EMPLOYMENT TRIBUNALS

Claimant: **Ms M Jones**

Respondent: **Cygnet (DH) Limited**

HELD by Cloud Video Platform ("CVP") **ON: 30, 31 May & 8 June 2022**
Deliberations 20 July 2022

BEFORE: **Employment Judge Loy**
Members: **Ms B Kirby**
Mrs P Wright

REPRESENTATION:

Claimant: **Mr Price, Counsel**
Respondent: **Mr Boyd, Counsel**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. **The complaint of unlawful detriment contrary to section 47B Employment Rights Act 1996 is not well-founded and is dismissed.**
2. **The complaint of unfair dismissal contrary to section 103A Employment Rights Act 1996 is not well-founded and is dismissed.**
3. **The complaint for unpaid, accrued holiday pay contrary to section 13 Employment Rights Act 1996 and/or Regulation 16 Working Time Regulations 1998 is well-founded and succeeds. The respondent shall pay the claimant the agreed sum of £115.60**
4. **The complaint of failure to inform and consult contrary to Regulations 15 and 16 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is dismissed upon withdrawal by the claimant.**

Covid-19 Statement:

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

REASONS

The claimant's claims

1. By a Claim Form presented on 20 December 2019, the claimant brought claims of:

    (i) Unlawful "whistleblowing" detriment contrary to section 47B Employment Rights Act 1996 ("ERA 1996");

    (ii) Automatically unfair "whistleblowing" dismissal contrary to section 103A ERA 1996;

    (iii) Unpaid, accrued holiday pay contrary to section 13 ERA 1996 and/or Regulation 16 Working Time Regulations 1998 ("WTR"); and

    (iv) Failure to inform and consult contrary to Regulation 15 and 16 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2. On the first day of the hearing, Mr Price confirmed on behalf of the claimant that there was no claim in respect of unpaid wages over and above the claim in respect of unpaid holiday pay.

3. On day four of the hearing, Mr Price withdrew on behalf of the claimant the claimant's claim for failure to inform and consult under TUPE. The Tribunal notes that it was on account of late disclosure made during the hearing that the claimant was put in a position to withdraw this part of her claim.

4. It became apparent from excerpts of a heavily redacted sale and purchase agreement (bundle pages 507-509) that the method of acquisition of the Danshell Group (the original name of the claimant's employer) by Cygnet Health Care Limited took effect by way of a share acquisition. The legal effect of acquisition by share transfer is that there is no transfer of an undertaking within the meaning of Regulation 3 TUPE. That is because with a share acquisition there is no change to the identity of the employer. Rather there is only a change in the beneficial ownership of the same employing legal entity. The same applied to the beneficial interests in the Danshell LLP.

The hearing

5. The hearing was conducted remotely using Cloud Video Platform (CVP) technology. The claimant gave evidence on her own behalf. Another former healthcare assistant, Lynsey Hodgson, also gave evidence on behalf of the claimant.

6. The respondent called the following witnesses:

    (a) Alex Russell – HR Business Partner, Cygnet Health Care;

    (b) Adam Harris – HR Business Partner, Cygnet Health Care; and

    (c) Lyn Elliott – Head of HR Operations, Cygnet Health Care

7. No one from a senior management position in Cygnet gave evidence in any form despite the plain limitations to the evidence from the more junior Cygnet witnesses when it came to explaining key decisions. It was clear from the limitations to the evidence the Tribunal heard from the respondent's witnesses that all of the important decisions affecting Whorlton Hall in the aftermath of the Panorama documentary were (perhaps unsurprisingly) taken by members of the Cygnet senior management team. That included the key decisions on redeployment following the respondent's decision to close Whorlton Hall. Mr Peter Smith (Managing Director, Cygnet Social Care) and Ms Shareena Record (Cygnet Operations Director), both members of the respondent's SMT/Executive Committee, were particularly notable by their absence from these proceedings. Mr Shield, the Service Manager at Whorlton Hall, was dismissed in the light of the Panorama revelations and did not give evidence.

8. The parties prepared a bundle of documents consisting of 505 pages. To that bundle were added three documents which, although plainly disclosable in accordance with the Employment Tribunal Orders in this case, were only disclosed during the course of this hearing when specific disclosure orders were made on the Tribunal's own initiative. The respondent's failure to disclose these documents as ordered is, to put it mildly, far from satisfactory. The Tribunal is grateful to Mr Boyd for his assistance in rectifying the disclosure failures prior to his involvement in this matter.

9. The first document was a redacted copy of the sale and purchase agreement by which Cygnet Health Care Limited acquired the share capital of Danshell Holdings Limited and 98% of the partnership interests in Danshell Management LLP, bundle pages 506-509. The second document was a copy of a briefing regarding Whorlton Hall dated 23 May 2019, bundle pages 510-512. The third document was the notes of an Incident Coordination Meeting re: Whorlton Hall on 23 May 2019 held between 9:30 and 12:00, bundle pages 513-516.

10. The first morning of the first day (30 May 2022) was set aside for reading by the Tribunal. The parties attended at 14:00 on the first day. Evidence finished 15:05 on day 3 during the morning. The Tribunal deliberated on that afternoon oand again on 20 July 2022.

The Issues

11. There was no document listing all of the issues to be determined in the case. However, Employment Judge Garnon, at a private preliminary hearing by telephone on 25 January 2021, identified at paragraph 20 of his Notes of Discussion that the following were the main liability issues:

    (1) Did the claimant make one or more disclosures, of what, to whom, how and when?

    (2) Did she reasonably believe they tended to show a relevant failure, if so which one(s) and that the making of the disclosure was in the public interest?

    (3) Were the disclosure made in accordance with sections 43C to H ERA 1996?

    (4) Was the making of any disclosure the principal reason for dismissal or her selection for redundancy?

(5) Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

12. Employment Judge Garnon also ordered the claimant to send to the Tribunal and the respondent a statement of the protected disclosures she said she made, how she made them, to whom, approximately when, what relevant failures she believes they disclosed and the detriments, including dismissal, to which she claims to have been subjected as a result.

13. The claimant complied with that direction in a document which is at page 96 of the bundle and the respondent's reply to the alleged protected disclosures is at pages 97 to 99 of the bundle. The Tribunal summarises the statement of protected disclosures as follows:

Disclosure 1

14. This disclosure she says was made to Chris Shield, the Service Manager at Whorlton Hall Hospital. According to the claimant's evidence it was made on or around 12 April 2018 in writing by email. The relevant failure the claimant believes she disclosed was the inability of agency staff to speak and understand English, and the lack of adequate training of agency staff, *which was putting service users at risk*.

15. The detriments to which the claimant claims to have been subjected as a consequence of disclosure 1 were that:

(i) The claimant was placed at a personal risk of injury;

(ii) The claimant was unjustly treated during the redundancy process; and

(iii) Dismissal.

16. The respondent's position in response to the alleged disclosures is at pages 97 to 99 of the bundle.

17. In respect of disclosure 1 the respondent's position is that:

(a) It is not admitted that the claimant made the alleged disclosure on 12 April 2018. It is admitted that concerns were raised about the quality of agency staff. No admissions are made as to whether what she said amounted to a protected disclosure.

(b) It is not admitted that there was a disclosure of information.

(c) The claimant has not asserted what she contends the alleged disclosure tended to show in accordance with section 47B ERA 1996. It is not admitted that any belief is reasonable.

(d) No admission is made that the claimant believed that she was making the disclosure in the public interest and/or that such a belief was reasonable.

Disclosure 2

18. Between April and August 2018, the claimant alleges that she advised Mr Shield that untrained staff would not carry out the correct checks twice a day, for example, cutlery counts. Elsewhere, the claimant explained that counting the cutlery was necessary because, amongst other things, knives might go missing which service users could use for self-harm or to harm to others. The claimant

also says that she, on numerous occasions, advised that there were less than the required amount of staff working to ensure the requisite patient observation levels. The claimant advised that the day to day running of the hospital was falling below minimum standards, for example, the claimant having to work shifts in excess of 12 hours and being unable to leave due to service users otherwise being left alone and at risk to others and themselves.

19. The claimant says she made this disclosure verbally, between April and August 2018, to Chris Shield, Service Manager Whorlton Hall Hospital and to Steve Rodrup, Deputy Service Manager, Whorlton Hall Hospital.

20. The claimant identifies the relevant failures that she believes the disclosure made:

    (i) Breach of health and safety;

    (ii) Inadequate staffing levels and failure to meet the minimum operating standards;

    (iii) Abuse of service users (unnamed); by a member of staff

    (iv) Breach of health and safety and lack of management, leading to risk and injury to service users and staff.

21. The detriments to which the claimant says she was subject in respect of disclosure 2 were:

    (i) She was placed at personal risk of injury;

    (ii) She sustained personal injury;

    (iii) She was unjustly treated during the redundancy process;

    (iv) She was dismissed.

22. The respondent's position in respect of disclose 2 is as follows:

    (a) The respondent does not admit that the claimant made the alleged disclosures from April-August 2018.

    (b) It is not admitted that there was a disclosure of information.

    (c) The claimant has not asserted what she contends the alleged disclosure tended to show in accordance with section 47B ERA 1996. It is not admitted that any belief is reasonable.

    (d) No admission is made that the claimant believed that she was making the disclosure in the public interest and/or that such a belief was reasonable.

Disclosure 3

23. The claimant advised that a service user was being physically abused and assaulted by a member of staff. The claimant says it was raised verbally with the claimant's line manager (unnamed, but in all likelihood either to Wendy Owen, Charge Nurse or Mr Shield, Service Manager) in November 2018. The relevant failure the claimant believes was abuse of a service user by a member of staff.

24. The detriment that the claimant alleges she was subjected to as a result of disclosure 3 was that:

    (i) She was unjustly treated during the redundancy process;

(ii) Her dismissal.

Disclosure 4

25. The claimant advised of breaches of health and safety, concerns about patients and staff, and lack of assistance from management. The claimant further advised the physical injuries that she had sustained as a consequence of the failures of her employer. The claimant alleges that she made this disclosure in writing and delivered by hand (bundle pages 136-140). The claimant says she made the disclosure to Chris Shield, Service Manager on 27 November 2018. The relevant failure that the claimant believes she disclosed was breach of health and safety and lack of management, leading to risk and injury to service users and staff. The detriments to which the claimant says she was subjected as a consequence of disclosure 4 are:

(i) Placed at personal risk of injury;

(ii) Sustained personal injury;

(iii) Unjustly treated during redundancy process; and

(iv) Her dismissal.

Disclosure 5

26. The claimant advised that she sustained personal injuries as a result of low staffing levels in the hospital. The claimant says that she made this disclosure verbally over the telephone. The disclosure was made to Chris Shield, Service Manager on 21 January 2019. The relevant failure that the claimant believes this disclosure tended to show was breach of health and safety and inadequate staffing levels.

27. The detriments to which the claimant says she was subjected as a consequence of disclosure 5 were:

(i) She was placed at risk of personal injury;

(ii) She sustained personal injury;

(iii) She was unjustly treated during the redundancy process;

(iv) Her dismissal.

Disclosure 6

28. The claimant says that she advised that she had raised concerns about breaches of health and safety on a number of occasions in the past and her concerns had been ignored and not acted upon. She says that she raised these disclosures verbally at a meeting on 5 June 2019 with Mr Russell, HR Business Partner, Cygnet Health Care and that she provided Mr Russell with a copy of the document referred to at Disclosure 4 above (bundle page 136-140). The relevant failure that the claimant believes the disclosure tended to show was breach of health and safety and failure to respond.

29. The detriment to which the claimant says she was subjected as a consequence of disclosure 6 were:

(i) She was ridiculed, mocked and taunted by Mr Russell over the telephone on 28 June 2019 and in a consultation meeting on 8 July 2019;

(ii) She was unjustly treated during the redundancy process; and

(iii) Her dismissal.

30. The respondent's position in respect of disclosures 1 to disclosure 6 are broadly the same. In each case the respondent denies that there was a qualifying disclosure. The respondent does not admit there was a disclosure of information (as opposed to an allegation). The respondent says that the claimant has not asserted what she contends the alleged disclosure tended to show in accordance with section 47B ERA 1996. In each case the respondent does not admit that any belief was reasonable. In each case the claimant makes no admissions that the claimant believed that she was making the disclosure in the public interest and/or that such a belief was reasonable.

31. Specifically, in relation to disclosure 1, the respondent does not admit that the claimant made the alleged disclosure of 12 April 2018. The respondent admits that concerns were raised about the quality of agency staff. However, the respondent makes no admissions as to what the claimant said or whether what she said amounted to a protected disclosure.

32. In respect of disclosure 2, the respondent specifically says that it does not admit that the claimant made the alleged disclosures from April-August 2018.

33. In respect of disclosure 3, the respondent does not admit that the claimant made the alleged disclosures in November 2018.

34. In respect of disclosure 4, the respondent makes no admissions in relation to the "letter or body map".

35. In respect of disclosure 5, the respondent does not admit that the claimant made the alleged disclosure on 21 January 2019.

36. Finally, in respect of disclosure 6 the respondent does not admit that the claimant made the alleged disclosures on 5 June 2019. The respondent asserts that during the meeting on 5 June 2019, the claimant was asked, following the Panorama programme, whether she had witnessed any "abuse" of service users, which she said she had not.

37. Furthermore, the respondent asserts that even if the claimant has made a protected disclosure, the respondent denies that:

(i) The Tribunal has jurisdiction to hear any claim in relation to any detriment which took place more than three months prior to the presentation of the claim;

(ii) She has been subjected to any detriment on the grounds that she has made a protected disclosure; and

(iii) She was dismissed because she made a protected disclosure.

38. The respondent asserts that the claimant was dismissed by reason of redundancy after the closure of her place of work following the Panorama documentary which was aired on 22 May 2019.

Findings of fact

39. The claimant commenced work with the respondent (then the Danshell Group) as a Healthcare Assistant on 8 January 2018. The claimant entered into an undated written contract of employment which is at pages 126 to 132 of the bundle. The claimant's employment terminated, ostensibly by reason of redundancy, on 26 July 2019. The claimant presented her Claim Form on 21 December 2019. The claimant was based at Whorlton Hall Hospital near Barnard Castle in County Durham subject to a mobility provision in her contract of employment by which she agreed to "serve at such other place of employment as the company may reasonably specify to [her] in writing."

40. The claimant has considerable experience in care work (mainly mental health sector care work) having worked intermittently in the care sector for some 16 years as at the date of her Claim Form. At Whorlton Hall, the claimant was required to support service users on a 1:1, 2:1 and 4:1 observation at arm's length, as well as acting as a keyworker for certain service users. In those capacities, the claimant had a responsibility to ensure that service users, staff and the general public were safe at all times.

41. Whorlton Hall was a 22-bed private hospital providing accommodation and care for patients with autism and learning disabilities. The service users (i.e. the patients) had challenging behaviours by definition.

42. There were 59 employees working at Whorlton Hall before its closure on 23 May 2019. 42 (including the claimant) of the 59 employees were healthcare assistants. Whorlton Hall was regulated by the Care Quality Commission (the CQC) and was required to comply with applicable statutory requirements including statutory regulations.

43. In or around March 2018, the claimant began to notice problems at the hospital. She identified that staffing levels were dangerously low with agency staff used to hit minimum ratios. The claimant observed that the agency staff didn't always have the required training or qualifications, as a result of which the permanent staff had to work longer hours.

44. On or around 12 April 2018, the claimant says she started filing her concerns and complaints with Chris Shield, Service Manager at Whorlton Hall. She did this by email and a summary of her observations at that time were that:

    (1) Agency staff couldn't always speak or understand English;

    (2) The agency staff were inadequately trained and;

    (3) As a consequence of the above, service users were being put at risk.

45. The claimant had a meeting with Mr Shield shortly after sending the above mail where the same issues were raised again. The claimant is aware that one of her colleagues also raised a similar complaint around this time.

46. The Tribunal accepts the claimant's evidence that she raised these matters with Mr Shield. The Tribunal found the claimant to be a sincere and credible witness who plainly cared deeply about the treatment of the service users at Whorlton Hall and the ability of the care staff to provide the appropriate standard of care in a secure environment for both staff and the service users. It is also consistent with her subsequent interactions with management, which are much to the same effect, that she started raising concerns about service standards from relatively early in her employment.

47. The claimant presented Mr Shield with a copy of her notes of the problems that she had observed (bundle pages 136 to 140). Much of those comments relate to general management of the hospital. In the most part they are not matters which would raise serious alarm. For example, the claimant notes faults with care plans, debriefs and that charts were inconsistent.

48. Mr Shield's response to the concerns that the claimant had brought to his attention is at page 141 of the bundle. It is an undated letter to the claimant from Mr Shield. The terms of that letter are as follows:

> *"***Dear Michelle**
>
> **I am writing by way of an update and to thank you for your submitted statement where you raised a number of concerns. These concerns related to a particular set of night duties that you were working on Thursday 16 April 2018. There were also some wider issues noted.**
>
> **I would like to assure you that all of these concerns have been reported, addressed and acted upon. A full breakdown of required actions has been conducted and some operational changes made as a result of this.**
>
> **At the next earliest opportunity during your next shift I will personally go through these within a supervision forum with you and discuss face to face what these actions include.**
>
> **I look forward to following this up with you.**
>
> **Thank you once again Michelle,**
>
> **Regards**
>
> **Chris Shield (Service Manager)"**

49. It is worthy of note that the terms of this letter are constructive, express gratitude and envisage action being taken and having already been taken. The tone of the letter is very respectful towards the claimant and towards the fact that she is bringing concerns to the attention of the Service Manager. There is no indication of any irritation, indignation or annoyance. On the contrary, the response is constructive and supportive. We therefore find at this stage that the respondent reacted entirely properly to the concerns raised by the claimant, including in the way they treated her for having raised those concerns.

50. Between April and August 2018, the claimant says she continued to raise concerns with Mr Shield and the Deputy Service Manager at Whorlton Hall, Steve Rodrup. The claimant says she raised the following issues:

    (a) Breaches of health and safety – untrained and some trained staff would not do the correct checks which needed to be carried out twice a day, some of which were simple checks such as cutlery counts which were required to be done to ensure that knives did not go missing and be taken by service users who would use them as weapons or to harm themselves.

    (b) Staffing levels – there were numerous occasions on which the claimant observed where there were less than the required amount of staff working to ensure the requisite patient observation levels. The claimant says approximately 23 Healthcare Assistants should

have been scheduled per shift which would cover the minimum number of staff required to observe service users and for the response team. The claimant said there was never an occasion when she worked a shift at Whorlton Hall where there was the required number of staff available. The claimant said that she frequently saw the Chef and the Activity Organiser assist the Healthcare Assistants when attacks took place because there were not enough staff to cope or control the situations as they developed. As a result of being understaffed and/or of employing untrained staff, management had to employ what was termed as a "mixed staff rota" which entailed putting an unskilled or inexperienced member of staff alongside a "strong" member of staff who was someone who had more experience. The claimant said this often meant that when dealing with the most problematic service users, the more experienced member of staff was left to manage difficult situations alone which often involved having to protect the less experienced member of staff who would become targets.

(c) Day to day running of the hospital – as a result of the above issues, the day to day running of the hospital would also fall below minimum standards. The claimant says that she would often have to work 12 + hour shifts, sometimes not being able to leave at all due to service users otherwise being left alone and at risk to others and themselves. The claimant felt a sense of responsibility not to leave the service users alone when they would be at risk to themselves and others. The respondent did not call any evidence to contradict the claimant's evidence that she was in reality compelled to continue working beyond her contracted shift hours because of staff shortages

51. The Tribunal again accepts the claimant's evidence about the concerns what she says she raised between April and August 2018. The Tribunal did not hear from either Mr Shield or Mr Rodrup and, as has already been said, the Tribunal found the claimant to be a credible and mostly reliable witness both in the way she gave her evidence to the Tribunal and in its consistency with the contemporaneous documents such as the claimant's own notes of concerns to be found at pages 136-140 of the bundle.

52. On 31 July 2018, Cygnet Healthcare Limited acquired the beneficial ownership of Danshell Holdings Limited, including 98% of the beneficial ownership of the LLP membership which was part of the ownership structure of Danshell. It was common ground that there was no information provided to or consultation with the claimant or anyone representing the claimant at the time of the sale. It subsequently transpired when the respondent provided documents (albeit at the hearing rather than at the time ordered for disclosure to be made in accordance with Employment Judge Garnon's Orders) which allowed the claimant to concede that the acquisition by Cygnet of Danshell was by share acquisition with the effect that there was no change of employer with the effect that the Transfer of Undertakings (Protection of Employment) Regulations 2006 were of no application.

53. In or around September 2018, the claimant says that she was told by colleagues that a service user (AD) had been pinned up against a wall in the hospital by a member of staff. The claimant says that the staff member should have pulled the attack alarm but instead inappropriately managed AD. The member of staff

said that AD had tried to attack her. However, the claimant's position was that the staff member should have pulled the attack alarm in any event. The Tribunal accepts the claimant's evidence that she raised this matter with her line manager in November 2018. Although unnamed in the Claim Form and the claimant's witness statement, we find the reference to the claimant's line manager to be a reference either to Wendy Owen, the Charge Nurse at the hospital, or to Mr Shield, Service Manager. The Tribunal notes that in the claimant's contract of employment (bundle page 126), the claimant's Line Manager is identified as the Service Manager who was Mr Shield. The claimant's evidence was that she did not personally witness the abuse of A, rather that it had been reported to her by two colleagues. Nevertheless, the Tribunal finds that the claimant sincerely believed the abuse had taken place and that she had no reason to doubt the veracity of what her colleagues told her.

54. On 27 November 2018, the claimant wrote up a summary of numerous concerns relating to health and safety breaches; concerns about the safety of patients and staff; and the lack of assistance from management. The claimant handed this document to Mr Shield (bundle pages 136-140). The claimant also handed Mr Shield a body map of all of the injuries she said she had sustained personally as a result of the issues at the hospital confirming there were definite risks to health and safety. The Tribunal accepts the claimant's evidence that she handed to Mr Shield a copy of her notes at pages 136-140 of the bundle and that this included the body map of her injuries.

55. The claimant says Mr Shield initially said he would play devil's advocate with her as an attempt to justify the issues that the claimant was raising, but when it became clear the claimant was serious and told Mr Shield that she wished to resign from her role so seriously did she feel about the matter and the failure to address her concerns, Mr Shield made a note of the discussion and told the claimant he had organised a meeting with doctors, other professionals and HR so that there could be a further discussion of the concerns. The claimant says she was not contacted any further and that she was "simply ignored". The claimant said she drafted (but did not send) a letter of resignation (bundle page 146) such was the strength of her feeling about matters at the hospital and the inaction of management.

56. On 19 January 2019, the claimant was assaulted by a service user which caused her to take a period of sick leave which lasted until her employment was terminated, ostensibly by reason of redundancy, on 26 July 2019. The Tribunal accepts the claimant's (again undisputed) evidence that she telephoned Mr Shield on 21 January 2019 to inform him that she had suffered an injury at work and that she also told him that she felt that this had resulted from the low staffing levels at the hospital about which she had already complained to the respondent.

57. The claimant says that she was contacted on 21 January 2019 by Mr Shield when she was on sick leave. Mr Shield wanted to know when the claimant would be returning to work. The claimant told Mr Shield that she had been hurt as a result of low staffing levels in the hospital. The claimant says she once again reiterated her concerns to Mr Shield and that Mr Shield advised her that he would finally look back over the detailed concerns the claimant had sent in November 2018.

58. On 17 March 2019, Mr Shield and Audrey Jones (Healthcare Assistant) came to the claimant's house to meet with her (bundle page 166).

59. On 3 May 2019, Cygnet were informed by a letter from the BBC about an undercover investigation that it had undertaken at Whorlton Hall between December 2018 and February 2019. The letter identified the perpetrators of significant physical and mental abuse that had been carried out by Healthcare Assistants while the BBC reporter had been undercover at Whorlton Hall. It was common ground that the physical and mental abuse that had taken place at the hospital was on a very significant scale.

60. On 20 May 2019, Cygnet made the decision to close Whorlton Hall and, with the consent of the CQC, to transfer the residents to other sites both within and outside Cygnet. The notes of the multi-agency meeting on 23 May 2019 (bundle pages 513 to 516) reflect that the residents were transferred both to NHS Trusts and to independent sector care providers including Cygnet.

61. On 22 May 2019, the Panorama documentary aired. It uncovered abuse of patients at the hospital. The undercover filming showed patients at the hospital being mocked, taunted, intimidated and repeatedly restrained. The claimant watched this documentary and was shocked at the scale of the abuse of patients, which she said was far worse than she had ever witnessed or contemplated. The claimant had been absent from work on account of sickness throughout the period that the undercover reporter had been at the hospital. The claimant was concerned as to what would happen next with the patients, the hospital and her job. However, the claimant heard nothing from the respondent in the immediate aftermath of the documentary.

62. At the time, the claimant believed her employer was still the Danshell Group as she had not been informed that the respondent had taken over the ownership of Danshell. The claimant tried to contact management at least three times before she was told that someone from HR would call her back. When no one called the claimant, she went to her union for assistance. It was only after the claimant's union representative got in touch with Rita Clarke, Cygnet HR, that the claimant was made aware that she had not been contacted because the respondent had no knowledge of the claimant working for the company.

63. The claimant again contacted Ms Rita Clarke to ask for information about what was happening with the hospital. The claimant was told the respondent would be looking to find other units in which to place members of staff displaced at Whorlton Hall, but that this would take around a month. The claimant informed Ms Clarke that this situation could have been avoided had management looked into the concerns and issues she had raised previously. The claimant was forced to visit her GP that same day as she was not coping well with the stress and anxiety of having seen what had happened in the documentary but also what was now happening to her as a result. The claimant was prescribed medication and the claimant was advised to monitor her heart rate going forward.

64. On 23 May 2019, there was a multi-agency meeting to discuss the situation at Whorlton Hall. The notes of this meeting are at pages 513 to 516 of the bundle. This is one of the documents which was only disclosed to the claimant and the

Tribunal when a specific disclosure order was made by the Tribunal during the final hearing.

65. The meeting took place at The Old Exchange, Barnard Street, Darlington. It lasted between 9:30 and12:00. There were some 16 attendees at the meeting. There were seven attendees on behalf of NHS England/Improvement; a representative of the Care Quality Commission who dialled into the meeting by phone; Detective Superintendent ("DSU") David Ashton from Durham Police; a representative from Tees, Esk and Wear Valleys NHS Foundation Trust; a representative from Durham County Council; two representatives from the Care Commissioning Group, one of whom was the senior responsible officer; a lawyer from Howard Kennedy; and Mr Peter Smith and Ms Sharena Record representing Cygnet. Mr Smith and Ms Record were both members of the Cygnet senior management team. Mr Smith was the Managing Director of Cygnet, Social Care and Ms Record was the Operations Director for Cygnet. Their attendance at that meeting is the only documentary evidence of the involvement of the respondent's senior management team in the management of Whorlton Hall in the light of the Panorama exposé, and in particular the management of the implications of its revelations on the future employment of the Whorlton Hall employees.

66. In so far as these proceedings are concerned, the notes of the Incident Coordination Meeting are remarkable only to the extent that there is no reference whatsoever to any request for any assurances in connection with Whorlton Hall employees, whether from Durham Police, the CQC or any other organisation represented at the meeting. Equally, there is no reference to Cygnet offering any assurances to any organisation present at the meeting whether in response to a request from a stakeholder to do so or on a voluntary basis. That is so despite the respondent's explicit position, both during the management phase leading up to the redundancies of virtually all the Whorlton Hall employees and throughout this litigation, being that the reason why Cygnet could not redeploy Whorlton Hall employees after the closure of the hospital was that Durham Police had required Cygnet to provide assurances that no one at Whorlton would be redeployed unless Cygnet could be sure that individuals employees had no involvement in any patient abuse at Whorlton Hall, whether as perpetrators or witnesses.

67. The only reference to internal management of the hospital in the meeting notes of the Incident Coordination Meeting of 23 May 2019 is on page 513 of the bundle. It is entitled "***provider update***", where it is noted that all the patients have been transferred and that ***"Cygnet confirmed that they will follow HR process and act accordingly."*** There is no response to that confirmation in the notes of the meeting from any of the attendees and, as indicated above, no attempt by any of the attendees to influence in any way the internal management by Cygnet of its remaining employees at Whorlton Hall (i.e. those not engaged in potential criminal behaviour in the Panaroma programme).

68. The Tribunal also notes that in its Response Form, a document issued on behalf of the respondent at an organisational level, that there is no reference to any assurances being sought by the police or any other outside agency. It is only in the evidence of Ms Elliott, Mr Russell and Mr Harris, together with the contemporaneous documents created by those three individuals, that the

assurances, which were the central plank of the respondent's case, are to be found. In other words, there is no direct involvement of the Cygnet senior management decision-makers at any stage of these Tribunal proceedings.

69. Later on 23 May 2019, the claimant attended a meeting along with her colleagues following the Panorama Programme. The claimant had not been informed about the meeting, she was only told about it by one of her colleagues. The claimant decided that she needed to go to the meeting due to the lack of information she was receiving from the respondent. At the meeting the respondent advised the staff that the hospital was now closed. The staff were informed that an internal investigation would be undertaken once the police had investigated the matter. The respondent confirmed to the staff that they would look at vacancies within the region but there was a potential risk of some redundancies due to the hospital being closed. The respondent advised staff that the process of looking for alternative roles would take around 30 days but there would be meetings where the respondent would meet with staff to discuss the process and alternative potential roles. At this stage, the respondent's position on redeployment was therefore that they would make every effort to avoid redundancies.

70. On 27 May 2019, the respondent asked for nominations for the election of employee representatives for collective redundancy consultation purposes.

71. On 29 May 2019, all staff including the claimant were sent two letters. The first letter informed them of their 1:1 consultation meeting which would now take place on 5, 6, 7 June 2019 (bundle pages 344 to 345); and a second letter invited them to nominate an elected representative for collective consultation purposes. The respondent did not recognise UNISON. However, because of the level of membership within the affected group, the respondent invited UNISON regional representative to attend the collective consultation meetings.

72. By a letter dated 31 May 2019, the claimant was invited to a consultation meeting (bundle page 175E). The letter is from Ms Elliott, Head of HR Operations, Cygnet Health Care. At paragraph 2 of the letter (bundle page 175E), the purpose of the meeting is described as:

> ***"to discuss the redundancy situation and we would also like to ask you questions in relation to the abuse at Whorlton Hall.".***

The letter goes on to say:

> "I also have to inform you that ***at a meeting on 23 May 2019*** with senior management and the police, ***we had to give assurances to the police that we would not redeploy any staff, unless we were certain that they had not witnessed or been party to any abuse at Whorlton Hall.*** We are looking through the footage of the programme as quickly as possible and have requested further information from the BBC in order for use to expedite this matter."

73. This was the first that the claimant had heard about assurances being sought by the police (or anybody else) or assurances being given by Cygnet. Despite the direct reference in Cygnet's letter of 31 May 2019 to the Incident Coordination meeting on 23 May 2019, there is (as the Tribunal has already

noted) no mention whatsoever in the notes of the Incident Coordination meeting to any such assurances being sought by the police or any such assurances being given by Cygnet. It would be extraordinary to omit from those meeting notes reference(s) to such assurances had they actually been sought or given.

74. In these circumstances, the Tribunal finds (in the absence of any direct oral or any documentary to the contrary) that no such assurances were either sought or given and that Cygnet's senior managers were allowing Mr Russell and Ms Elliott to mislead the Whorlton Hall employees in the respondent's letter of 31 May 2019. In so finding, the Tribunal attaches no blame to either Mr Russell or Ms Elliott who were only able to proceed on the basis of the misinformation that they had been given by their managerial superiors.

75. The Tribunal is fortified in reaching that conclusion by the written evidence from DSU Ashton form Durham Police who was contacted by the claimant's solicitors prior to the litigation phase of these proceedings. On 2 August 2019, the claimant's solicitors wrote to DSU Ashton (bundle page 376) asking whether "***the police had instructed Cygnet to make redundancies***" due to the police ***"needing assurances that these employees had not witnessed or been party to any abuse at Whorlton Hall."***. In his response of 21 August 2019 (bundle pages 376-77), DSU Ashton says **"*The police have not instructed Cygnet Healthcare to make any employee redundant."*** DSU also confirms the ***"the police will remain impartial"*** from Cygnet Healthcare procedures seeking only evidence that related to the criminal investigation.

76. Mr Boyd pointed out that the question posed by the claimant's solicitors falls short of asking directly whether assurances were sought by the police. Rather, the question asks whether Durham Police instructed Cygnet to make redundancies based on any such assurances. Be that as it may, the Tribunal finds that on any fair reading of both communications taken as a whole, DSU Ashton made it very clear that there had been no interference in domestic Cygnet procedures by Durham Police. In so doing, DSU Ashton's reply is inconsistent with the respondent's position that Durham Police sought any assurances regarding redeployment (or otherwise) from Cygnet, whether at the meeting on 23 May 2019 or at all.

77. The Tribunal repeats that it heard no evidence from either of the respondent's senior management representatives who both attended the meeting on 23 May 2019. The Tribunal also notes that no attempt was made by the respondent's solicitors (who have been on record since the presentation of the Response Form) to clarify the information provided by DSU Ashton in his email of 21 August 2019 and further notes that there was no obligation on DSU Ashton to be as forthcoming as he was in his email of 21 August 2019.

78. DSU Ashton also confirmed that he had attended a multi-agency meeting concerning Whorlton Hall, presumably the meeting on 23 May 2019. DSU Ashton confirmed that the internal HR processes of the respondent were a separate matter to the police investigation and that the respondent's internal investigation did not have to await the outcome of the police investigation. DSU Ashton also said in his email that decisions about what would happen to the individual employees at Whorlton Hall were a matter for the respondent and not the police, adding that he thought decisions affecting individuals should be

approached on the basis of individual assessment of the risk posed individual by individual. Certainly DSU Ashton does not indicate any requirement or expectation by the police which might have contributed to a blanket approach to non-redeployment by the respondent and to the dismissal of all but two Whorlton Hall employees.

79. On 5 June 2019, the claimant attended her first individual redundancy consultation meeting with Mr Russell. Ms Emma Kavanagh, another Cygnet HR Business Partner, was also in attendance. The claimant was accompanied by her trade union representative, Sheila Wilson of UNISON (bundle pages 181 to 184). At that meeting the claimant provided Mr Russell with a copy of her handwritten notes originally supplied by the claimant to Mr Shield in November 2018 (bundle pages 136-140). It was common ground that the claimant handed over a copy of these notes to Mr Russell and the Tribunal also accepts that the claimant amplified her concerns verbally at the meeting including telling Mr Russell that she had previously raised heath and safety concerns and that those concerns had not been acted upon.

80. Mr Russell's evidence, which the Tribunal accepts, was that he assumed the claimant was giving him a copy of her notes for information purposes only. The Tribunal has come to that conclusion on the basis that it found Mr Russell to be a reliable and credible witness albeit one who had been placed in a difficult position by the respondent.

81. The Tribunal also noted that, while not wanting in any way to detract from the significance of the matters that the claimant had noted down, those matters were not on any assessment of the same order or scale as the serious physical and mental abuse that had by then already been publicly revealed in the BBC Panorama documentary aired on 22 May 2019 and which had also by then already led to Cygnet's senior management's decision taken on 20 May 2019 to close Whorlton Hall altogether. Indeed, the claimant herself accepts that was the case when she says at paragraph 21 of her witness statement about the Panorama revelations that, ***"I watched this documentary and was shocked at the scale of abuse of patients, which was far worse than I had ever witnessed or contemplated."*** For those reasons too, we accepted Mr Russell's evidence that he did not regard the copy of the claimant's notes, first handed to Mr Shield in November 2018, as having such significance that it required any immediate action either by himself or his superiors. Nor was there any evidence that Mr Russell passed a copy or otherwise conveyed the contents of the claimant's November 2018 notes to any of the respondent's senior management team, including Mr Smith and Ms Record the managers the Tribunal has found to have been the key decision-makers in the decision to effect a near blanket dismissal of all of the remaining Whorlton Hall staff.

82. The Tribunal does not accept the claimant's contention that the respondent's change of position on redeployment was caused or materially influenced by the fact or contents of the copy of the claimant's November 2018 notes or anything raised verbally that were handed to Mr Russell at the consultation meeting on 5 June 2019. The Tribunal finds that on 5 June 2019 both Mr Russell and Ms Elliott were understandably unclear about the precise implications for the remaining Whorlton Hall employees of the apparent requirement that Cygnet

needed to be certain that any redeployed employees had not "witnessed or been party to" any abuse.

83. To the extent that Mr Russell may have thought that redeployment was still a possibility as at 5 June 2019, the Tribunal finds that this was due to the uncertainty caused by the respondent's shifting position and not anything said or done by the claimant. The Respondent's initial position after the Incident Coordination meeting on 23 May 2019 was that it was looking at the BBC footage before coming to any decisions on redeployment. Subsequently, the respondent's position was that since certainty was not obtainable concerning the involvement of the remaining Whorlton Hall employees, that there would need to be a blanket dismissal of all service user facing staff. In short, the Tribunal rejects the claimant's submission that the Respondent's change of position on redeployment was caused or materially influenced by the fact or content of the notes handed by the claimant to Mr Russell on 5 June 2019 or by anything the claimant may have said or done prior to her dismissal whether before, at or after the meeting on 5 June 2019 or otherwise.

84. The Tribunal finds that the respondent's change of position arose out of the meeting on 23 May 2019. It was shortly after that meeting that the messages being given to Ms Elliott (and thereafter from Ms Elliott to Mr Russell) started to change. Unfortunately, due to the absence of any evidence from anyone present at that meeting on behalf of the respondent, the Tribunal is unable to say precisely why that was the case.

85. On 25 June 2019, the first collective redundancy consultation meeting took place. Ms Elliott, Head of Cygnet HR Operations, led the meeting for the respondent. The meeting included representatives of RCN and UNISON. The meeting was informed that as a result of the closure of Whorlton Hall, the respondent proposed to make 42 redundancies. During the meeting Ms Elliott said ***"Cygnet had to give a reassurance to Police that it would not redeploy staff"***. The notes of the meeting are at pages 185 to 189 of the bundle.

86. The Tribunal has carefully considered whether either or both Mr Russell and Ms Elliott were told by senior Cygnet management that in fact that no assurances were sought by the police at the meeting on 23 May 2019 (or at any other time). The Tribunal has concluded that they were not. Neither Mr Russell nor Ms Elliott attended the Incident Coordination Meeting on the morning of 23 May 2019. Neither were therefore in any position to know directly what had or had not been discussed at that meeting. They were both reliant on Mr Smith and/or Ms Record for any account of what happened at that meeting, including whether the police or any other organisation had sought assurances from Cygnet. The Tribunal finds that the respondent' senior management team alone were aware that no assurances had been sought by the police (or anyone else) and that Mr Smith and Ms Record deliberately led Ms Elliott (who passed it on to Mr Russell) to believe that assurances on redeployment had been sought when, based on the evidence the Tribunal heard, they had not. The Tribunal finds that Cygnet's senior management misled Ms Elliott and Mr Russell with a view to Ms Elliott and Mr Russell passing that misinformation onto the Whorlton Hall employees and employee representatives as a pretext to justify what quickly became a blanket dismissal of all the service user facing employees at the hospital.

87. At the consultation meeting on 25 June 2019, Ms Elliott confirmed that Helen Grundy and Colin Patten had been redeployed. Ms Elliott's explanation was that neither Helen Grundy nor Colin Patten interacted with the service users to any material extent and therefore could not be party to any of the abuse. Helen Grundy was an administrator at Whorlton Hall and she was being retained to ensure that there was a liaison with the police and to deal with the relevant administration consequent upon the closure of the hospital and the transfer of the thirteen patients to other care providers. Mr Patten undertook maintenance for the property and he was retained while Whorlton Hall was made secure. He was subsequently made redundant.

88. On 26 June 2021, the claimant was told by her UNISON rep what had happened at the meeting on 25 June 2019. After receiving the update from UNISON the claimant went to Durham Police Headquarters and asked to speak to the Investigating Officer on the Whorlton Hall matter. She was asked to leave her number and would be telephoned back. Within five minutes of leaving Police Headquarters, the Investigating Officer (presumably DSU Ashton) called the claimant on her mobile telephone. During the course of the conversation, DSU Ashton denied that the police had instructed the respondent to make redundancies and said that the police had no power to do so. DSU Ashton said that the police had encouraged the respondent to do its own investigation. Both of those statements directly contradicted what the respondent had already told the trade unions, the lay employee representatives and the Whorlton Hall employees, including the claimant.

89. On 27 June 2019, Mr Russell sent a letter to the claimant arranging for a final individual consultation meeting on 4 July 2019. That meeting actually took place on 8 July 2019 for reasons that are not material. The claimant was warned in that letter that a potential outcome of the meeting could be the termination of her employment by reason of redundancy.

90. On 28 June 2019, the claimant telephoned Mr Russell. The claimant says that Mr Russell was "rude and evasive" on the phone. Mr Russell confirmed that the respondent was acting on police instructions when coming to the decision to make all the remaining employees at Whorlton Hall redundant. The claimant says that Mr Russell "goaded" her about the consultation process (see the claimant's witness statement paragraph 31).

91. On 1 July 2019 the second collective consultation meeting took place (bundle pages 192 – 195).

92. On 8 July 2019, the claimant attended her second individual consultation meeting with Mr Russell. Mr Russell told the claimant that the respondent had decided not to redeploy any more staff from Whorlton Hall. Mr Russell said what he understood to be the case which was that Cygnet had given assurances to the police and the CQC that the respondent would not redeploy anyone (see Mr Russell's witness statement paragraph 23). The claimant says that at that second consultation meeting Mr Russell was dismissive of her concerns and was "rude and condescending" towards her.

93. The Tribunal accepts that the claimant may have genuinely perceived Mr Russell's manner on both 28 June 2019 and 8 July 2019 in the way that she describes it, but the Tribunal finds that Mr Russell behaved professionally at all

times in his interactions with the claimant, albeit in difficult circumstances and against a background where he was given no room for manoeuvre by his superior management. In short, the Tribunal finds that Mr Russell did his best and in good faith on the basis of the information and brief he had been given. Having carefully considered the evidence of the claimant and Mr Russell, the Tribunal prefers the evidence of Mr Russell that he was not dismissive, rude, condescending or evasive towards the claimant

94. By a letter from Ms Elliott dated 17 July 2019, the claimant was dismissed on one week's notice (bundle pages 210-212). The claimant was informed of her right of appeal. A total of 31 employees received a similar letter and were also dismissed ostensibly by reason of redundancy because of the alleged need for assurances relating to non-redeployment required by Durham Police but which could not be given by Cygnet. As previously indicated, there were only two redeployments: Ms Grundy and Mr Patten.

95. On 22 July 2019, the claimant appealed against her dismissal.

96. On 26 July 2019, the claimant's employment terminated.

97. On 29 July 2019, Mr Russell wrote to the claimant arranging an appeal hearing for 6 August 2019 (bundle page 218). Also on 29 July 2019, Mr Shield, Service Manager at Whorlton Hall, was summarily dismissed for negligence following the Panorama revelations.

98. On 6 August 2019, the claimant's appeal hearing took place. The respondent's appellate officer was Mr Harris, another Cygnet HR Business Partner. The claimant was accompanied by her UNISON representative, Tony Martin. The notes of the appeal are at the bundle pages 222-224. After the meeting, Mr Harris liaised with Ms Elliott who again confirmed that assurances had been given that Whorlton Hall staff would not be redeployed (Mr Harris witness statement paragraph 11).

99. By a letter of 19 August 2019, Mr Harris informed the claimant that her appeal had been unsuccessful (bundle pages 227-228). In that letter Mr Harris says:

> **"In a meeting with several regulatory bodies and two senior managers of Cygnet, Shareena Record, Operations director and Peter Smith, Managing Director on 23 May 2019, the police, present at the meeting, asked for reassurances from Cygnet that we would not redeploy any staff from Whorlton Hall unless we were certain that they had not been involved in any abuse of vulnerable adults. Cygnet agreed to this, given we were and are co-operating with the police with this matter…**
>
> **… It is impossible for us to say who was or wasn't involved or witnessed abusive behaviour…**
>
> **… Therefore, we believed the fairest way to deal with the staff group was to make them all redundant."**

100. The kitchen staff and the cleaning staff along with all remaining Healthcare Assistants were therefore dismissed, ostensibly by reason redundancy. Mr

Harris says that all appellants were treated the same, and the letter of 19 August 2019 sent to the claimant dismissing her appeal became a template for the other appellants. Mr Harris says in his statement that no wider issues were taken into account, including any disclosure, protected or otherwise. He essentially confirms it was a blanket dismissal pursuant to assurances sought by outside bodies, in particular Durham Police.

101. Turning to the question of the reason for the claimant's dismissal.

102. Mr Russell verbally dismissed the claimant at the second consultation meeting on 8 July 2019. This was followed by a letter from Ms Elliott of 17 July 2019 confirming her dismissal. On both occasions, the claimant was told that the reason for her dismissal was redundancy arising out of the respondent's decision to close Whorlton Hall, together with the assurances on non-redeployment that had been sought by police.

103. The Tribunal finds that the effective cause of the claimant's dismissal was not the closure of Whorlton Hall, but the misinformation that either Mr Smith or Ms Record gave, or caused to be given, to Ms Elliott to the effect that Durham Police had asked for assurances on redeployment which Cygnet were not able to give. Ms Elliott then cascaded that information to down to amongst others Mr Russell and Mr Harris.

104. The closure of the hospital is plainly part of the background to the respondent's decision-making. However, it became the respondent's explicit position during May and June 2019 that it would no longer seek to redeploy any of the remaining hospital staff despite there being alternative opportunities elsewhere in Cygnet and despite the presence of mobility clauses in the contracts of employment of (at the least) the Healthcare Assistants. The Tribunal therefore finds that although the background to the claimant's dismissal may well have led to a reduced requirement for employees in general or at the place of work at Whorlton Hall, the effective cause of the claimant's dismissal (in common with the 20+ other Healthcare Assistants also dismissed by the respondent) was the respondent's unevidenced assertion that Durham Police had sought undeliverable assurances on redeployment.

Relevant law

Meaning of protected disclosure

105. In order to gain the protection provided under the Employment Rights Act 1996 for "whistleblowing", the claimant must first of all show that she made a "protected disclosure". Protected disclosure must fall within the definition of a disclosure qualifying for protection section 43B. It must also show that the method of disclosure is in accordance with one of the methods identified at section 43C to 43H ERA 1996.

106. Section 43B sets out the definition of a disclosure which qualifies for protection. Section 43B provides:

> (1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

…

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

107. This requires there to have been

- a disclosure of information;
- which, in the reasonable belief of the worker (an objective test)
- tends to show one or more of a number of failures; and
- the worker reasonably believes that the disclosure is made in the public interest (a subjective and objective test).

108. Thereafter the disclosure must be made to an appropriate person within the meaning of paragraphs 43C to 43H. In this particular matter, it is not in dispute that the alleged Disclosures 1-6 were made by the claimant to the claimant's employer and, accordingly, the method of disclosure relied upon by the claimant is that under section 43C – disclosure to employer or other responsible person.

Definition of redundancy section 139 ERA 1996

109. The definition of redundancy is set out at section 139 ERA 1996. It provides as follow:

139.— Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by

reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed

by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the

employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

Unfair dismissal – section 103A ERA 1996

110. It is common ground that the claimant does not have the right to be "ordinary" unfairly dismissed contrary sections 94 and 98 ERA 1996 since she did not have the period of 2 years' qualifying service as required by section 108(1) ERA 1996 ending with the effective date of termination. The claimant's case is that she falls within one of the exceptions which does not require two years' service. In particular, the claimant says that her dismissal was automatically unfair contrary to section 103A ERA 1996. Section 103A provides that:

> "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".

111. Given the claimant's lack of qualifying service, the burden of proof is on her to show that the reason for her dismissal (or if more than one, the principal reason) was that she made a protected disclosure. Smith v Hayle Town Council [1978] ICR 996 and Ross v Eddie Stobbart EAT 0068/13. If the claimant is able to establish a prima facie case that the reason, or principal reason, for her dismissal was her protected disclosure(s), it will then be for the respondent to produce evidence to the contrary: Smith v Hayle Town Council [1978] ICR 996. If the claimant discharges that burden the dismissal is automatically unfair. However, if the reason or principal reason for the dismissal is not that the claimant made protected disclosure, then no matter how inappropriate the reason or how unfairly the matter was managed, the claimant will not be able to establish that she has been automatically unfairly dismissed.

112. Section 105 provides as follows:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
>
> (b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer …

113. Accordingly, the same principles of automatically unfair dismissal apply where the claimant is selected for dismissal from a pool of employees in the same circumstances as her.

114. It follows that the requirement of establishing causation between a protected disclosure made by the claimant and the reason for her dismissal is very important indeed. The Supreme Court decision in Royal Mail v Jhuti [2019] UK SC 55 makes clear that where a bogus reason is invented by an employer but the decision maker adopts that in good faith "it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination" – Jhuti paragraph 60. The protected disclosure(s) must be the sole or principal reason or cause of the decision to dismiss. In Kuzel v Roche Products [2008] EWCA Civ 380; [2008] IRLR 530, Mummery LJ dealt with the

issue of causation in a case where the employee had two years' service such that the employer had to prove the main reason for dismissal. Mummery LJ remarked as follows;

"

> *57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*
>
> *58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*
>
> *59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was.* ***But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so****."*

115. In Aslef v Brady [2006] 3WLUK 885, the Employment Appeal Tribunal found that even where a Tribunal accepts there was a prima facie potentially fair reason open to the respondent (on the facts of the Brady case the prima facie potentially fair reason was misconduct, whereas in this case the prima facie potentially fair reason for the dismissal is redundancy), the Tribunal must go on and assess whether that was in fact the reason operating on the respondent's mind.

116. As per Elias P in that case (substituting the word "misconduct" for the words "redundancy situation";

> *"it does not follow therefore that whether there is a redundancy situation which could justify dismissal, a Tribunal is bound to find that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the redundancy situation an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for dismissal – the operative cause – will not be the redundancy situation at all since that is not what brought about the dismissal, even if the redundancy situation in fact merited dismissal. Accordingly, once the employee has put in issue with proper evidence of the basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the Tribunal is left in doubt it will not have*

done so … On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There was a difference between a reason for dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords."

Detriment – section 47B/48

117. Section 47B includes:

> (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.
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, …
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (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).
>
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

118. Section 48 provides:

> *(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.*
>
> *(2) On a complaint under subsection … (1A) … it is for the employer to show the grounds on which any act, or deliberate failure to act, was done.*
>
> *(5) In this section and section 49 any reference to the employer includes—*
>
> *(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.*

119. Importantly, whereas in respect of the automatically unfair dismissal claim the protected disclosure must be the sole or principal reason for the dismissal in order for the dismissal to be unfair under section 103A, in a claim of subjection to detriment the protected disclosure only has to materially influence the treatment where "*material*" means "*more than trivial*", and it is for the employer to show why it acted as it did. In the case of Fecitt v NHS Manchester [2012] ICR 372, Elias LJ said once the employer has satisfied the Tribunal it has acted

for a particular reason, that necessarily discharges the burden of showing the protected disclosure played no part in it, but if the Tribunal considers the reason given is false or it has not been given the full story it is legitimate to infer the treatment was by reason of the protected disclosure."

120. It is for the claimant to specify what detriments which do not "amount to dismissal" she is complaining about. In the case of Timis v Osipov [2018] EWCA Civ 2321 Underhill LJ said of the dividing line between a detriment and a dismissal claim as follows:

> *"(1) It is open to an employee to bring a claim under section 47B (1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B (1B). All that section 47B (2) excludes is a claim against the employer in respect of its own act of dismissal.*
>
> *(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B (2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply."*

121. Mr Boyd in his written submissions said as follows (which the Tribunal takes into account):

> "*The burden of proof in whistleblowing detriment claims is often misunderstood. While section 48(2) ERA provides that it is for the employer to show the grounds on which any act or deliberate failure to act was done, it does not follow that once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant ie that there was a protected disclosure, that there was a detriment and the respondent subjected the claimant to that detriment, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the grounds that he or she had made the protected disclosure."*

Holiday pay

122. The parties were in agreement on the quantum of the holiday pay claim. The agreed amount of accrued unpaid holiday pay upon termination (assuming the claimant could prove the facts required) is £115.60.

123. There is much detailed law on this issue, but the Tribunal has regard to the need for proportionality given the relatively modest sum involved. In summary, following the case of Bear Scotland and Fulton the position in respect of overtime – in particular whether overtime payment should be included in the calculation of holiday pay – reached the position where only overtime that was obligatory on both sides i.e. compulsory under the contract to be given and to be worked, was to be included in normal working hours for the purposes of calculating a week's pay and which would also apply in the case of holiday pay calculation.

124. In Tarmac Roadstone Holdings Ltd v Peacocks [1973] ICR 273 three scenarios were identified:

    (a) Guaranteed compulsory overtime: even if the employee is not called to work yet the employer is liable to pay the employee for that compulsory period. Such pay was to be included in the calculation of normal working hours and therefore in the calculation of holiday pay.

    (b) Voluntary overtime: an employee cannot be required to work overtime and the employer does not have to provide it. Pay in respect of such voluntary overtime was excluded from the calculation of normal working hours and therefore excluded from the calculation of holiday pay.

    (c) A "halfway house": where the employee is obliged to work overtime if required but the employer is not obliged to provide overtime. In this halfway house situation overtime pay needs to be included in the calculation of normal working hours and therefore in the calculation of holiday pay.

125. Accordingly, the key issue was whether or not the claimant fell into the "halfway house" category in that there was no contractual obligation on both sides and nor was there any guaranteed compulsory of overtime regardless of whether or not the employee was required to work it.

Submissions

126. Both parties' representatives made written and oral submissions.

127. The written submissions were of great assistance to the Tribunal, not least because they summarised their respective contentions in respect of one of the key matters in this case, namely whether or not there was any causative link between any protected disclosure made by the claimant and any detriment suffered by the claimant and/or the claimant's dismissal. The Tribunal recognises the different causative requirements in respect of the claims for detriment and in respect of the claim for automatic unfair dismissal as set out in the relevant law section above.

The claimant's submissions

128. The Tribunal has taken all of Mr Price's submissions into account. The Tribunal has highlighted parts of those written submissions below.

129. It is accepted that the claimant was dismissed by the respondent.

130. It is accepted by the respondent that one alleged public interest disclosure was a qualifying disclosure communicated to the decision-maker who the respondent identifies as Mr Russell, Human Resources Business Partner Cygnet Health Care. That disclosure is at pages 176 – 180 of the bundle. It is essentially the disclosures made initially in November 2018 (bundle pages 136 to 140) to Mr Shield which were then handed to Mr Russell during a redundancy consultation meeting on 5 June 2019. The claimant submits that qualifying disclosures were also made to Mr Shield on 27 November 2018 which were, as indicated above, essentially re-presented to the respondent when given to Mr Russell by the claimant on 5 June 2019 at the claimant's first individual consultation meeting. The claimant points out that within the scope of those

disclosures the claimant was highlighting possible abuse of patients (see bundle page 176).

131. The claimant submits that the only real issue for the Tribunal is to determine the reason, or if more than one, the principal reason for the claimant's dismissal. The claimant says in relation to assessing that matter that it is highly relevant for the Tribunal to make factual determinations of why the respondent did not even seek to redeploy the claimant.

132. The claimant submits that it has established a prima facie case that the reason or principal reason, for her dismissal was her protected disclosure and that it is therefore for the respondent to produce evidence to the contrary. In support of the contention that the claimant has raised a prima facie case, the claimant submits that while there was a risk of redundancy arising from the closure of Whorlton Hall, the scope for that redundancy being implemented is not well evidenced by the respondent. The claimant points to the total number of staff and Healthcare Assistants within that group that were affected. In the light of mid-hearing disclosure it became clear that the BBC had explicitly identified 21 members of staff as having been involved in the abuse of patients observed by the undercover reporter. Those employees were subject to disciplinary proceedings or resigned. Mr Russell's evidence was that 31 people were made redundant (see his witness statement at paragraph 24) whereas when Ms Elliott held the collective consultation meeting on 25 June 2019 there was a proposal to make 42 people redundant (bundle page 185).

133. The claimant points to the mobility clause in the claimant's contract of employment (see bundle page 127). The claimant says that there were many other sites to which the claimant could have been redeployed. The claimant points to the shifting explanation on redeployment which moved from being a likelihood at least for some of the Healthcare Assistants to a complete non-starter for any of them. The claimant points out that prior to 23 May 2019 the respondent believed it could and would redeploy staff (bundle page 187) and that was communicated in terms to the claimant and others within the potentially at risk redundant group.

134. The respondent relies on the multi-agency meeting on 23 May 2019 at which members of the respondent's senior management team (Mr Peter Smith, Managing Director of Cygnet Social Care and Shareena Record, Operations Director Cygnet DH Limited) were in attendance. The claimant properly points out that neither Mr Smith nor Ms Record gave evidence to the Tribunal about what appears to be their plain involvement in the key decisions in relation to whether or not any employee at risk of redundancy at Whorlton Hall would be redeployed elsewhere.

135. After the multi-agency meeting on 23 May 2019, the claimant was informed by Ms Elliott in her letter of 31 May 2019 (bundle page 175E) that redeployment could only take place if the respondent was **"certain that they had not witnessed or been party to any abuse at Whorlton Hall"**. The respondent was explicit in that letter that this was because the respondent had **"had to give assurances to the police"** to that effect.

136. The claimant submits that at some point between 5 June 2019 and 25 June 2019 the respondent's position on redeployment significantly changed. The claimant submits that there was no satisfactory explanation for this change in the respondent's evidence. There were no further multi-agency meetings. Ms

Elliott was unable to help the Tribunal about exactly when the decision was made to rule out redeployment. The claimant points out that it was on 5 June 2019 at her first consultation meeting that the claimant passed to Mr Russell the document that she had first provided to Mr Shield in November 2018 and which the respondent now accepts was a protected disclosure for the purposes of section 43A and B ERA 1996. It was Mr Russell's evidence that he believed that Ms Elliott had provided a copy of the claimant's disclosure to Mr Smith, the Managing Director.

137. The claimant submits that neither Mr Russell, nor anyone else at the respondent, provided any details of the claimant's disclosure to the police in order, says Mr Price, to suppress the fact that the claimant had raised highly material concerns relating to patient abuse going back to November 2018. Mr Price also points to the fact that two employees (Ms Helena Grundy and Mr Colin Patten) were in fact not made redundant at the same time as the Healthcare Assistants and, in the case of Ms Grundy, she was redeployed to an alternative role within the Cygnet group.

138. The claimant submits that the contents of the claimant's disclosure were made available to the respondent's executive committee who then took the decision to impose an all-out blanket ban on redeployment of the Whorlton Hall employees. The claimant submits that the claimant's disclosures dating back to November 2018 would have been unwelcome to the respondent because, this then became a case where the respondent might have cause to be subject of internal or external criticism or scrutiny for failure to deal with disclosures relating to patient abuse at a significantly earlier stage than the revelations made by the BBC's undercover investigation which occurred between December 2018 and February 2019.

139. Mr Price also refers to the evidence of Ms Elliott who said it was the respondent's executive committee that had decided that the claimant, along with the other remaining Whorlton Hall employees who had not been identified by the BBC, should no longer be considered for redeployment and dismissed. In the words of Ms Elliott, the executive committee decided that the respondent would "not carry on with the employment" of staff formerly working at Whorlton Hall.

140. In those circumstances, Mr Price submits that the claimant has raised a prima facie case that the reason or principal reason for her dismissal was her protected disclosures.

141. Understandably, Mr Price relies on the notes of the pivotal meeting on 23 May 2019 were only produced at this hearing in response to an order for specific disclosure that the Tribunal made of its own motion. Although an order was made for specific disclosure, the documents ordered to be disclosed fell squarely within the order for general disclosure made by EJ Garnon and should therefore have been disclosed pursuant to the disclosure orders made at the preliminary hearing on 25 January 2021. Mr Price (in the Tribunal's view fairly and accurately) refers to the absence of those notes from the respondent's disclosure as a "remarkable omission". Again, the claimant also points out the respondent has chosen not to call either Mr Smith or Ms Record to give evidence leaving the HR managers who appeared before the Tribunal to give evidence of how they implemented instructions from their superiors and leaving them to be accountable to this Tribunal for responding to the claimant's serious allegations in these proceedings.

142. Mr Price says there is therefore no evidence to support the respondent's case that there was ever any assurance requested by the police to the effect that the respondent would not redeploy Whorlton Hall staff; and no evidence that any such assurance was given voluntarily. The claimant submits that on the balance of probabilities no such assurance was ever sought or given.

143. Furthermore, there is the positive evidence of DSU Ashton. In his email of 21 August 2019 (bundle pages 376-377), DSU Ashton responds to a letter from the claimant's solicitors making certain enquiries about the role of the police in the internal decisions taken by the respondent after the police became aware of the Panorama investigation on 3 May 2019. In the claimant's solicitors' letter, DSU Ashton is asked **"whether or not the police instructed Cygnet Health Care that they were required to make all employees who worked at Whorlton Hall redundant due to the police needing assurances that these employees have not witnessed or been party to any abuse at Whorlton Hall?"** DSU's Ashton's response was a simple one, **"the police have not instructed Cygnet Health Care to make any employee redundant."** While this falls short of being a direct answer to the question posed, Mr Price says that there was no support in that letter for the respondent's claim that it had been required to give assurances by the police.

144. In response to the question ***"what instructions were given to Cygnet about the redundancy process if any?"***, DSU Ashton responds that he made clear at the multi-agency meeting (presumably on 23 May 2019) that internal disciplinary procedures were a matter for Cygnet Healthcare to progress and that the police would remain impartial to those procedures. DSU Ashton stresses that the internal disciplinary procedures and the police investigation were two separate processes operated by two separate entities.

145. DSU Ashton also says regarding the wider safeguarding risk posed by those who had not been directly involved in the abuse revealed by the BBC, that those employees working at Whorlton Hall would need to be subject to **"an assessment on an individual basis taking recognition of information known in relation to that individual's behaviour or conduct"**. Mr Price fairly points out that nothing in DSU's letter supports the respondent's case. He says that the police simply did not involve themselves, or even see it as part of their role to involve themselves, in the internal decision-making of the respondent in general and on the question of redeployment in particular.

146. Mr Price also addresses the key issue of causation. Mr Price submits that the respondent's case appears to be that the claimant was not an outlier and that she was simply dismissed along with the blanket policy to dismiss 40 or so other employees. Mr Price rejects that analysis and says that the claimant was indeed an outlier. Only the claimant raised protected disclosures relating to the care of patients and service standards during her consultation meetings. It was the claimant's disclosures, Mr Price submits that caused the senior management team to change its position on redeployment. As in the case of Royal Mail Limited v Jhuti, the dismissal may have been communicated by a relatively junior employee, Mr Russell, but the actual decision not to redeploy the claimant was taken by the executive committee. Put bluntly, Mr Price says that Ms Elliott's evidence that the respondent was unable either to investigate or to redeploy because of the requirement to give assurances to the police is untrue and was fabricated as a way to limit the company's exposure. Mr Price

invites the Tribunal to do its duty as identified in Jhuti "to penetrate through the invention rather than to allow it also to infect its own determination".

147. Mr Price on the question of unfair dismissal therefore invites the Tribunal to reject the respondent's case on the basis that the evidence quite simply does not support the reason (redundancy) that the respondent gave for not redeploying the claimant.

The claimant's position on detriment – 47B ERA 1996

148. Mr Price also relies upon his submissions in relation to the unfair dismissal claim in respect of the claim for unlawful detriments.

149. Mr Price identifies three particular detriments:

(a) Being exposed to and suffering personal injury;

(b) Mr Russell's mocking, taunting and ridiculing of the claimant during their meetings of 28 June 2019 and late July 2019; and

(c) Unjust treatment of the claimant during the redundancy process.

150. The first detriment, namely exposure to injury, Mr Price says occurred as a result of Mr Shield's deliberate failure to act when the claimant disclosed in November 2018 the risk to health and safety of the inadequate and inexperienced staffing of Whorlton Hall.

151. Mr Price submits that the Tribunal should accept the version of the meetings with Mr Russell that the claimant provided in evidence. Mr Price says that if the claimant was ridiculed or mocked this would plainly constitute a detriment. Mr Price says that the reason for this ridiculing and mocking, which was a change in Mr Russell's behaviour after the meeting on 5 June 2019, was because Mr Russell received during the course of that meeting a copy of the claimant's prior disclosures, leading Mr Russell to perceive the claimant as a trouble maker. Mr Russell's attitude towards the claimant altered as a direct result of the telephone call on 28 June 2019 which caused her to prepare an email in a state of distress (bundle pages 191A to 191D).

152. In relation to the treatment during the redundancy process, the claimant identifies the failure to investigate the likelihood that she was involved in the abuse; the decision not to assess her suitability for redeployment and the respondent's refusal to redeploy the claimant because of an assurance which was never actually sought or given as amounting to unjust treatment. That unjust treatment continued up until the dismissal of the claimant's appeal.

Holiday pay

153. Mr Price submits that the Tribunal should accept the claimant's evidence that she would "regularly work 12.5 hour shifts" alternating between three and four days each week and would never get out before midnight. Mr Price concedes that the claimant had no contractual right to overtime, however he says that non-guaranteed overtime must be taken into account when calculating holiday pay in accordance with Bear Scotland Limited v Fulton [2015] ICR 221 EAT. Mr Price essentially submits that the claimant was left with no choice but to work beyond her contracted shift hours due to the understaffing and the need to ensure that the patients were taken care of and were not a risk to themselves or others given the specialist nature of the hospital at Whorlton Hall.

The respondent's submissions

Unfair dismissal: section 103A ERA 1996

154. The respondent accepts that the notes at pages 136 to 140 of the bundle which were handed to Mr Russell at the consultation meeting on 5 June 2019 amount to a protected disclosure.

155. Mr Boyd submits that the Tribunal should be mindful that that this is not an "ordinary" unfair dismissal claim. The claimant did not have two years' service and the principles relating to the general fairness of a dismissal by reason of redundancy or otherwise simply do not come into consideration in this case.

156. Mr Boyd refers to the following factors that the claimant needs to overcome in order to succeed in her automatic unfair dismissal claim:

(a) There is no dispute that the Panorama programme which aired on 22 May 2019 displayed extremely troubling scenes of actual physical and mental abuse against vulnerable hospital patients. Mr Boyd submits that when assessed in the context of the BBC revelations of abuse, the matters that the claimant disclosed to Mr Russell on 5 June 2019 and previously to Mr Shield during and after April 2018, were of a relatively minor scale;

(b) There is no dispute that there was a decision taken by the respondent's senior management team to close down Whorlton Hall Hospital after learning on 3 May 2019 of what the undercover BBC reporter had found and before the airing of the programme on 22 May 2019;

(c) There is no dispute that there had been approximately 42 Healthcare Assistants employed at the hospital which included the claimant;

(d) There is no dispute that there were some alternative employment positions within the Cygnet organisation into which some of the affected Whorlton Hall might in principle have been redeployed;

(e) There is no dispute that none of the 42 Healthcare Assistants was redeployed by the respondent – the two individuals who were kept on had little, if any, meaningful contact with the service users;

(f) There is no suggestion that all 42 Healthcare Assistants were whistleblowers;

(g) There were a substantial number of Healthcare Assistants who were not redeployed and who were not whistleblowers;

(h) As a matter of logic, the respondent was unable to say with absolute certainty which, if any, of the remaining Healthcare Assistants could be said not to have been involved in any abuse of service users at any time; and

(i) It was therefore understandable that the respondent would take the blanket view that it did not to redeploy any of the remaining Healthcare Assistants.

157. Mr Boyd recognises what he calls the "one sizeable evidential gap". That gap relates to the alleged rationale behind the respondent's decision not to redeploy anybody (other than the two noted exceptions) from Whorlton Hall into other roles within Cygnet and instead to dismiss them ostensibly by reason of

redundancy. In particular, the contention that the police, the CQC or any other external agency sought reassurances that the respondent would not redeploy any employee who they could not be certain had not been involved in witnessing or perpetrating any abuse. Mr Boyd pragmatically acknowledged the unhelpful failure by the respondent to disclose the minutes of the meeting of 23 May 2019 at the appropriate stage. He says that those minutes do not make "specific reference to assurances being sought by those bodies, nor was there any supporting emails or communications directly confirming the point."

158. In fact, the minutes of the meeting of 23 May 2019 do not make <u>any</u> reference to any assurances being sought or being given whether specific or otherwise. The plain truth is that the notes make no reference whatsoever to any assurances or to any instruction that the respondent should not carry out its own internal investigation and there is no other written or direct oral evidence that any such assurances were either sought or given. Indeed, Mr Boyd, for understandable reasons, does not address in his submissions the email from DSU Ashton in which DSU Ashton makes clear that the police would not and could not intervene in the internal decision-making of the respondent and did not do so on this particular occasion.

159. Nevertheless, Mr Boyd relies on the evidence of Ms Elliott which he said was to the effect that Ms Elliott had been told by either Mr Smith or Ms Record after they had both attended the multi-agency meeting on 23 May 2019 that there was to be no redeployment because of "assurances" sought by the police at that meeting, and that Ms Elliott in turn communicated that information to Mr Russell who then conducted the redundancy consultation meetings with the claimant. Mr Boyd repeats that the content of the disclosure to Mr Russell at pages 136 to 140 of the bundle are modest in comparison with the actual abuse shown on the Panorama programme. In those circumstances, Mr Boyd said it would defy all common sense for the respondent to make a decision not to redeploy the claimant or any other Healthcare Assistant because of those relatively modest disclosures.

160. In those circumstances, Mr Boyd submits that it cannot be said that the reason, or if more than one the principal reason, for the dismissal of the claimant was because she had "blown the whistle".

<u>Whistleblowing detriment</u>

161. Mr Boyd's submissions relating to the claimant's detriment claims is that either the alleged detriments did not take place (the alleged mocking, taunting and ridiculing of the claimant by Mr Russell); or if they did take place they were not connected to any extent to any disclosure(s) made by the claimant.

162. Mr Boyd submits that it would also be illogical in the context of dealing with the fall out to the Panorama programme for the "relatively benign matters raised in the claimant's disclosure document" for that to have led Mr Russell to adopt a ridiculing, mocking and taunting tone from start to finish as alleged in the meetings between the claimant and Mr Russell on 28 June 2019 and 8 July 2019. Mr Boyd submits that what may have occurred is that the claimant became so bitter about her plight (and understandably so) that she was construing matters rather more negatively than was in fact the case.

163. In relation to the alleged "unjust treatment during the redundancy process", Mr Boyd says it is unclear to what this relates. The claimant said it related to the mobility clause in her contract of employment – in other words

redeployment. Mr Boyd says that this allegation of detriment is therefore already addressed in his submissions in relation to allegedly unlawful dismissal.

164. Furthermore, the claimant also identified as a detriment the fact that she was "overlooked" when she was not invited to the first staff meeting after the respondent had become aware that the BBC would be airing a Panorama programme containing scenes of abuse of service users. The claimant said it was a colleague and not any of the respondent's managers that told her about this meeting. Mr Boyd points out that the claimant later seemed to accept in cross examination that the reason she had not been told formally about this meeting was that she was absent from work through illness at the time. In any event, Mr Boyd says it seems manifestly unlikely that this had anything to do with whistleblowing.

Holiday pay

165. Given the relatively modest amount in dispute, Mr Boyd dealt with this matter pragmatically, and submits that if the Tribunal find that the claimant was "obliged to work overtime if required" that the effect of the authorities in relation to the question of how to calculate holiday pay including in relation to overtime would entitle the claimant to the agreed sum of £115.60. Mr Boyd says that on balance the evidence shows that she was not so obliged but, as Mr Boyd says, the respondent "recognises the sum is a modest one."

Discussion and conclusions

166. The respondent original position is that is does not admit that any of the disclosures were made by the claimant. During the hearing, Mr Boyd made a limited concession to the effect that Disclosure 6 had been made and could amount to a protected disclosure. The respondent faces significant evidential difficulties, since it did not call Mr Shield, Mr Rodrup or any other witness to whom Disclosures 1-5 were made to give evidence. The Tribunal found the claimant to be a credible and, for the most part, reliable witness and the Tribunal accepted as true that the information that she says she disclosed to her employer was so disclosed.

167. Dealing with each of the disclosures in turn.

Disclosure 1

Did the claimant make one or more protected disclosures, of what, to whom, how and when?

Was there a disclosure of information and, if so, to whom?

168. *Disclosure 1*. The Tribunal has accepted that the claimant disclosed information to Mr Shield, Service Manager, to the effect that agency workers at the hospital could not speak or understand English sufficiently to undertake their role as Healthcare Assistants at Whorlton Hall and that some agency staff were inadequately trained. The claimant says that this was done on or around 12 April 2018. However, the Tribunal find that the information was disclosed on or after 16 April 2018 in reliance on Mr Shield's undated but contemporaneous response to the claimant at page 141 of the bundle which refers to a number of the concerns raised by the claimant having occurred on the night shift of Thursday 16 April 2018. Mr Shield's letter is itself consistent with the claimant having made Disclsoure1.

Did she reasonably believe that they tended to show a relevant failure, if so, which one and that the making of the disclosure was in the public interest?

169. The Tribunal accepts that the claimant sincerely and reasonably believed that the standard of English and level of training some agency staff was putting service users at risk. The claimant is clear about the information she is disclosing and Mr Shield's letter at page 141 of the bundle accepts that the claimant's disclosure was substantially accurate when Mr Shield says to the claimant that ***"he would like to assure [her] that all of these concerns have been reported, addressed and acted upon."*** Raising reasonably held concerns about the welfare of patient care tends to show that the health or safety of an individual has been, is being or is likely to be endangered within the meaning of section 43B(1)(d) ERA 1996. The Tribunal also readily accepts that the claimant reasonably believed that her disclosure, made as it was by a care assistant in the context of the discharge of statutory healthcare duties, was made in the public interest.

170. The Tribunal therefore concludes that Disclosure 1 was a disclosure made within the meaning of section 43B ERA 1996

Were the disclosures made in accordance with sections 43C to H ERA 1996?

171. It was common ground that all of the claimant's disclosures were made either to Mr Shield (Service Manager) or Mr Russell (HR Business Partner). In both cases the claimant made her disclosures to her employer and accordingly were all disclosed to her employer in accordance with section 43C(1)(a) ERA 1996.

172. The Tribunal therefore accepts that Disclosure 1 was a protected disclosure.

Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

173. The claimant alleges that she was subjected to three detriments on the grounds that she made Disclosure 1:

    (i) The claimant was placed at personal risk of injury;

    (ii) The claimant was unjustly treated during the redundancy process; and

    (iii) Dismissal.

174. The fundamental problem that the claimant faces when contending that she was subjected to the detriment of being placed at personal risk of injury on the grounds that she made Disclosure 1, is that the detriment identified is in fact the subject matter of the claimant's disclosure not a consequence of it. It is not sufficient for a claimant to identify a breach or potential breach of health and safety and then rely on the fact that the breach so identified has not been rectified as the detriment complained of. The detriment must be an act or a failure to act by the employer on the ground that the claimant has made a protected disclosure. A state of affairs which pre-existed the making of a disclosure and continued thereafter cannot be a relevant detriment unless the employer's failure to act/rectify the breach after the disclosure has been made was itself on the grounds that the claimant had made a protected disclosure.

175. It was no part of the claimant's case that the reason why nothing was done after April 2018 about the standard of English and/or inadequate training of agency workers was related in some way to the fact of the claimant's Disclosure 1 (or

any other Disclosure). The claimant's case was that her concerns were simply ignored by substandard management rather than that management inactivity was itself some form of reaction or response to Disclosure 1 (or any other Disclosure). On that basis, the Tribunal does not find that the claimant was subjected to the detriment identified at paragraph 173(i) on the grounds that the she made a protected disclosure. That part of the claimant's claim therefore fails.

176. In respect of the detriment at paragraph 173(ii) above - that the claimant was unjustly treated during the redundancy process on the grounds that the claimant made Disclosure 1, the Tribunal first notes that the nature of this unjust treatment was identified at the hearing as Mr Russell's allegedly dismissive, rude and condescending behaviour towards the claimant after the claimant had on 5 June 2019 handed Mr Russell a copy of her November 2018 notes and verbally brought other concerns to Mr Russell's attention.

177. The Tribunal has at paragraph 93 above found that Mr Russell did not behave towards the claimant in the way the claimant alleges. The Tribunal has found that that it was the claimant's understandably heightened sensitivities at the time that led to her perceiving Mr Russell as dismissive, rude and condescending. Since the Tribunal has found that the alleged detriment did not happen at all, these parts of the claimant's claim must fail.

178. The Tribunal addresses the issue of dismissal separately below.

Disclosure 2

Did the claimant make one or more protected disclosures, of what, to whom, how and when?

Was there a disclosure of information and, if so, to whom?

179. Disclosure 2.The Tribunal has accepted at paragraph 51 above the claimant's evidence in respect Disclosure 2. The Tribunal has accepted that the claimant disclosed information to the respondent as is clear from the Tribunal accepting that the claimant provided details to Mr Shield and Mr Rodrup in relation to the cutlery count not always being carried out to ensure knives did not get into the possession of service users; the claimant bringing to the attention of Mr Shield/Mr Rodrup that the respondent was not maintaining minimum staffing ratios; that there had been abuse of service users; and that the respondent was allowing workers to be put at risk of injury due to the lack of experience of some Healthcare Assistants.

Did she reasonably believe that they tended to show a relevant failure, if so, which one and that the making of the disclosure was in the public interest?

180. The Tribunal noted that the respondent did not call any evidence to contradict the claimant's evidence with the result that the Tribunal was satisfied that the claimant having directly observed the matters she disclosed herself had reasonable grounds to believe they tended to show that the health or safety of an individual had been, was being or was likely to be endangered within the meaning of section 43B(1)(d) ERA 1996. Again, given that the information related to the standard of healthcare given to vulnerable adults and the safety of the care workers themselves, the Tribunal was satisfied that the claimant had reasonable grounds to believe that making the disclosure was in the public interest.

Were the disclosures made in accordance with sections 43C to H ERA 1996?

181. Disclosure 2 was made to the claimant's line managers and therefore her employer. The Tribunal therefore accepts that Disclosure 2 was a protected disclosure.

Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

182. The claimant alleges that she was subjected to four detriments on the grounds that she made Disclosure 2:

    (i) She was placed at personal risk of injury;

    (ii) She sustained personal injury;

    (iii) She was unjustly treated during the redundancy process;

    (iv) She was dismissed.

183. The claimant faces the same difficulties in respect of the alleged detriments at paragraph 182 (i) and (iii) as she does in relation to the alleged detriments at paragraph 173 (i) and (ii). The Tribunal therefore repeats its conclusions at paragraphs 174 and 175 above in relation to the alleged detriment at paragraph 182 (i) above of being placed at personal risk of injury on the grounds of having made Disclosure 2.

184. In relation to the detriment identified at paragraph 182(ii), the Tribunal similarly concludes that the fact that the claimant sustained a personal injury on 19 January 2019 when she was assaulted by a service user was not on the grounds that she made Disclosure 2 between April and August 2018 (or any other Disclosure).It was again the circumstances about which the claimant complained (and not the fact that she disclosed them to the respondent) that, putting the claimant's claim at its highest, caused or contributed to the claimant suffering a personal injury.

185. In relation to the detriment identified at paragraph 182(iii), the Tribunal repeats its conclusions at paragraph 176 above.

186. These parts of the claimant's claim to have been subjected to detriment therefore all fail.

187. The Tribunal addresses the issue of dismissal separately below.

Disclosure 3

Did the claimant make one or more protected disclosures, of what, to whom, how and when?

Was there a disclosure of information and, if so, to whom?

188. The Tribunal has accepted at paragraph 53 above that in November 2019 the claimant told Mr Shield verbally that a service user (AD) was being physically abused by a member of staff. The Tribunal accepts that this was a disclosure of information to the respondent, albeit without the identity of the member of staff being identified.

Did she reasonably believe that they tended to show a relevant failure, if so, which one and that the making of the disclosure was in the public interest?

189. The Tribunal has also found at paragraph 53 above that although the claimant did not directly witness this incident, she sincerely believed that what she was told about the incident by two of her colleagues was true and that she had no reason to doubt the veracity of her colleagues. The Tribunal concludes that the claimant also had reasonable grounds to believe that that the information disclosed to the respondent tended to show that the health or safety of an individual (service user AD) and of other service users had been, was being or was likely to be endangered within the meaning of section 43B(1)(d) ERA 1996. Once again, given the context and nature of this disclosure the Tribunal concludes that the claimant plainly had reasonable grounds to believe that her disclosure was in the public interest.

Were the disclosures made in accordance with sections 43C to H ERA 1996?

190. Disclosure 3 was made to the claimant's line manager and therefore her employer. The Tribunal therefore accepts that Disclosure 3 was a protected disclosure.

Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

191. The claimant alleges that she was subjected to two detriments on the grounds that she made Disclosure 3:

    (i) She was unjustly treated during the redundancy process;

    (ii) She was dismissed.

192. In respect of the alleged detriment at paragraph 191(i) above, the Tribunal repeats its conclusions at paragraph 176 above.

193. These parts of the claimant's claim to have been subjected to detriment therefore all fail.

194. The Tribunal addresses the issue of dismissal separately below.

Disclosure 4

Did the claimant make one or more protected disclosures, of what, to whom, how and when?

Was there a disclosure of information and, if so, to whom?

195. The Tribunal has accepted at paragraph 54 above that the claimant did disclose to Mr Shield the matters to which she refers in Disclosure 4 which included information about the injuries that says she suffered as a result of the risks to which the staff were being put, together with a body map of her injuries and a copy of her notes at pages 136 to 40 of the bundle. Those notes plainly disclose information about failures to count cutlery and to take other steps to ensure a safe environment for both service users and staff.

Did she reasonably believe that they tended to show a relevant failure, if so, which one and that the making of the disclosure was in the public interest?

196. The Tribunal has accepted that the claimant reasonably believed that the information disclosed by the claimant in Disclosure 4 tended to show that the health or safety of an individual – staff and service users - had been, was

being or was likely to be endangered within the meaning of section 43B(1)(d) ERA 1996. The claimant refers to the injuries she suffered which has to be put in the context of the claimant's repeated contentions that the ratios and training deficiencies at the hospital were such that staff were at risk of injury and the possible failure to ensure that service users might be able to get hold of knives and other potentially dangerous objects also indicates the reasonableness of the claimant's belief. We repeat what the Tribunal has already said in respect of Disclosures 1, 2 & 3 that in the context of providing healthcare to vulnerable adults the claimant plainly reasonably believed that making Disclosure 4 was in the public interest.

Were the disclosures made in accordance with sections 43C to H ERA 1996?

197. Disclosure 4 was made to the claimant's line manager and therefore her employer. The Tribunal therefore accepts that Disclosure 4 was a protected disclosure.

Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

198. The claimant alleges that she was subjected to four detriments on the grounds that she made Disclosure 4:

(i) Placed at personal risk of injury;

(ii) Sustained personal injury;

(iii) Unjustly treated during redundancy process; and

(iv) Her dismissal.

199. The claimant again faces the same difficulties in respect of the alleged detriments at paragraph 198 (i) to (iii) as she does in relating to the alleged detriments at paragraph 173(i) & (ii) and paragraph 182 (ii) above. The Tribunal therefore repeats its conclusions at paragraphs 174, 175, 176 and 184 above in respect of those three alleged detriments to which the claimant alleges she was subjected on the grounds of Disclosure 4. It follows that all these parts of the claimant's claim fail.

200. The Tribunal addresses the issue of dismissal separately below.

Disclosure 5

Did the claimant make one or more protected disclosures, of what, to whom, how and when?

Was there a disclosure of information and, if so, to whom?

201. The Tribunal accepted at paragraph 57 above that the claimant did disclose to her line manager, Mr Shield, the matters to which she refers in Disclosure 5 which included the fact that she had sustained personal injury as a result of low staffing levels in the hospital and reiterating the concerns she raised in Disclosure 4.

Did she reasonably believe that they tended to show a relevant failure, if so, which one and that the making of the disclosure was in the public interest?

202. The Tribunal again concludes that the claimant reasonably believed that the information disclosed by the claimant in Disclosure 5 tended to show that the health or safety of an individual – staff and service users - had been, was being or was likely to be endangered within the meaning of section 43B(1)(d) ERA 1996. The claimant refers to the personal injury she sustained on 19 January 2019 which has to be put in the context of the claimant's repeated contentions, reiterated again on 21 January 2019, that low staffing levels were putting staff at risk. The Tribunal again repeats what it has already said in respect of Disclosures 1, 2 3 & 4 i.e. that in the context of providing healthcare to vulnerable adults the claimant plainly reasonably believed that making Disclosure 5 was in the public interest.

Were the disclosures made in accordance with sections 43C to H ERA 1996?

203. Disclosure 5 was made to the claimant's line manager and therefore her employer. The Tribunal therefore accepts that Disclosure 5 was a protected disclosure.

Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

204. The claimant alleges that she was subjected to four detriments on the grounds that she made Disclosure 5:

(i) She was placed at risk of personal injury;

(ii) She sustained personal injury;

(iii) She was unjustly treated during the redundancy process;

(iv) Her dismissal.

205. The Tribunal repeats its conclusions at paragraphs 174, 175, 176 and 184 above in respect of the same three alleged detriments to which the claimant alleges she was also subjected on the grounds of Disclosure 5. In addition, it was the claimant's own case both that Disclosure 5 was made on 21 January 2019 and that she sustained the specific personal injury to which Disclosure 5 appears to relate two days proper to that on 19 January 2019 (see bundle page 96 page). To the extent that Disclosure 5 relates to the personal injury sustained by the claimant on 19 January 2019, it cannot to any extent have been caused by Disclosure 5 which was not made until 2 days later. These parts of the claimant's claim therefore fail.

206. The Tribunal addresses the issue of dismissal separately below.

Disclosure 6

Did the claimant make one or more protected disclosures, of what, to whom, how and when?

Was there a disclosure of information and, if so, to whom?

207. The Tribunal accepted at paragraph 79 above that the claimant did on 5 June 2019 disclose to Mr Russell a copy of her notes of failings at Whorlton Hall that she originally passed as Disclosure 4 to her line manager Mr Shield, as well as telling Mr Russell verbally about other safety related matters and concerns that she had previously raised with Mr Shield during her employment. The Tribunal has also already found that those disclosures involved the provision by the claimant of information to the respondent.

Did she reasonably believe that they tended to show a relevant failure, if so, which one and that the making of the disclosure was in the public interest

208. The Tribunal has already found that the disclosures that were re-presented to the respondent as Disclosure 6 at her consultation meeting with Mr Russell on 5 June 2019 were disclosures that the claimant reasonably believed tended to show that the health or safety of an individual or individuals – staff and service users - had been, was being or was likely to be endangered within the meaning of section 43B(1)(d) ERA 1996. The Tribunal repeats that conclusion here.

Were the disclosures made in accordance with sections 43C to H ERA 1996?

209. Disclosure 6 was made to the claimant's line manager and therefore her employer. The Tribunal therefore accepts that Disclosure 5 was a protected disclosure. Indeed, Mr Boyd conceded in his written submissions that at least part of Disclosure 6 was capable of amounting to a protected disclosure.

Did the respondent subject the claimant to any detriment which did not amount to dismissal? If so, did it do so, at least partly, on the grounds she made one or more protected disclosures?

210. The claimant alleges that she was subjected to three detriments on the grounds that she made Disclosure 6:

    (i) She was ridiculed, mocked and taunted by Mr Russell over the telephone on 28 June 2019 and in a consultation meeting on 8 July 2019;

    (ii) She was unjustly treated during the redundancy process;

    (iii) Her dismissal.

211. The Tribunal has found at paragraph 93 above that the claimant was not treated in a dismissive rude or condescending way by Mr Russell. It transpired at the hearing that detriments (i) and (ii) at paragraph 210 above were essentially one and the same. Having found that Mr Russell behaved professionally during all of his interactions with the claimant, it follows that the Tribunal rejects that these detriment took place with the effect the claimant was not subjected to them. It further follows that these parts of the claimant's claim fail.

212. The Tribunal addresses the issue of dismissal separately below.

Was the making of any protected disclosure the principal reason for the claimant's dismissal?

213. The claimant contends that her dismissal was on the grounds the she made six disclosures separately and/or cumulatively.

214. Section 103(A) ERA 1996 renders automatically unfair a dismissal the reason (or, if one than one, the principal reason) for which is that the employee made a protected disclosure. No period of qualifying service is required.

215. The Tribunal has set out at paragraphs 102 to 104 above its findings on the reason for the claimant's dismissal. The Tribunal finds that it was a member of the respondent's senior management team (most likely Mr Smith or Ms Record) who effectively took the decision to dismiss the claimant by implementing a revised policy of blanket dismissal. The respondent's position on redeployment radically shifted from initially proactively seeking redeployment opportunities, to a broadly blanket dismissal of all but two of the Whorlton Hall employees. Ostensibly, this was because assurances on redeployment were required by Durham Police at the Incident Coordination Meeting on 23 May 2019, the terms of which led to the respondent to take the decision that "the fairest way to deal with the staff group was to make them all redundant" (letter of 19 August 2019 from Mr Harris dismissing the claimant's appeal, bundle pages 227-228.)

216. The Tribunal has found that the respondent's change of position on redeployment occurred after the meeting on 23 May 2019. However, the Tribunal has also found that no assurances were sought by Durham Police and none were given to them by the respondent at any stage.

217. The burden of proof is on the claimant to show that the reason or principal reason for her dismissal was her protected disclosure. As the Supreme Court in Jhuti made clear, where a bogus reason for dismissal is invented by an employer but is adopted by the decision-maker in good faith, the Tribunal must "penetrate through the invention rather than allow it also to infect its own determination". The Tribunal finds that this is just such a case where the bogus reason of assurances on redeployment were invented by Mr Smith or Ms Record but then adopted in good faith by Mr Russell at the dismissal stage and Mr Harris at the appeal stage.

218. However, the Tribunal's conclusion is that it is not persuaded that the claimant has established a prima facie case that any or all of her disclosures were the reason or principal reason for her dismissal. Nor was the Tribunal persuaded that the claimant had established that redundancy arising out of redeployment assurances from a third party was the genuine reason for the claimant's dismissal.

219. Had this been an ordinary unfair dismissal case under sections 94 and 98 ERA 1996, the claimant's dismissal may well have been found to be unfair due to the employer's failure to establish a prima facie fair reason for dismissal. However, it is not and the Tribunal must apply the analysis required under section 103(A) ERA 1996.

220. In that regard, the Tribunal did not consider that the claimant established a credible case that her disclosures were any part of the reason for her dismissal. The claimant was one of 42 Healthcare Assistants employed at Whorlton Hall before the closure of the hospital. Less than 20 Healthcare Assistants were either dismissed or resigned as a result of their involvement in the Panorama revelations. The claimant's case was that the respondent decided to dismiss all of the remaining 20+ Healthcare Assistants as well as the other members of staff because the claimant made a disclosure in the form of handing Mr Russell a copy of her November 2018 notes and verbally telling Mr Russell about the other concerns she had raised since April 2018. The claimant said that this was because she then became identified as a troublemaker who the respondent decided to silence by dismissing her (and everyone else) to avoid, amongst other things, it becoming known that the respondent had been put on notice of

patient safety and patient abuse issues long before the undercover reporter arrived at the hospital.

221. The Tribunal does not accept the claimant's submission that her disclosures to Mr Russell on 5 June 2019 or anything she said verbally at the meeting on that date caused the respondent such concern that it decided to change tack and to implement a blanket dismissal policy rather than to redeploy where possible. Not one single Healthcare Assistant was redeployed. Only the claimant was a whistleblower. The matters raised in the claimant's disclosures were not (as the claimant conceded) comparable to the troubling scenes of actual physical and mental abuse against vulnerable service-users revealed in the panorama documentary. Ms Elliott wrote to the claimant on 31 May 2019, before the meeting on 23 May 2019, in terms which made direct reference to the assurances that the police had (allegedly) asked the respondent to give on redeployment. It was Ms Elliott's evidence that it was either Mr Smith of Ms Record who told her about those alleged assurances, but there was no evidence that either Mr Smith or Ms Record (the real decision-makers) were ever shown the claimant's November 2018 notes or given an account of any other disclosure made by the claimant.

222. Where the Tribunal has found that the reason for dismissal was not that advanced by the employer, the Tribunal is not obliged to accept the reason advanced by the employee. In all of the circumstances, the Tribunal concludes that no part of the reason for the claimant's dismissal was that the claimant made one or more protected disclosures.

Holiday Pay

223. The Tribunal accepts the claimant's evidence that so stretched were the staffing levels at Whorlton Hall that it was regularly the case that the claimant had no choice other than to work overtime and that this was acquiesced in by the employer who no doubt also benefited from the professional commitment and sense of duty of the Healthcare Assistants. In those circumstances, the Tribunal concludes that the claimant's holiday pay ought to have included the element of overtime she regularly worked. The Tribunal therefore upholds the claimant's holiday pay claim in the agreed sum of £115.60.

Employment Judge Loy

Employment Judge
Date 25 October 2022

JUDGMENT SENT TO THE PARTIES ON:

26th October 2022

Mrs. T. Hussain
FOR THE TRIBUNAL OFFICE

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