that she was not asked. Prior to this in a different context she had said that she preferred to work in Croydon nearer to her home. The level of any lost opportunity and resultant financial loss is a matter for the remedy hearing.

232. Paragraph 29 alleges as follows:

"The Respondent did not follow the Whistleblowing policy namely para 8, 9 and 10. The claimant suffered a detriment because of this. Namely, no written acknowledgement that the concern had been received, no indication of how it would be dealt with, no estimate of how long it would take to receive a final response or the timescales involved, no information regarding initial enquiries, no information about support mechanisms, and the claimant not being informed of the right to be accompanied at the investigation meeting (this detriment causing her significant disadvantage). These actions and omissions caused a significant detriment to the claimant, both financial and to her mental health and well-being. The failure to inform her of the right to be accompanied also caused her a detriment as it deprived her of a valuable witness to what was said in the investigation meeting."

233. This detriment is made out. It was clear that Mr Barnes, incredibly, did not perceive these matters as amounting to protected disclosures even in the face of the clear policy defining what a protected interest disclosure was and his role within the policy. There is no statutory right of accompaniment in this context. The level of any financial loss and harm caused to her mental health and well-being is of course a matter for the remedy hearing.

234. We therefore conclude that the claimant's complaints of detrimental treatment by both respondents in respect of the making of protected disclosures is well-founded.

Unfair dismissal

235. In order to succeed in a complaint of unfair dismissal, a claimant has, of course to have been dismissed. The claimant relies on an actual dismissal by ABC based on its words and conduct. The respondents deny that the claimant was dismissed and say that she remained on ABC's books if work became available for her to undertake.

236. Usually it is clear from the circumstances that a claimant has been dismissed. The employer usually terminates the employment with or without notice, clear and unambiguous words are used and there is an

ascertainable end date of employment. Sometimes there are circumstances from which it can be argued that a dismissal has occurred where an employer behaves in a certain manner either by words or conduct.

237. But if there is a dispute over whether a dismissal has occurred, the onus is on the claimant to show on the balance of probabilities that she has been dismissed. If the Tribunal cannot decide this issue on the available evidence, the claimant's complaint will fail (Morris v London Iron and Steel Co [1987] IRLR 182, CA).
238. Where the employer's words are ambiguous, the Tribunal should look at the purpose and effect of those words in the light of all the surrounding circumstances and, in particular, the conduct of the parties and what happened before and after the disputed dismissal (Tanner v D T Kean Ltd [1978] IRLR 110, EAT). The Tribunal must then decide how a "reasonable" employee would have interpreted the employer's words (J & J Stern v Simpson [1983] IRLR 52, EAT). This would appear to be the argument that Ms Reilly raised in her submissions as to dismissal.
239. On the other hand, if the employer's words clearly indicated a dismissal, and are taken at face value, the dismissal probably stands even if the employer did not mean to dismiss and a reasonable listener would have understood that (but the case law is conflicting on this).
240. On the evidence that we heard, we were unable to reach the conclusion that the claimant had been dismissed. This was simply not dealt with sufficiently by the claimant in evidence.
241. Whilst the claimant stopped going into work at Mr Barnes' behest and he formed the view from Mr Anderson's report that she did not wish to continue working for ABC at UKCP's homes and it was not in UKCP's interests for her to do so, she was simply taken off the rota for work at UKCP but was still on ABC's books if future work was available for her which she wished to undertake.
242. The claimant did not want to work at Home B whilst CD was still placed there and had previously indicated that she preferred to work in Croydon. UKCP operated both the properties on ABC's books and these were both in Croydon. ABC had nothing else on their books. In addition, the claimant's position was somewhat blurred in that she had started to work elsewhere for CareOline at the time she still alleges she was employed by ABC.
243. Whilst we can well understand the claimant's concerns about the situation, the burden of proof is upon her to show that she was dismissed.
244. We do not believe that a reasonable person would construe the words used and the surrounding conduct as amounting to a dismissal, particularly given her employment as an agency worker by ABC to work at UKCP's homes.
245. Furthermore, we were not convinced that the failure to offer the claimant additional work in these circumstances where she was employed as an

agency worker on a zero hours contract was capable of amounting to a dismissal.

Further disposal

246. There will be a one day hearing to deal with remedy in respect of the detrimental treatment found. The parties are at liberty to arrive at a settlement of this matter. The parties should notify the Tribunal of the position by 18 March 2022 otherwise it will be listed for hearing on the first available date.
247. Four weeks before the date set for the hearing, the claimant shall send to the Tribunal and the respondents a witness statement dealing with remedy, if so advised, and an updated Schedule of Loss with evidence in support and if injury to health is claimed this should include medical evidence in support.
248. Two weeks before the date set for the hearing, the respondents, shall send to the Tribunal and the claimant a witness statement dealing with remedy, if so advised, and a counter Schedule of Loss.

Employment Judge Tsamados
Date: 6 January 2022