Case No: 3300011/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Yanquoi**

Respondents: **Abbeyfield Reading Society Limited (1)**
Ms Kathleen Davis (2)

Heard at: Reading **On:** **19-23 February 2024 (on 23 February Tribunal only, by CVP)**

Before: Employment Judge L Findlay and
Members: Mr A Kapur and Mr J Appleton

Representation
Claimant: Mr S Swanson (Consultant)
Respondent: Ms A Johns (Counsel)

RESERVED JUDGMENT

(1) By consent, the claimant's complaint of unauthorised deduction of wages (holiday pay) is dismissed upon withdrawal;
(2) The claimant's complaint that she was subjected to detriment on the ground that she had made a protected disclosure contrary to section 47B of the Employment Rights Act 1996 is dismissed;
(3) The claimant's complaint that the reason or principal reason for her dismissal was that she made a protected disclosure and that she was therefore automatically unfairly dismissed under section 103A of the 1996 Act is not well founded and is dismissed;
(4) The claimant's complaint that she was victimised by the 1st and/or 2nd respondent under section 27 of the Equality Act 2010 is not well founded and is dismissed.
(5) The claimant's claim that she was unfairly dismissed under Part X of the Employment Rights Act is well founded and succeeds, but there will be a reduction from the basic and compensatory awards of 40% under sections 122(2) and 123(6) of that Act;
(6) The claimant's claim of breach of contract (wrongful dismissal)/unauthorised deduction of wages (notice pay) is well founded and succeeds.

REASONS

Procedural background

1. The hearing started slightly late on the first day, at 10.55 am, due to train cancellations. It transpired that the claimant's representative, Mr Swanson, did not have a hard copy of the bundle, only hard copies having been directed to be produced. The Tribunal had received only 4.5 copies – 1 for each of the panel, the witness bundle and volume 2 of the copy intended for public inspection. Around 10.25 am, the Judge asked the clerk to give Mr Swanson the witness bundle. The delay in starting meant that he had the opportunity to refamiliarize himself with it (he had seen all the documents on discovery). As it seemed likely that most of the day would be spent reading, we asked the parties to address us on any preliminary matters that could usefully be dealt with, so that extra bundles could be produced and the parties could resolve any further practical issues during the day.
2. Mr Swanson was unsure whether the supplementary bundle at the rear of volume 2 was complete, so we asked him to check this during the day. We received a more legible copy of page 619 from the respondent.
3. Mr Swanson wanted to check the second respondent's notebook, which had been reproduced in the bundle, and again we considered it would be possible for him to do that during the 19th of February whilst we were reading. He also asked that the second respondent's letter to the Disclosure and Barring Service (" DBS") regarding the claimant should be included and we asked the respondents to deal with this.
4. On the second day, Mr Swanson confirmed that he had now seen Ms Davis' notebook and was content with it. We received a complete supplementary bundle with appropriate numbering, and it was confirmed that the letter sent by Ms Davis to the DBS had been included at page 38 of the supplementary bundle. There was a short adjournment to allow the claimant and Mr Swanson to read it.
5. Mr Swanson also mentioned that the claimant had a notebook in which she had recorded important matters and which she had kept in a locked cupboard in her office. Although this had been referred to by her during the disciplinary proceedings it had not been disclosed to the claimant. Mr Swanson said that the 2nd respondent had been given a key to the cupboard during the disciplinary process but that the notebook seemed to have gone missing. The judge checked whether the claimant had previously made an application that the notebook be disclosed, but this had not been done. The judge asked whether the notebook was still in existence, and Ms Johns said that she would check; if it was still in existence, it would be produced, if it was not she would endeavour to find out what had happened to it. On day 2, 20 February, Ms Johns told us that the respondent did not believe that the claimant's notebook was still in existence. This was further pursued in the evidence before us, when Ms Davis said that although she had been given a key to the cupboard behind the claimant's desk during the disciplinary investigation meeting and had opened it in the company of the deputy manager at the time, there had been no black notebook of the kind described by the claimant in the locked cupboard. The deputy manager had not been able to find any such notebook. On the balance of probabilities, we accepted Ms Davis evidence about this – there are emails at page 770 dated 14 May 2021 which

corroborate her concern to have a witness present when she opened the cupboard – and we reject Mr Swanson's assertion that Ms Davis ("KD") had found it and had deliberately disposed of it. It is clear from the email of 14 May 2021 that the interim manager had been using the office for around 5 months before the claimant referred to her notebook, and it seemed to us to be likely that there was some innocent explanation for the notebook going missing in those circumstances. KD told us that when she went into the office after the claimant's suspension, there were "documents everywhere, including in black bin liners". There was no evidence produced as to how this situation had come about, whether it had been the case before the claimant's suspension or afterwards, but as the claimant's suspension came as a shock to her we find that it is probable that the notebook was not in the locked cupboard and had somehow got mixed up with other documents in the following months, so that it could not then be found.

6. In the correspondence before the tribunal was an e-mail from the claimant's representative, seeking a witness order for the former deputy manager to attend to give evidence. This had been requested shortly before the hearing and had not yet been dealt with, but Mr Swanson clarified that the witness order was no longer being pursued.
7. Ms Johns pointed out that there were references within the claimant's witness statement to her race discrimination and other discrimination allegations which had been struck out by Judge Anderson on 8 September 2023, see page 144. The tribunal said that it was aware of the strike out judgement and would disregard the allegations of race and other discrimination as a result.
8. Ms Johns raised the issue of the order of witnesses. Mr Swanson suggested that as, in his words, the primary claim was of unfair dismissal, it would be better if the respondents' evidence was heard first. The judge pointed out that the Tribunal was also being asked to deal with allegations of detriment and automatic unfair dismissal due to public interest disclosures having been made, and a claim of victimisation. There was a risk that, if the respondents' witnesses went first, they may have to be recalled at a later stage if the claimant raised matters during her evidence which had not been put to them. After hearing from Ms Johns and after some consideration we decided that for reasons stated at the time the claimant's evidence should go first.
9. The Judge asked whether any witness or party required any reasonable adjustments in order fully to participate in the hearing but was told that none were required.
10. Ms Johns mentioned that one of the respondent's witnesses, Mr Tim Howe, was in New Zealand and would be giving evidence from there by video link. Permission for this to take place had previously been granted. We noted that given the time difference, it would be in the interests of the overriding objective if Mr Howe gave his evidence as early as possible in the morning. As the claimant's evidence would be heard first, and Mr Howe was only available on Tuesday and Wednesday, we decided that he would be heard at 10:00am on Wednesday the 21st of February (11:00pm NZ time) and interposed between the claimant's witnesses if necessary. The judge checked on several occasions during his evidence that Mr Howe ("TH") was comfortable to continue his evidence and whether he required a break, but he confirmed on each occasion that he was happy to continue and did not wish to have a substantial break.

11. We heard from the following witnesses: the claimant, two witnesses on her behalf - Rahel Belay (a former care assistant at the 1st respondent), and Sarah Potten, the former administrator for the respondent between May 2010 and June 2020; the respondent did not have any questions for these witnesses, and nor did we. We also received written testimonies, mainly about the claimant's good character, from former colleagues and a provider of training for staff at the 1st respondent's home: Ms B Gurney and Mr C Mace (staff members) and Ms L Bailey, training provider, although they did not attend. On behalf of the respondent, we heard (in the following order) from Jane Domhill ("JD"), an independent HR consultant who heard the claimant's appeal against her dismissal , Tim Howe ("TH"), the chair of a different Abbeyfield Society and a former HR Consultant who agreed to chair the claimant's disciplinary hearing, David Magowan ("DM"), a voluntary trustee of the respondent from the 22nd of January 2021, Kathleen Davis ("KD"), the second respondent, and Mark Oliver ("MO"), who heard the claimant's grievance appeal.
12. We heard the parties' submissions on the afternoon of 22nd February 2023. The claimant produced written closing submissions; we checked whether the respondent's counsel needed further time to consider these, but she declined.
13. **The Issues**: the issues are set out in the order of Employment Judge Shastri Hurst in her order sent out on 15 February 2023 at pages 92 to 98 of the bundle and are appended hereto. In addition, Employment Judge Anderson heard a preliminary hearing on the 8th of September 2023, when the claimant's claims of direct discrimination and harassment on the grounds of sex, age and race were struck out as having no reasonable prospects of success and the claims against the 3rd and 4th respondents were dismissed. This resulted in allegations 58-61 in EJ Shastri-Hurst's order being struck out. The remaining claim against the second respondent (KD) was limited to an allegation that she victimised the claimant by escalating the disciplinary allegations against the claimant from 2 allegations to 8 on or around the 5th of March 2021, and that she dismissed the claimant on the 15th of September 2021. Those allegations are set out at paragraphs 62.4.1 and 62.4.2 of the order of Judge Shastri Hurst.
14. At the start of the hearing on the 19th of February 2024, the judge asked Mr Swanson about the nature of the unauthorised deductions claim, which had previously been said to refer to **holiday pay**. Mr Swanson said it did refer to unpaid holiday pay, and that he needed to check what it consisted of. He said that he might need information from the respondent about that. The judge asked whether a previous request had been made to the respondent for disclosure of documents which might cast light on the holiday pay claim. Ms Johns pointed out that a calculation of the 53 days holiday pay which had been paid to the claimant was attached to the dismissal letter at page 901. Mr Swanson said that he would check that during the day whilst the tribunal were reading. By the morning of the 20th of February, the matter had still not been clarified, and the judge asked the parties to liaise to clarify this. No questions were put to any of the respondent's witnesses about holiday pay by Mr Swanson. In closing submissions, the judge asked again about holiday pay, and was told by Mr Swanson that the claimant was no longer pursuing that claim and agreed that this claim could be dismissed upon withdrawal.

15. The parties were agreed that the **breach of contract** claim was a claim for wrongful dismissal, and that the relevant notice period, as shown in the claimant's contract of employment, was three months.
16. Although the respondent accepted that the claimant had done protected acts, the **victimisation claims** were disputed, and the respondent denied that the claimant had made any **protected disclosures**.
17. The remaining claims were therefore in respect of **ordinary unfair dismissal**, **wrongful dismissal**, that the claimant was **subjected to detriment and automatically unfairly dismissed** as set out in paragraphs 55 to 57 of Judge Shastri Hurst's order because she had made a protected disclosure, and that she had been **victimised** under section 27 of the Equality Act 2010 as there set out.
18. Judge Anderson had directed that the hearing before us (on the dates listed) should be a liability hearing only (p150) as the claimant intends to make a claim in respect of personal injury should any of the claims which allow for such a remedy be successful. There was no mention in the orders of what was to happen regarding the issues of any reductions in respect of the case of **Polkey v AE Dayton Services** under section 123 of the Employment Rights Act 1996 or in respect of reductions to the basic and compensatory awards in respect of any contribution by the claimant under sections 122 and 123 of the 1996 Act. At the judge's suggestion, the parties agreed that the issues of **Polkey** and **contribution** would be dealt with at this hearing, and that any relevant questions should therefore be asked of the witnesses in that respect.
19. **The Facts:** the 1st respondent is a charity which, at the relevant time, owned and operated a 28-bed residential care home. The care home provided residential care for people aged over 65 but was not registered as a dementia care home. We were told that the 1st respondent charity was governed by a board of trustees, of whom Ms Davis (KD), Mr Magowan (DM) and Mr Oliver (MO) are three. The Board of Trustees is sometimes also referred to as "The Executive Committee". By the time of the claimant's dismissal, there were four trustees - the remaining trustee, from whom we did not hear, was Ms Sonja Sharpe. Mr Oliver and Mr McGowan were recent recruits to the Board of Trustees, both having been appointed on the 22nd of January 2021. They were appointed after the claimant's suspension. The 2nd respondent, KD was Chair of the Board of Trustees at the relevant time, having taken up that position in September 2020 when the previous Chair, Paul Barton, resigned.
20. The claimant, Mrs Yanquoi, was employed by the 1st respondent from February 1996 until 15 September 2021 when she was dismissed. Initially, she was employed as a care assistant, but progressed to become a senior care assistant, principal senior care assistant, deputy manager and then finally registered manager from July 2002 until her dismissal. So, she had more than 25 years' employment with the respondent.
21. Early conciliation began on the 3rd of November 2021 and ended on the 2nd of December 2021. The claim form was presented on the 3rd of January 2022. Subject to any extension of time, therefore, any complaints about matters occurring prior to the **4th of August 2021** would be out of time – see EJ Shastri-Hurst's order paragraph 52.
22. The events to which the claims relate primarily occurred during the coronavirus pandemic and between late 2020 until September 2021, but it is important that we make some findings about the claimant's employment prior to that time, insofar as they are relevant to the issues that we will

have to decide. The claimant's job description is set out at page 619 to 620, but it is signed only by Christopher Widdows (CW) on 16th of November 2016, a trustee who was then chairman of what was referred to as the "House Management Committee". At that time, that committee oversaw the day-to-day operation of the care home on behalf of the first respondent. The claimant was a member of the committee, which met every four to six weeks until about 2016. CW was also chairman of the Board of Trustees until 2018. The claimant did not seriously dispute that the job description was an accurate reflection of her duties. The job description sets out wide-ranging obligations upon the claimant as manager of the care home. It is stated at paragraph 1.1 that she is the overall supervisor of the day-to-day running of the care home. The claimant, together with the deputy manager, was to provide "on call" cover outside normal working hours. The objectives of the home were said to be to provide high quality care for up to 28 frail and elderly residents, with 24-hour staff supervision, in a relaxed and homely atmosphere; to enable the residents to live the rest of their lives with dignity and respect, living as full a life as possible.

23. At paragraph 1.4 it is stated that the manager was appointed by the 1st respondent and was responsible to the "Chairman of the House Management Committee" for all matters concerning residents' care and well-being, whilst operating within an agreed budget covering annual expenditure We were told that by 2017, there was no longer a house management committee and that liaison with the claimant was mainly carried out by the chairperson of the board of trustees.
24. The claimant was said to be responsible for recruiting and appointing staff in accordance with Abbeyfield procedures, ensuring proper staffing levels for 24-hour operation and developing a rosters to ensure effective staffing, including sharing of duties between all staff. A paragraph 2.3, she was to ensure a proper standard of supervision and discipline among staff within the home. She was to ensure correct and efficient performance of duties. At 2.4 she was required to ensure that all levels of staff had appropriate training, including induction training for newly appointed staff. She was to ensure satisfactory work performance, good communications and working relationships within the home between staff, visitors, residents, and volunteers. She was responsible (point 2.8) for ensuring the Abbeyfield policies regarding the physical, emotional, and spiritual well-being of the residents were implemented. This involved ensuring the patient and sympathetic handling and support of residents by staff and volunteers in the house and encouraging residents to be as independent as possible. She was responsible for monitoring the general health care and welfare of the residents. She had to ensure that the appropriate level of medical care was provided by encouraging and enabling residents to seek medical support as appropriate.
25. At clause 2.12, she was made responsible for liaising with the residents' General Practitioners to assess when the Society was unable to provide the appropriate level of care so that more suitable accommodation should be found. It was stated that the "Chairman of the House Management Committee" must be informed, and relatives/sponsors should be advised and supported to enable them to work with Abbeyfield to find appropriate accommodation. Such issues must be dealt with sympathetically and it was hoped that they would be rare. There is no reference in the document itself to liaison with the local authority and CQC about this, but the

claimant was charged with ensuring the smooth running of the home in accordance with all relevant statutory regulations and legislation.

26. At clause 2.15, she had to ensure that the Society's fire prevention instructions and procedures were fully met and practised. Clause 2.16 provided that she must maintain close relations with the Fire Authority, Social services, Health authority, GPs, District nurses, Social workers, clergy, relatives/sponsors of residents. She was expected (by clause 2.17) to participate in regular executive committee and house management committee meetings, and "taking for discussion" reports on the running of the home and the residents' well-being. She was expected to work with the Society in whatever direction it may take to further excellence in care for the residents.
27. The first respondent was at the time affiliated to the national organisation known as the Abbeyfield Society, and several of the policies and procedures that we saw were standard documents which were provided by that organisation, which had not always been adapted to reflect the current situation at the 1st respondent. We were shown a document which set out expectations of Trustees (pp1033-1034). Again, this was a document which was produced by the national Abbeyfield Society, and which the claimant said she had never seen prior to her suspension in January 2021.
28. This document is headed "Abbeyfield Trustee Guidance; What is an Abbeyfield executive committee and what does it do?". It states that an Abbeyfield executive committee (in this case, also known as the Board of Trustees) is legally responsible for an Abbeyfield member society. It was said that the committee should meet regularly, usually every 8 to 10 weeks, although we note that the board of trustees in this case met roughly monthly during the pandemic. It was stated on page 1033 that paid members of staff of the Society (such as the claimant) should not be members of the executive committee and should attend meetings by invitation only. The role of the executive committee was said to give the Society purpose and direction and see that it makes progress towards its aims. It is stated that the committee **makes overall policies and plans**. It **monitors progress towards achieving objectives** and fosters the Abbeyfield spirit, ethos and values. It **makes sure that the work and all the resources are managed to good effect**. [emphases added]
29. It is stated that the committee must make sure that the Society **keeps to the law** and obeys its own governing body, sees that the Society's finances are well managed, **ensures that the employed staff and volunteers are properly managed and supported** and that work is delegated to them. It should make sure that the executive committee /board of trustees works well, reviews its performance and plans for its continuity. The executive committee (Board of Trustees) is responsible for ensuring that a Society is well run and meets its residents' needs. The passage continues: "an executive committee does not have to be responsible for carrying out all the Society's work. **It can delegate day-to-day matters to the house committee staff and individual volunteers" (emphases added)**. It is said that an Abbeyfield executive committee can be compared to a school governing body, local council or the board of directors of a company. The passage continues "However, it is not a necessity for executive committees to become involved in day-to-day matters and some Societies employ specialists to deliver on operational objectives. The Abbeyfield Society has an extensive range of policies and

procedures that our member Societies can use and modify for their circumstances." We note that the document clearly places responsibility for the making of policies and ensuring that progress is made towards their aims upon the Trustees. This is relevant because KD complained during her evidence that some of the policies were out of date or not appropriate to the structure of this home. She appeared to attribute responsibility to the claimant for this, although the claimant's job description does not give her responsibility for creating as opposed to implementing policy, and the guidance document suggests that policy making is the role of the Trustees – p1033.

30. One of the additional responsibilities set out at page 1034 is to ensure that the organisation is **effectively managed** and get its job done. In addition, at point 5 under "Make sure the Society keeps to the law and obeys its governing document" on page 1034 it is said that the trustees must see that the Society takes all necessary steps to abide by the regulations affecting either sheltered housing, residential or nursing care (such as registration with the local authority, compliance with fire and food regulations etc). The trustees should monitor and evaluate the work of the Society on a regular basis, this includes receiving reports from staff, **staff supervision**, feedback from residents, consumers etc [emphases added].
31. The claimant alleges that she made **qualifying disclosures** under section 43B of the 1996 Act on several occasions. The first of those was alleged (paragraph 55.1.1.1 on page 93) to have been made at an executive committee meeting on the **24th of October 2016**. There is a copy of the minutes at page 243 and 244 of our bundles. The relevant passage is on p244, where the claimant stated that she and her deputy manager felt dissatisfaction about failure to carry out their appraisals, which should have been done by one of the trustees. Two of the trustees then offered to carry out the task. The claimant had reported that several of the residents needed considerable care. There is a comment that closures on the fire doors were being upgraded and that a range of administrative help was needed in the manager's office. In her evidence before us, the claimant accepted that she was not raising these matters as concerns about safety in the workplace, but was simply informing the executive committee of the first respondent about relevant matters.
32. The next matter (chronologically) which is alleged to amount to a protected disclosure relates to a meeting of the Society on the **27th of June 2018**. We have the minutes of that meeting in the supplementary bundle on pages 20 and 21. We can see from the list of attendees that the claimant did not attend, and she confirmed this in her evidence. The meeting was attended by two individuals from the national Abbeyfield society, including Gaynor Cavanagh, and three trustees including CW (acting Chair at the time) and Paul Barton, who became the Chairperson later that year or in early 2019. The context of the meeting was that the 1st respondent had experienced several issues over the previous several months around resident vacancies. The Society had identified that there was a lack of trustee and staff resources to manage the associated difficulties. This had caused some concern to the national Abbeyfield society, which felt that the 1st respondent required more support. Another Abbeyfield society had offered to work more closely with the 1st respondent in several areas. We have heard from the claimant (and accept) that CW was not keen to take up this sort of assistance and had told her not to share too much information with other societies or the national society. An example of

CW's defensive attitude appears on page 4 of the supplementary bundle (SB).

33. The relevant parts of the minutes appear on page 21 (SB), where it was stated that the CQC were very interested in the governance of care homes and the 1st respondent may not score highly in this area. WE understand this to be a reference to the performance of the Board of Trustees rather than that of the claimant. On discussion, it was said that there was no clear process for managerial support, nor an appraisal system in place. We observed that this accords with what we have been told by the claimant in her evidence, and we accept that it was a true picture of the situation between the claimant and trustees by 2018 (and had been for at least two years by then). It was also stated that the manager - that is the claimant - did not receive supervision, which was said to be a key area of inspection. We noted above that it was said to be a responsibility of the trustees to ensure that appropriate "staff supervision" took place. Whilst we do not interpret that as meaning the trustees had to undertake day-to-day supervision, we find that there was an expectation that trustees should oversee the performance of staff in the home, ensure that staff received appropriate supervision and support and that they should provide some mechanism to supervise and support the claimant herself. This accords with what the national Abbeyfield Society were saying in 2018. It was said that the outcome of the inspection, if not good, "could only add to the governance issues" of the Society. The claimant told us (and we accept) that she had discussed these matters with Gaynor Cavanagh before this meeting, but as we have seen, Gaynor Cavanagh was not an employee of the first respondent.
34. As we have noted, by the time with which we are principally concerned, the autumn of 2020, the responsibilities of the Chairperson of the board of trustees of the 1st respondent, referred to as the House Chair, included liaison with and support for the claimant as registered manager. The previous incumbent, Mr P Barton (PB), had arranged to hold an update meeting with the claimant on the last Friday of every month. Sometimes, these took place by telephone. We accept the evidence of the claimant that these meetings did not always take place, although they were understandably more frequent during the pandemic in 2020. On page 607-608, Mr Barton had provided some notes for KD, the 2nd respondent, when she became chairperson of the trustees in September 2020. He said that formerly (by which we interpret "prior to 2019") there had been what he described as "a problem" because the claimant and CW, the previous chairperson, were "not communicating". We accept the claimant's evidence that this had dated back to 2016, when she had raised issues about her treatment by some of the trustees, and that CW had reduced his contact with her as a result.
35. In his note to KD, PB gave her a list of matters which should be discussed, including occupancy, new residents, problems, potential leavers, upgrades to higher level care, staffing and responsibility for repairs, and assistance with the claimant's relationship with a new member of staff. This referred to the new member of administrative staff who had been appointed by PB, and whom the claimant thought unsuitable. It was recorded that the claimant sought approval on any "irregular spend" over £500. This accords with the claimant's evidence to us and during her disciplinary hearings, and we accept it. It was also noted that the chairperson needed to approve service contracts, lift maintenance inspection and the cost of the gardener.

The chairperson was also expected to review new staff contracts if they were out of the ordinary. It was clear that the chairperson was aware of staffing issues and would receive feedback on performance appraisal. Mr Barton recorded that performance appraisals of the claimant and her deputy were planned for the next week, and that there was a need to discuss long term planning. Otherwise, he said there were plenty of small items to discuss on an ad hoc basis. This document is dated the 10th of September 2020, and an additional document setting out the chairperson's responsibilities is to be found on page 609. The document mentions the need to recruit additional trustees.

36. There is a copy of the claimant's performance appraisal from **15th of September 2020** starting on page 610. This was about six months after the start of the pandemic. It was shown that the claimant had maintained the budgeted level of occupancy, and indeed had bettered the budget level by £59,000. There was a comment that agency costs (for staffing) were worse than the budget by £70,000. It was said there was exceptional expenditure in February and March 2020 due to Covid, but still £50,000 worse overall. There had been difficulties in recruiting staff in 2020. The third item is "meet the Care Quality Commission standard". The objective was to have a good rating, as had been accomplished in January 2019. This was said to have been **"achieved**" as the good rating from January 2019 had been continued. It was said that there had been no problem cases in the year, and no negligence reported. It was said that the claimant's personal objectives included improving capability on the laptop provided. It was noted that she had started on this, but her PC capability and use needed improving. Under "staff management" it was said that the claimant had an objective to perform personal appraisals for direct reports, and it was noted that she had to improve and document the policy on appraisals for direct reports and that this still needed to be implemented. It was noted that the claimant's relationship with the other Abbeyfield societies needed further work. The performance of the claimant was assessed as "**good**", she had met the standard in most respects but that the administrative function needed support, and that she needed to attend update seminars. We note that the claimant had been drawing attention to the need for more administrative support for at least four years by then. The claimant refused to sign the appraisal form, as she said that it omitted some matters discussed, such as the inability of herself and the deputy manager to take leave due to shortage of staff, her request for consideration of a sabbatical and whether staff should be given a one-off payment to reflect their extra work during the pandemic.
37. As noted above, the first respondent had been inspected by the **Care Quality Commission in January 2019 and had received a "good" rating**. The CQC report was provided in our bundle between pages 467 and 477. The CQC report provided positive comments about the claimant's leadership and states that, at that time, the 1st respondent had an effective audit system in place and that staff ensured that health and safety audits were carried out. The registered manager and staff undertook other audits at the service as part of their roles. The inspectors spoke to about 8 care staff, 10 residents and a visiting relative as well as the claimant and her deputy. In relation to some of the matters to which the disciplinary issues related, whilst it was noted that training provided to staff was not fully in line with current best practice, it was stated that at that time, January 2019, staff received formal supervision with their line

manager to discuss their work and how they felt about it. Other management support was provided in the form of daily handover meetings and informal chats if requested by staff. In addition, staff had annual appraisals of their work. The staff spoken to confirmed they had regular supervision and said they felt supported by managers and senior staff. It was noted that the claimant planned to introduce more frequent 1 to 1 formal supervision meetings with staff. There were positive comments about the claimant's leadership, and it was stated that she (the manager) was very pleasant and helpful and that she did her work "with love" and that the home was "beautifully run". The trustees would obviously have seen the CQC report at the time it was issued.

38. As we have noted, despite the personal praise for the claimant's leadership in 2019, there had been difficulties between the claimant and the trustees of the 1st respondent for a few years. In her witness statement at paragraph 47, she states that after the complaint she made in 2016, the working relationships between the trustees and herself were at an "all-time low". CW would limit his contact with her, as would other trustees including, the claimant said, Sonja Sharpe and the 2nd respondent. This evidence was not challenged significantly, and we accept it.
39. At a meeting Gaynor Cavanagh (employee of the national Society) had held with the claimant in 2018, the claimant said that she was "not managed" and received no guidance from CW as chair of the 1st respondent (see page 1, SB). As appears from the claimant's job description, we do not consider that this refers to day-to-day supervision and management, as the claimant was herself the registered manager, but rather is a reference to an overall a lack of guidance or assistance with the direction her role should take, and a general lack of oversight by the trustees at that time. In the event, as we have seen, by the time of the CQC inspection, the requirements of the regulatory body were being maintained.
40. At paragraph 72 of her statement, the claimant sets out the decline in staffing of the care home from 2002 when she first became manager. At one point she had two deputy managers, but by 2020, the claimant was supported by one deputy manager, the administration manager had left and Sarah Potten, her replacement, had resigned and was due to leave in July 2020. By 2020, one senior carer had resigned, and another had reduced her hours without any replacement cover. Two other staff members were on furlough. Early in the pandemic, Mr Barton had hired a new administrator, "J", to replace Ms Potten. As noted above, the claimant believed he was unsuitable for the post. She stated that having to support J added to her workload – see paragraph 72, which we accept. She gives details of the other difficulties she was experiencing due to understaffing at this time, which again we accept.
41. The claimant complains in her witness statement that she did not receive supervisions for the 20 years or so that she was manager of the home, and that she did not have regular annual appraisals, having had only two prior to Mr Barton restarting the process in or about 2019. On the balance of probabilities, we accept that Mr Barton did carry out an appraisal in 2019, and we have already referred to the details of the 2020 appraisal above.
42. The claimant complaints that she was not receiving regular supervisions. We would observe that, according to the document at 1033-4, which

admittedly the claimant had not seen, the trustees are not expected to oversee day-to-day matters at the home and were unlikely to have had the qualifications or experience to supervise the claimant on a day-to-day basis. We do accept, however, that the claimant should have had more regular annual appraisals and that she should have had more regular contact with, and better support from the trustees than she appears to have received, and that there was a lack of oversight and support in the period between 2016 and 2019 when CW was still Chair and acting Chair of the trustees. PB attempted to improve this by instituting more regular meetings with the claimant between 2019 and September 2020, but these meetings were not usually face to face and did not always take place. The "House Management Committee" referred to in the claimant's contract, and to whose Chairman she was said to be responsible, ceased to exist by 2018, and PB took on responsibility for liaising with the claimant from 2019, followed by KD in September 2020.

43. The deterioration in her relationship with some of the trustees, lack of appraisals, lack of personal and administrative support and general understaffing, resulted in the claimant feeling resentful towards the board of trustees by 2020. The situation was complicated by the fact that, as the claimant sets out in her witness statement at paragraph 70, at earlier points in her employment, different trustees had become more involved with the day-to-day activities of the home than they were by 2020. Whether or not it was necessary or appropriate for trustees to become involved in this way, we can understand why it was confusing for the claimant to have received such inconsistent levels of support, and why the boundaries of her role had become confused by this. Despite her key role as the home's manager, for example, the claimant told us (and we accept) that she did not know that the 2nd respondent had become chairperson of the board of trustees until after the event. Another example is Mr Barton selecting a member of administrative staff whom the claimant found to be unsuitable, although her job description gives her responsibility for staff recruitment (p619).We accept that, after CW stopped the monthly "House Committee" meetings from about 2016, the claimant was left feeling exasperated as her only means of drawing things to the board's attention was at quarterly meetings, and that she did not receive much feedback from those. It was to the claimant's credit that the home retained its good rating from the CQC in January 2019.
44. The meetings of the Executive committee increased to virtually monthly from the start of the pandemic in March 2020, although we accept that the claimant had to make the initial decision to put the home into lockdown and take the necessary steps to do this, set up testing processes etcetera, and was only contacted by PB after the event.
45. It is clear from the minutes of the meetings of the Executive Committee /Board of trustees from early 2020 that the claimant was repeatedly raising issues about understaffing and that the committee, including the second respondent, were by then attempting to help her obtain staff. Examples can be seen at pages 521 and 530 (where it is recorded that Sarah Potten had given in her notice but would stay until the end of July and that further advertising was to take place with the 2nd respondents assistance - April 2020). On page 582 (26th May 2020) it was recorded that J had been offered a role as an administrator but did not have care home administrative experience. He would start on the 1st of June, but other staff were still required. In the minutes of 30th of June 2020 page 587

there is a reference to staff sickness due to Covid, and on the 29th of July at page 595 it was again stated that staffing was a concern and that a new role which combined an admin role with that of a receptionist was required. We were told that previously, volunteers had assisted with reception duties, but were now unwilling to do so because of Covid. On page 603, the minutes of the 9th September 2020 meeting, there was a reference to senior care assistant isolating for 14 days. The claimant said that she was hoping to recruit staff from a local nursing home that was closing, and it was recorded that the claimant and deputy manager were spending too much time on admin matters. As a result, it was agreed to make the recruitment of a receptionist and admin assistant a priority. The claimant was to work with the 2nd respondent on this. There is a note (page 600) of meetings between the 2nd respondent and others in September and October 2020. Apart from the matters mentioned above, it was clear that the 2nd respondent worked with the claimant on drafting job descriptions for admin workers and a receptionist.

46. On the 3rd of October 2020 the 2nd respondent emailed the claimant asking whether Sarah Potten would be willing to help by working for a few hours a week due to “admin overload”. The deputy manager, Roz Hutt (RH), said that Sarah was willing to help with inducting a new administrator, and she would check to see how Sarah felt about working some additional hours. By around this time the claimant’s work laptop stopped working, and RH was having to print off emails from KD and give them to her. The claimant had asked PB for advice about this and he referred her to the company with whom the 1st respondent had a contract to service its IT needs. It is unclear how or when this issue was resolved, but KD told us that after the claimant was suspended, her laptop was received back from the IT support company, where it had been sent for repair. The lack of a reliable PC cannot have helped the claimant during this difficult time.
47. The claimant has described some of her experiences during the pandemic at paragraph 66 and 67 of her witness statement, which we accept. We accept that the pandemic, a challenging experience for everyone, was particularly difficult for those involved in the health and residential care sectors, and that by late 2020 the claimant was struggling to cover all of the demands on her, which meant that some emails from the 2nd respondent, which were intended to assist her, were not dealt with. As she told us, she had difficulty keeping on top of all the administration and paperwork she was required to complete, as well as all her usual tasks, despite not taking any leave.
48. In the minutes of the 22nd of October 2020 trustees’ meeting there is a further reference to a receptionist being “desirable”, but it was said that the first respondent could not afford it. There was consideration by the trustees of creating a role that was part time financial and a part time administrator.
49. So it was clear that, by September 2020 the trustees, and in particular the 2nd respondent, were fully aware that the home was understaffed and that this was creating substantial additional work for deputy manager and the claimant, to the extent that they felt they were unable to take leave. The Trustees, particularly the 2nd respondent, were trying to assist but were not having much success, so that the home remained understaffed. The claimant was criticised for not replying to some of the emails sent by the 2nd respondent, but we accept her evidence that this was an extremely

busy and pressurised time - it was during a period when lockdowns were still happening, and vaccinations were in their infancy.

50. By the 18th of November 2020, the claimant was telling Ms Davis that she and the deputy manager were working long hours, starting at 7:30am, because of the work pressures. She said she was concerned about the effect on her health. She gave details of several challenges that were happening at the time. She said that she and the deputy manager were not able to take time off and that she was so busy that she did not have time to respond to recent emails that Ms Davis had sent. Ms Davis said that she needed the claimant to respond to her e-mail of the 1st of November 2020 about the job description for the fixed term administrator, so that this could be advertised. Ms Davis (KD) told the claimant to make this a priority, as this was support that the trustees had agreed to provide to reduce her workload and enable her to take leave. KD records that she mentioned getting in a relief manager to help but the claimant "did not respond" to this. On the 24th of November 2020, Ms Davis again emailed the claimant to suggest that it might be worth asking Sarah Potten to come in for a few weeks to give her and the deputy manager "breathing space" and allow her to take time off, but by the 26th of November, the claimant had tested positive for COVID and was required to isolate for 10 days. We accept the claimant's evidence that she did not consider that Sarah Potten, as administrator, had the right skills or qualifications to cover the claimant or her deputy, so that if one took time off, it would create an intolerable burden for the other. Ms Davis had been told by the claimant (initially) that she was not experiencing Covid symptoms, so Ms Davis took a laptop to the claimant's home so that she could continue to do some work. There is no evidence that the trustees of the first respondent attempted to get an interim manager in to cover the claimant's absence at this stage. We accept the claimant's evidence that after her initial enquiry, KD did not ask again about the claimant's health or express concern for her, although the claimant did develop some symptoms such as severe headaches and was worried as she was in more than one "at risk" group.
51. On the 2nd of December 2020, the 2nd respondent emailed the claimant having received a complaint from a relative of a resident that the resident was being "evicted" at the age of 94. The e-mail is on page 654 and we received an unredacted copy during the hearing. The writer said that he and his brother were handed a letter on the 24th of September 2020 by "an assistant" of the claimant when visiting their mother, giving 30 days' notice to find a new care home. The writer said that the tone of the letter was "formal, business-like and cold". He said it was written as if he and his brother were "complete strangers" and that this was a shock. The writer said that he was shocked to discover that neither Reading Borough Council (who were paying most of the cost of his mother's residence at the care home), nor his mother's GP, nor the community psychiatric nurse knew anything about the eviction. According to the writer, their opinion had not been sought prior to the decision to ask the resident to leave and the 1st respondent had not suggested a meeting with his brother and himself to discuss the matter (although they both had a lasting power of attorney for their mother). He pointed out that there was a suggestion that his mother had been wandering about the care home at night, ending up in the building's basement, although she required a walking frame and support from another person to get about. The resident also had

Parkinson's disease. The writer was concerned about the effect on his mother of having to move during a Covid pandemic.

52. Ms Davis immediately wrote to the claimant on the 2nd December 2020, whilst the claimant was isolating, saying that she needed to respond to this and asking "what the procedure was for moving people on", particularly in respect of the council. She said she wanted to be sure that they had acted in line with any requirements, and she asked for a response that day.
53. On page 943, we have the letter about which the complaint was made, signed by the claimant, dated 22nd of September 2020. It states that the resident's diagnosis is Parkinson's disease and dementia. The letter states "this letter is to inform you that I am giving you one month's notice to find an appropriate home for the resident that can meet all her needs". It stated that the resident was at risk of falling down the stairs the longer she remained at the first respondent's premises, and that she had also started wandering into other residents' rooms. The letter concludes that the resident had periods when she was very agitated with increased anxiety. The staff had looked after her since the 7th of September 2018 but felt that they could not keep her safe or give her the care she required.
54. We accept the claimant's evidence that she had previously had an informal discussion with one of the resident's sons (not the one who wrote the letter of complaint) on or about 15 July 2020, when she had suggested to him that it was time to find alternative accommodation for his mother as her dementia was getting worse, and that the 1st respondent was not registered as a dementia care home. This is recorded in the daily notes for the resident. We accept the claimant's evidence that the resident's son was, at that stage, accepting of this proposal and that she had subsequently talked to him about potential alternative homes. We also accept that one of her reasons for not contacting Reading Council right away was that, as funder, they might select a care home which, in the claimant's opinion, did not provide the best standard of care. We also accept that, although the claimant was aware that both sons had lasting power of attorney for their mother, most of her dealings were with the son she spoke to on 15 July 2020. As the family had not found an alternative home by 22 September and the resident's condition was deteriorating, the claimant decided to give them formal "notice". She now accepts that she did not follow the correct procedure in doing so.
55. The 30 days' notice was not enforced, and by 2nd December 2020 the resident's family had found another placement for their mother. This was the date when the complaint was made. After the notice was given to the resident's family on 24th of September 2020, but before 2 December 2020, the claimant had informed Reading Borough Council and, it seems, the resident's GP in early October 2020, but no "best interests" meeting was held in accordance with the relevant legislation before the notice was given, or at all before the move. Reading Borough Council was aware that the resident had been asked to move out but did not object and took no action against the 1st respondent. We note that no family member of the resident had complained until the 2nd of December 2020.
56. We find that the 2nd respondent was extremely concerned by the complaint she had received, and that she did not consider that she had the expertise to deal with it. When she discussed it over the telephone with the claimant on the 2nd of December the claimant said that the complaint was not accurate. By the 10th of December 2020, the 2nd respondent had decided to place the investigation in the hands of an independent

investigator, PGH. She decided that after discussing the matter with Sonja Sharpe, the vice chair of the board of trustees, and from whom we did not hear. She had not discussed the matter further with the claimant before doing so. She told the resident's son about the steps she was taking on the 10th of December 2020 in an e-mail at page 661. She said that PGH had a “lot of care home experience and knowledge of dementia”. It was said that the respondent was hoping that she would start the investigation the following week, and that the complainant and other relatives of the resident should expect contact. Ther ewas no indication in the evidence before us that PGH had managed a Care Home since the pandemic had started.

57. During her evidence, the claimant was adamant that the resident in question was still staying at the care home at the point at which the claimant was suspended in January 2021, and that therefore it was not appropriate for her to be suspended at that time, as she had already remained in charge of the home after the complaint was made for more than a month, and there was never any question that she was a source of danger or harm to the resident. We accept on the balance of probabilities that, as indicated in the resident’s son’s complaint, the resident had in fact moved out on the 2nd of December 2020 when the claimant was away from work isolating. We considered that given the passage of time, and probably due to the pressures on her around this time and subsequently, the claimant has simply become confused about this. We did not accept, as Ms Johns submitted, that this failure of recollection made the claimant’s evidence generally unreliable.
58. KD was questioned by Mr Swanson as to why she had not simply spoken to the claimant informally about the complaint. We accept KD’s evidence that she thought this was a potentially serious matter that was outside of her own expertise, and that getting an external view (and later, advice from the Abbeyfield Society) was an appropriate course.
59. By the 23rd of December 2020, PGH had concluded her report, which is a pages 677-681 in our bundle. PGH reviewed the documentation and, for example, records that on the 7th of May 2020 the CPN had reviewed the resident as she was experiencing increased confusion and anxiety, was pressing the bell in the home constantly, using derogatory and racist comments and was agitated. By the 8th September 2020, the CPN was reporting that the resident experienced increased confusion, anxiety and aggression towards staff. He reported that staff were showing concern about the resident using the stairs to come down to the lounge, and the increasingly high risk of falls. The resident was refusing to use an aid to walk and becoming aggressive if directed. There was a similar report on the 5th of October 2020.
60. As we have seen, the daily notes recorded that the claimant had discussed a move out of the 1st respondent’s home to a dementia registered home on the 15th of July 2020.On 7 September 202, the notes record that the resident was found in the basement of the Home (page 679). The CPN was consulted the following day. On the 22nd of September 2020, the daily notes record that the resident was found wandering on the ground floor, didn't settle at night and was using aggressive and derogatory language, and that the GP was informed. This was on the same day that the claimant drafted the “notice” to the resident’s family. On the 2nd of October 2020, there is an entry showing that the GP was called regarding the care of the resident, her changing

needs and a possible move to another home, which the CPN was to assess. This was, of course, after the notice letter was given to the resident's sons. The resident's relatives reported that prior to the service of the notice, they had a good relationship with the home in general and described the care received as "very good".

61. The resident's son said he was shocked, however, when the letter was received on the 24th of September 2020 and expressed disappointment as to how the matter was dealt with. He said he would have preferred a face-to-face meeting, and although there were Covid restrictions at the time, he felt that the meeting could have happened "outside". He also thought that a meeting with all relevant parties including the GP, CPN and the local authority would have alleviated the stress they encountered. It was pointed out that both sons had a lasting power of attorney. They felt that the content of the letter and the fact that an administrator had handed it over showed that the claimant lacked empathy towards the family.
62. PGH contacted Reading Council and was told that they had received a call from the claimant after the letter was issued, and that there had not been a best interests decision meeting to discuss a potential move to another suitable placement. Having said that, it does not appear that when they were told about the need to move the resident, Reading Borough Council raised any concerns, and they did not suggest a "best interests" meeting. PGH was told that this was "due to the pandemic".
63. PGH's conclusion was that the evidence demonstrated that staff were caring, sought professional support when they had concerns, and that care plans and risk assessments were in place and reviewed regularly. She records that the current plans and risk assessments were reflective of the resident's assessed needs. She records that the evidence demonstrated that since May 2020, there had been a decline in the resident's cognitive ability leading to "some behaviour". PGH reported that due to lack of evidence and lack of a care plan and risk assessment relating to "wandering", she was not able to find evidence supporting how the resident was found in the basement. She found that there were a lack of measures in place to assess the resident's risk of disorientation in place and time. She pointed out that there were no sensors or any alternatives to monitor her movement at night. She could not ascertain whether the resident had used a lift to get to the basement. She pointed to the lack of formal discussion with family, GP, CPN and funding local authority regarding the declining health of the resident. PGH said that she was unable to establish whether there was a review of care and the placement with the local authority. She points out the discussion with the GP on the 2nd of October 2020 referred to a "possible move" but this was after the notice was served on the 24th of September 2020. She suggested that the guidelines from the Mental Capacity Act 2005 (MCA) should have been used as part of the process to decide what was in the resident's best interests and that the investigation had demonstrated a lack of a multidisciplinary approach in this case. In her e-mail attaching the report at page 682, PGH said that she was not providing any recommendations but that she would suggest that "some lessons need to be learned" from this case. We accept that after receiving the reports, PGH had contacted the second respondent and said that if the 2nd respondent did not act on the report, she would have to "blow the whistle" by contacting the CQC.
64. The reference to a "best interests meeting" was a reference to the relevant provisions of the MCA. On the 24th of December 2020, PGH responded to

an e-mail from KD to say that the lack of a best interest decision under the Mental Capacity Act was “a major concern”. She said that this “could be classed as” breaching the Mental Capacity Act 2005 and that there was no evidence of a formal assessment of the resident’s capacity in relation to the decision to move. She said that having a multidisciplinary meeting or care review when someone is placed elsewhere was mandatory. Again, she said this was a major concern about the claimant’s practise. She pointed out that the complainant would expect lessons to be learned or “enforcement”. She went on to say that there was a breach in the resident’s safety as she put it “as there was nothing in place to monitor the lady’s movement at night”. She thought that a safeguarding issue should have been raised with the CQC. On about the 4th of January 2021 she sent extracts from the Mental Capacity Act and Health and Social Care Act regulations. The extracts from the legislation are to be found at pages 672 to 676 in a bundle. We note that PGH did not suggest that the outcome – the move to a dementia registered care home – was itself inappropriate, as opposed to the process followed.

65. In the extracts of the MCA that PGH provided (pp672-676), section 4 (7) of the Act has been highlighted. This provides that the person making a determination as to another person's best interests must take into account, if it is practicable and appropriate to consult them, the views of anyone named by the person as someone to be consulted on the matter in question, anyone engaged in caring for the person or interested in their welfare, any donee of a lasting power of attorney granted by the person, as to what would be in the person's best interest, and in particular as to the matters mentioned in subsection 6. PGH also included reference to the Health and Social Care Act 2008 Regulated Activities Regulations 2014 and to guidance on regulation 12. This refers to safe care and treatment, “assessing the risks to the health and safety of service users receiving the care or treatment”. Guidance on regulation 12(2)(b) provides that it is necessary to do all that is reasonably practicable to mitigate any such risks, and that risk assessments relating to health, safety and welfare of people using services must be completed and reviewed regularly. Risk assessments should include plans for managing risks. There is also guidance on assessments, planning and delivery of care and treatment, and it is said that this needs to be carried out in accordance with the Mental Capacity Act 2005. This includes “best interests” decision making.
66. The 2005 Act does not actually say that there needs to be a “best interests meeting” as such, but that where practicable and appropriate, certain parties need to be consulted. This would include the local authority and both sons.
67. On the 27th of December 2020, KD wrote to the resident’s relative and said that she acknowledged there were serious shortcomings in the way the resident was moved to “more suitable” accommodation. She referred to the lack of record keeping and lack of evidence of a multidisciplinary approach. She said that lessons were to be learned and that as a first step she would involve Abbeyfield headquarters - that is, the national Society - to make sure the 1st respondent was tackling all the issues in the correct manner. She noted that the claimant was on leave at present and that due to the Christmas period, it was difficult to get information from the national Society. She apologised for the way the notice was issued, the further distress caused to the family and hoped that their mother had now settled into a new accommodation.

68. We accept that KD then sought advice from the national Abbeyfield Society and was advised that it would be appropriate to take formal disciplinary action against the claimant. In paragraph six of her witness statement, the 2nd respondent describes PGH's report as including evidence of "several" serious breaches of regulations and procedure by the claimant. Whilst we accept there was more than one breach of procedure, we think that saying "several serious breaches" is an overstatement. The claimant had not consulted the second son, who also had power of attorney, and had not contacted Reading Borough Council before issuing the notice. She had regularly consulted the resident's CPN and GP, and had talked to them about a potential move, but she did not tell them she was going to issue the notice letter before she did. So that was a breach of the MCA. In her report, PGH also suggested there was a breach of regulation 12, and that the claimant should have reported to the CQC that the resident had been found by herself in the basement on 7 September and ground floor on 22 September 2020.
69. We can see from page 685 in the bundle that Gaynor Cavanagh had drafted a suspension letter for the 2nd respondent to issue to the claimant, using what she referred to as the "two points" suggested by the investigator. This was (1) that there was no mental capacity assessment of the resident under the Mental Capacity Act 2005, and (2) that there was an alleged breach of regulation 12 (Safe Care and Treatment) of the Health and Social Care Act 2008 (Regulated Activities) regulations 2014 in the context of assessing the risks to the health and safety of service user receiving the care or treatment.
70. In fact, the letter hand delivered by the 2nd respondent to the claimant when she suspended her the same day, 5 January 2021, had been amended after a discussion between KD a different member of staff at the national Abbeyfield Society. The allegations in the letter which was given to the claimant (page 690-1) states that there would be an investigation into allegations of gross misconduct, being dereliction of duties in her capacity as the registered manager, in her ongoing failure to properly assess and address the safeguarding, health and safety needs and mental capacity of a resident, and putting a resident at significant risk of harm due to the above failings. There was no specific mention of a "best interest" meeting, section 4 of the MCA or regulation 12 of the 2014 regulations.
71. By the 20th of January, the first respondent had found an interim manager to cover the claimant's duties via an agency.
72. On the balance of probabilities, we accept the second respondent's evidence that she was advised by the national Abbeyfield Society that she was in the best position to investigate the disciplinary allegations.
73. By the 28th of January, the claimant had lodged a **grievance** with the 2nd respondent. This is to be found at pages 701-703 of the bundle. The **first** point raised by the claimant was lack of support staff to run the home. She pointed out that she had been complaining about lack of administrative support "on many occasions". She said that, after the pandemic began in March 2020, she had placed the home in lockdown and made all decisions for the health and safety of residents and staff without any support from the trustees. She said that the burden brought about by the pandemic had been "chaotic" and "enormous".
74. After summarising some of the difficulties regarding staff cover, she records that, despite all of the challenges, only one resident was lost to COVID-19 in the first wave of the pandemic. She points out that all of the

above contributed to a very stressful time for the management of the home. She refers to the difficulty in getting essential supplies at the start of the pandemic and that she had "to source items together with the deputy manager" after work. She pointed out that in a trustee meeting that took place in September 2020, some of the difficulties regarding the resident who was eventually moved, and who was the subject of the complaint, were discussed with the trustees. There is reference to this on **page 598** where PB had forwarded the claimant's report to KD on **8 September 2020**. It does not, however, suggest that the claimant was going to give the resident's relatives notice to move her.

75. **Secondly**, she complained about her inability to take annual leave due to the demands of the pandemic and the shortage of staff. She said that she had made several requests to do so and alleged that the 2nd respondent had done nothing about it for a year. She said this had exerted enormous pressure on her physical and mental health. She said that she was saddened that, after all of the sacrifices she had made and her unblemished loyal service, that she would be "unceremoniously and unfairly" suspended when she had, with the informed consent of next of kin, made arrangements for a dementia sufferer to be moved to accommodation that provided dedicated care for dementia sufferers.
76. The **third** Point which she raised was a lack of COVID-19 risk assessments of black and minority ethnic group (BAME) staff [claimant's description], including herself. Although the complaints of race discrimination have been struck out, we note that the claimant's race was recorded by Employment Judge Shastri Hurst as black British/Caribbean. She said that no risk assessment had been carried out by the trustees considering her age, health and BAME group. She said that the failure to do so, in her opinion, was motivated by unconscious bias and was tantamount to discrimination on the grounds of race and age contrary to the Equality Act 2020 [sic – should be 2010]. She said that at no time had the trustees offered her any support or assistance, or considered that she should work off site, at a time which put her at high risk. She said she had received no help, guidance, or support even before the beginning of the COVID-19 pandemic.
77. **Finally**, she complained that after testing positive on the 26th of November 2020 she did not receive any contact regarding her well-being, and that the only contact made concerned a complaint that was raised regarding a resident and an unrelated issue regarding work.
78. The 2nd respondent acknowledged the claimant's grievance on the 2nd of February 2021 in a letter which is at 704/5 in our bundle. She said that a formal grievance meeting would be arranged to obtain specific information to enable an investigation to take place in accordance with the Acas step-by-step grievance process and the Acas Code of Practice on disciplinary and grievance procedures, of which a copy was enclosed. The second respondent stated that as the grievance had been raised during the disciplinary investigation into the two allegations, that it was important to understand at this stage if the claimant felt that the two matters were linked and said that if the claimant felt they were linked, she should explain about this in as much detail as possible by the 9th of February 2021. A decision would then be made as to whether the two processes would continue at the same time, or if the disciplinary investigation should be placed "on hold" until the grievance had been concluded, so that the findings of the grievance could be added to the ongoing disciplinary

investigation. By the 10th of February, the claimant confirmed that although she wished the grievance and disciplinary to be dealt with separately, she did not consider they were linked. This is at page 717.

79. On 16th February 2021, the second respondent had decided to involve a further external consultant, TD, to assist with the investigation and into the disciplinary matter. In an e-mail at page 719 dated the 16th of February 2021, the 2nd respondent said that she was finding the investigation to be "too much". She asked for some guidance from the national Society about the order in which to hold the grievance and disciplinary meetings.
80. On the 19th of February 2021, the claimant was invited to a formal grievance meeting which was initially set for the 23rd of February and would be chaired by David Magowan, who was appointed Trustee of the 1st respondent on 22nd of January 2021. In his evidence, he told us that he had been a school governor in two primary schools and a secondary school and was a trustee of three other charities in his capacity as a minister of religion. He said that he had dealt with disciplinaries in schools. He had no specific training regarding grievances. He had not met the claimant before the grievance hearing. Mr Swanson asked him if he felt that it was appropriate for him to conduct the investigation given that it was a grievance against the trustees, of which he was one. Mr Magowan stated, and we accept, that at the time there were only four trustees, two of whom had been referred to in connection with the grievance, those being KD and Sonja Sharpe. The additional trustee, Mr Cummins had resigned due to ill health (and PB had resigned with effect from the previous September). Mr Magowan did not accept that he had any conflict of interest in carrying out this role, given his lack of previous involvement. We accept that his decision making was not influenced by anyone else, so far as the grievance was concerned.
81. On the 21st of February 2021, the claimant informed the 2nd respondent that she was unable to attend the grievance meeting on the 23rd of February. She had also asked the 2nd respondent to confirm if the disciplinary investigation was based on the resident whose son had made the complaint on the 2nd of December 2020.
82. By the 26th of February 2021 TD, who is described as a "Care consultant" and from whom we did not hear, had provided her report, which is at pages 730 to 736. It is apparent from page 730 that TD's investigation focused on gathering evidence from available documentation and a conversation with the deputy manager and senior carer on duty about the occasions when the resident was found in the basement and lounge at the home in September 2020. It does not appear that TD spoke to the claimant. Her report covers much the same ground as that of PGH. At page 732, she says that on or about the 8th of September 2020, when the resident was reviewed by the CPN and the staff were showing concern about the resident using the stairs to come down to the lounge, a sensor mat should have been placed in her bedroom and a DOLS (deprivation of liberty) authorization should have been completed by the registered manager.
83. There is a further reference to the 5th of October 2020, when the resident was reviewed again by the CPN who found increased agitation, aggression and confusion. TD said that there was no evidence that a risk assessment was in place regarding the resident's use of stairs and that this was a breach of regulation 12 of the 2014 regulations referred to above. TD also found that, after the discussion between the claimant and

the relative on the 15th of July 2020, a best interests meeting with the family and the multidisciplinary team who were caring for the resident should have been arranged by the registered manager, and that in her view this was a breach of the Mental Capacity Act 2005.

84. TD had been told by the deputy manager that, when the resident was found in the basement on 7 September 2020, this had been recorded in the accident book, but no CQC notification had been completed. She also said that no audits were completed. TD recorded on Page 734 that staff at the 1st respondent were caring and seeking professional support when they had concerns about the resident's health or behaviours. She also found that care plans and risk assessments were in place and reviewed regularly, but were not (in the end) reflective of this resident's needs. There was no risk assessment after the resident was found in the basement and no guidance for staff as to what they needed to do support her when she became agitated and when they needed to monitor her whereabouts. She said this was a breach of regulation 12 of the 2014 regulations. She said there was no risk management plan after the decline in the resident's cognitive impairment and perception in May 2020. She said that after the resident began to wander in and out of other residents' bedrooms and was found to be "walking down flights of stairs to the basement" without support, there was no documentation about how staff were going to manage this serious risk in the future and that this was a breach of regulation 13. We note that, elsewhere in the bundle, there is a suggestion that this resident was actually using the lift to access the basement. We consider this to be probable given the resident's impaired mobility, and the fact that she reached the basement without significant injury.
85. TD said that although there was evidence of the resident being found in the basement, there was no documentation about how she got there without staff knowing, and that there were a lack of measures in place to assess her risk of disorientation, and no bedroom sensors or any alternatives to monitor her movement at night. She pointed to the lack of evidence of formal discussion with the family, GP, CPN and local authority and no best interests meeting. She thought that a DOLS assessment should have been completed. She referred to Section 4 of the Mental Capacity Act and the need to consider the views of carers, the family and people who have an interest in in the resident's welfare. She restated that those with a lasting power of attorney should have been consulted. She said that there was no evidence that the CQC had been notified after the resident was found in the basement and said that the CQC can issue a warning which could lead to prosecution if they are not notified when an "unintended incident" occurs towards a resident. She said that there had been a dereliction of duty in the capacity of the registered manager and her ongoing failure to accurately assess and address the safeguarding, health and safety needs and mental capacity of the resident, therefore placing her at significant risk of serious harm, and that this was a breach of the "good governance regulation 17".
86. TD added further information at page 737 as to other issues that she had found. She said the Home's policies on file were last reviewed between 2013 to 2018. We have seen that the creation of policies are in fact the responsibility of the trustees of the first respondent rather than the registered manager. TD said that the deputy manager told the investigator that she had never had a formal supervision. The senior carer also

informed the investigator she had not had a supervision. Several staff said they had not had supervision for many years. We note that these comments are inconsistent with the records which KD accepted she had seen - supervision records up to July 2018 – and what the CQC had recorded in January 2019. TD said that a carer she had spoken to (in the context of a separate disciplinary investigation against that carer) said she had not had "a probation" when she started the job and had never had a supervision. There is no information in the report about how long that individual had been employed and the records of the disciplinary investigation in question are not in the bundle.

87. TD also said that there was no evidence the audits for the service had been completed. She said that the only audits that she had seen were for medication, and that those appeared to be in doubt, although she does not say why. She said that management staff spoken to did not understand what an audit was or what it was used for. She said this was again a breach of Regulation 17 (governance). Again, this is inconsistent with the 2019 CQC findings and the previous "good" CQC ratings for the home..
88. **The grievance meeting** was then rearranged the 1st of March 2021. This is at page 727. The claimant had been unable to attend the initial meeting because of medical appointments, and she requested that her union representative join the grievance meeting via video link.
89. The notes of the grievance meeting are at pages 738-740. The claimant told Mr Magowan about the change in the way the trustees had interacted with her over her long period of employment. She said that the relationship had somehow deteriorated to the point where the 2nd respondent and Sonja Sharpe were talking to the admin staff and not the management, and messages would filter through in that way. The claimant described that she had a difficult relationship with Sonja Sharpe, so that Paul Barton had asked Sonja only to speak to the claimant through him, and that the claimant could not think of any reason why this should be the case. The claimant said that when Paul Barton resigned, the 2nd respondent took over as chair and their relationship did not improve. She was worried that the reason for this was racially motivated and that the 2nd respondent and Sonja did not like her. The claimant said that she had received no support from the trustees after the Covid pandemic started and that she made the decision on her own to put the home into lockdown. She talked about staff shortages. She said that because of lack of staff there were times when she and the deputy manager were working "nonstop" and that she had taken no extended annual leave "for a long time" despite having told the trustees. She said that she had raised concerns about lack of support from trustees at annual appraisals and at trustee meetings, that this did not appear in the notes or minutes or actions were not carried out. She mentioned that she was not consulted when the new administrative staff was appointed, and she felt they were "not up to the task". She said that volunteers who usually worked in reception did not come in during Covid, again increasing the workload for herself and the deputy manager.
90. **On the 5th of March 2021, the 2nd respondent wrote to the claimant extending the allegations against her from 2 up to, at that point, 9 allegations (**not 8 as set out in the issues). These are set out at pages 741 to 742. One of those allegations was later dropped - this was a failure to keep the complaints procedure in the residents' handbook up-to-date and failure to maintain a record of the complaints made. KD told us that

the reason this was later withdrawn was that after she had spoken to the claimant about it, the complaints folder was in fact located.

91. Four of the allegations related to the incident relating to the resident who was the subject of the complaint. Other additional allegations were failure to carry out audits of the home services, failure to carry out supervision of staff or to arrange for senior carers to carry out supervisions, failure to rectify items as raised in a fire risk assessment carried out on the 5th of June 2018 (including five short term solutions that represent the highest risk and are judged to impinge directly on the safety of people).The other allegation was failure to conduct regular fire evacuation drills in accordance with the regulations.
92. The claimant was invited to an investigatory meeting on the 15th of March 2021.
93. Mr Swanson put it to the 2nd respondent, KD, that the reason she had added another seven allegations was because the claimant had brought a grievance. He did not actually put it to KD that the reason for the additional allegations was because the claimant had complained of **discrimination** within her grievance. In any case, on the balance of probabilities, we accept KD's evidence that the reason she added a further 7 allegations to the disciplinary charges was because TD had identified additional matters in her report (and the addendum), and because , after the claimant had told the Board on the 22nd of October 2020 that the outcome of a fire risk assessment was rated as " tolerable", the trustees asked to see the report. On the 25th of November 2020 KD asked the Fire risk assessment company to send her the previous report. She found that both reports included the same items that needed attention. The Trustee Board did not have the opportunity to discuss this with the claimant before her suspension as she was not able to attend the meeting in November as she had tested positive for Covid and because she excused herself from the meeting in December.
94. Although the interim manager later reported to KD that staff said they had never had a fire drill, we note that this was not mentioned until the 18th of March 2021, that is after the allegations were extended. KD's statement refers to page 753, which records that some staff had said that they had never had a "proper" fire drill. It is not clear what is meant by that, and the report on page 753 was never given to the claimant prior to her dismissal.
95. On the balance of probabilities, we find that the second respondent did not add the additional 7 allegations because she was influenced by the fact that the claimant's grievance included allegations of discrimination under the Equality Act 2010, but rather because these matters had come to her attention through the report of TD (which was produced in late February 2021) and the fire assessment which she had by now had the opportunity to digest.
96. On the 8th of March 2021, the claimant wrote to the 2nd respondent – see page 750. She added an **additional grievance** to the effect that she was being victimised because she did a protected act and had raised a grievance about racial discrimination against the 1st respondent. She refers to the invite to the investigatory meeting and the additional allegations, and says that there appears to be an attempt to go on a "fishing expedition" to find an excuse to dismiss her, because the reasons for her suspension are without foundation. She said that making an allegation from 2018 - apparently a reference to the fire assessment - is motivated to damage the trust and confidence she held in Abbeyfield. She

said that there cannot be any sound basis for this allegation given the passage of time and subsequent inspections, and she was disappointed by what she referred to as “a continuing act of discrimination”. She asked that the disciplinary investigation meeting should be postponed in accordance with the Acas Code of Practice whilst the grievance was dealt with. The 2nd respondent read this second letter of grievance as a suggestion by the claimant that her grievances and disciplinary action were linked - see page 746.

97. On the 10th of March, at page 751, Mr Magowan (DM) wrote to the claimant referring to the letter dated 8th March 2021, stating that the allegations about racial discrimination should be investigated as part of the disciplinary process, not the grievance process. He asked her to send him any further evidence she wanted to be taken into consideration regarding the grievance related to lack of trustee support over the COVID lockdown, or any other grievance points(but not about responses to the disciplinary investigation allegations or assertions that the disciplinary allegations are without foundation). These should be sent to him by the 19th of March so that the grievance investigation could proceed and be concluded prior to the disciplinary investigation continuing. On the 15th of March 2021, see page 752, the claimant responded, saying that her letter dated the 8th of March 2021 did not only raise an additional concern of racial discrimination but said that her new concern was victimisation because she had done a protected act and complained about racial discrimination. She said that the additional allegations made against her after her grievance meeting were being made in retaliation, and repeated that the inclusion of an allegation from 2018 was being made to damage her trust and confidence in Abbeyfield as her employer. It seems that DM's letter was based on advice taken from the national Abbeyfield society -page 746.
98. On the 23rd of March, DM wrote back to the claimant saying that he was investigating the original grievance outlined in the letter of 28th of January 2021. He said that he would address the matter of the trustees not carrying out a risk assessment for BAME staff. He reiterated that the additional allegations made against her after the grievance meeting related to the separate disciplinary matter in which he had no involvement and that she would have the opportunity to respond to them as part of the disciplinary investigation. He said he was not aware of any details of the disciplinary matter. He said he could not investigate and form a conclusion as to the validity of the disciplinary allegations (including whether the older issues were relevant) and that would be part of the disciplinary investigation. He said that if the claimant wished to raise a grievance about the disciplinary process that could be dealt with after its completion. He said that in the absence of the claimant providing any further information by the 19th of March he was now proceeding to complete the grievance investigation.
99. DM sent the claimant his grievance decision on the 30th of March 2021 - page 761-765. DM did not uphold the claimant’s grievance. Regarding frequency of contact with trustees, he focused on the contact with trustees during the period of the Covid pandemic, and pointed out that there were trustees’ meetings monthly between April and September 2020, except in August. He pointed out that Trustee meetings were also held in October and November. He also noted that on the 27th of April 2020, PB had reported he was speaking to the claimant two or three times per week, and

that there was some evidence of meetings between him and the claimant, and that KD had been in contact with the claimant regularly. He did not investigate the earlier periods of time with which we have dealt with above, although we find that the first 3 lines of the grievance of 28 January 2021 are wide enough to cover that, in the context of her requesting more support and staff on many previous occasions. The claimant had also referred to the previous four or five years in the grievance meeting.

100. In relation to support staff, he focused on the period of the pandemic, on the attempts that the trustees had made in 2020 to help the claimant recruit more staff. He noted that there had been discussions about care staff and support staff needs. DM concluded that although it was a very busy and stressful time for the claimant as home manager as she faced the “unprecedented challenges of Covid and sought to protect the residents who were vulnerable to the virus”, the evidence did not support her allegation of lack of support from trustees over that period. He said that the trustees were responding to the need for administrative support following Sarah Potten leaving in July 2020, and did not uphold the grievance.

101. Regarding annual leave, on page 760 DM said that he had found no record of the claimant requesting annual leave at the trustees’ meetings nor of it being raised in her annual appraisal. We accept the claimant’s evidence that she had in fact raised this during her appraisal and we have noted above that there was some evidence about the claimant requesting annual leave and saying she was unable to take it during trustees’ meetings and whilst she was in contact with KD.DM does not seem to have been given access to those emails by KD.

102. DM does say that there is no record of the claimant being told by the trustees that she could not take annual leave. He says that, with a manager and deputy manager employed at the home, it should have been possible for her to take leave, and for the manager and deputy manager to take these separately at some point over the period. He said it was within her remit as manager to coordinate this, and he did not uphold the grievance.

103. Regarding the question of a Covid risk assessment for BAME staff, he maintained that the production of risk assessments was the responsibility of the home manager and not the trustees. He said that the claimant had the professional experience and detailed knowledge of working practice to undertake an assessment of the risks to staff and residents. He said that as the pandemic progressed, she would have been aware of the risks to BAME staff, who formed most of the care staff, to older staff and to staff with other health conditions. He said that the claimant had access to advice and guidance from the national Society's care home support. He said that there was no record of the claimant requesting (at a Trustees’ meeting or at her annual appraisal) to work off site because of the heightened risk due to her age, health or BAME group, and that he would not expect the trustees to have the specialist care knowledge to be aware of this requirement. He did not uphold this aspect of the grievance.

104. In respect of the claimant testing positive for Covid and her complaint that she didn't receive any contact regarding her well-being, he said that KD was in contact with her by e-mail from the 26th November inquiring how she was feeling and whether she had her laptop at home. He said that there was phone contact, and that KD delivered the claimant’s laptop to her at home. The 2nd respondent had said that although the claimant tested positive she

had reported no symptoms. Because of this, the 2nd respondent was in contact with the claimant by phone and e-mail regarding the recruitment of additional administrative assistance.

105. There are no specific issues that we have to determine in relation to the grievance, as it is not a matter that is specifically referred to in respect of the complaints of detriment due to public interest disclosure (that is, the grievance and its outcome are not alleged to be detriments, although "lack of support" is) or victimisation. The grievance was dealt with separately from the disciplinary proceedings, although if the grievance had been upheld this may have had an impact on the disciplinary outcome, and Mr Swanson suggested that, as a trustee, DM should not have heard the grievance.

106. We consider that Mr Magowan did not get to grips with some of the longer-term aspects of the claimant's grievance, and that the opening words of her letter of 28 January were wide enough to suggest that she had concerns which were not limited to the period of the pandemic in 2020.

107. His conclusion is that the role of the executive committee (trustees) is principally to provide oversight and governance, to develop strategic plans and policies, review finances, check legislative compliance and monitor progress towards achieving set objectives. He said that the manager was responsible for day-to-day operation of the home and for management of staff. He said that the manager was an experienced and trained professional in the care sector and should provide regular reports and advice to the trustees, identify areas of concern, and seek their counsel and approval for strategic decisions. The letter concludes that whilst DM appreciated that it had been a busy and stressful time for the claimant as home manager, and that she together with other staff faced the unprecedented challenges of COVID and sought to protect the residents who were so vulnerable to the virus, it was not correct to say that there was no support from the trustees in the areas she identified, so that the grievance was not upheld. The claimant was told that she had the right to appeal within seven days giving reasons why she believed that the decision was unfair and that the appeal would be conducted by another trustee.

108. On the 6th of April 2021, the claimant appealed against the grievance outcome and said that she had asked that DM speak to the deputy manager, who was aware of conversations that took place between them both regarding staffing problems. She said that there had been no reference to the deputy manager. She pointed out that two staff were furloughed,, which contributed to staff shortages and that she had not seen the minutes of the [trustee] meetings he mentioned. She pointed out that she had not agreed with the appointment of the replacement administrator and that she had told KD how difficult it was to work with him. She said it would have been "too much" for the other person if she or the deputy manager had taken leave. She said that there were many subjects discussed during her appraisal which were not written on the form. She said that the fact that KD had asked her to work whilst quarantining did not support the assertion that she could have taken annual leave. She said that the first respondent had a duty of care for the health and safety of this staff and therefore a risk assessment should have taken place for managers to explore safer ways of working. She did a risk assessment for each of the care staff and a risk assessment should have been done for herself by a trustee. They should have considered that she was from a BAME background and had underlying health conditions. Regarding her positive Covid test, she said that Ms Davis was in contact via e-mail, but this was after she had phoned the claimant to

see what she (the claimant) could do to help the deputy manager. She said that KD did not show any concern for her health.

109. Also on 6th of April 2021, the claimant was invited to an investigatory meeting on the 14th of April regarding the disciplinary allegations.

110. The second respondent asked its other new trustee, Mark Oliver, to conduct the grievance appeal. Mr Oliver (MO) told us that he had previously worked for a civil engineering firm for over 30 years and had at one point been line manager to about 70 people. He said that he had experience of dealing with many employee relations issues, including redundancies, disciplinaries and grievances.

111. Mr Swanson put it to him that the claimant's grievance was against him as a he was a trustee, and therefore he should not have heard the appeal. Mr Oliver stated that the focus of the grievance was prior to his engagement as a trustee and that he had never even met the claimant before the appeal hearing. He felt that he was in a good position to take responsibility for the grievance appeal. He said that he had taken advice from the national Abbeyfield Society who agreed that this was appropriate. Having heard and seen MO give evidence, we accept that he was not influenced by KD (or anyone else) in his approach to the appeal. MO had also consulted the Acas guidance on grievance procedures before agreeing to hear the appeal. We accepted his evidence that his decision to reject the appeal was not influenced by the fact that it was a decision made by Mr Magowan and because it was against his fellow trustees.

112. Due to the appeal against the grievance outcome, the 1st respondent decided to postpone the disciplinary investigatory meeting. We can see this from the e-mail sent by KD on the 20th of April 2021 at page 774. She was asking for additional support from the national Abbeyfield Society.

113. On the 23rd of April 2021, the grievance appeal hearing took place. The claimant was again represented by her trade union representative, Trevor Knowles-Alowu (TKA), and there was a note taker. It is clear from the notes that the claimant talked about the history of her relationship with the trustees and about the decline in staffing of the home. She said that she had been asking for help during appraisal meetings from as far back as 2012. She provided MO with a letter dated the 13th of July 2018 to CW from Gaynor Cavanagh(GC) about the situation at the home (SB pp1-3) which included the comment that the claimant had made to GC, that she was not managed and received no guidance from CW. MO noted that the formal grievance letter focused mainly on COVID and lockdown issues but the claimant appeared to be now "introducing" complaints going back over many years. The claimant said that Covid "brought all the previous issues to a head" because nothing had been done. The claimant reiterated that the deputy manager should have been spoken to and that if she had, she would be able to corroborate what the claimant said about the lack of support. The claimant said that she had refused to sign her last appraisal and that questions she had raised were not answered by the 2nd respondent. The claimant said that it was "not her place" to complete a risk assessment for herself (as a person at particular risk from Covid). She said that she felt that the trustees could have asked, at least, about her welfare. She said that she felt disheartened because, when she was off sick with Covid, having experienced very bad headaches, KD was asking her if she could drop off the laptop so that the claimant could provide support to [the deputy manager] and did not ask how the claimant was. She felt that her relationship with the trustees had been breaking down for many years.

114. Mr Oliver responded in a letter dated 4th of May 2001, which is on page 783 to 786. On 783 he set out the tests he was applying, that is whether the grievance procedures had been followed, whether a reasonable investigation had been undertaken previously and whether the outcome previously reached was reasonable. He said he had not found any breach of the grievance procedures and had made further investigations where he thought it necessary or where the claimant had provided him with further evidence to consider.

115. We can see some evidence of this in the bundle at page 776-775. He spoke to the deputy manager. He found that the minutes of trustee meetings had been emailed to the claimant and that on occasions they were sent to the deputy manager to print out and give to the claimant, and that the claimant had not challenged the minutes. We have not been provided with a complete set of minutes, so we are unable to reach any conclusions about them save where we have indicated otherwise. He notes that the first respondent was given a good CQC rating in January 2019.

116. Mr Oliver, for the reasons he gave, did not uphold the appeal. Whilst the claimant had indicated that she did not agree with the actions of the trustees in appointing an inexperienced administrator, and at the heart of this issue was the additional time she had to devote to supporting him, MO did not think this was sufficient to overturn the previous findings. He found that it was the claimant's responsibility to make sensible leave arrangements for the deputy and herself and that it would then be a matter of courtesy and good judgment to share this plan with the trustees. He said that the claimant had misunderstood her role and that whilst Covid may have made taking leave more challenging, she was the one with responsibility and best placed to determine an operational solution or come forward with proposals to the trustees. He noted the options to resolve the matter proposed by the trustees, including the hire of an interim manager to cover leave, and that there was an agreed solution to hire admin support.

117. Mr Oliver found that the claimant had again misunderstood her role when she expected a risk assessment for herself to be undertaken by the trustees. He said that she would be in the best position to do this and then share it with the trustees. Mr Oliver did not reach any conclusions on what the claimant said about her interaction with the second respondent when she had been tested positive for COVID. He said that he could not investigate claims that related to verbal interchanges and relied upon one person's word against another, and that the claimant had not provided any evidence to substantiate her assertion, by which we take it he means any independent evidence or documentary evidence. He said that the claimant had confirmed at the appeal meeting that the trustees had on occasions shown some concern for her.

118. In his concluding remarks at pages 785-786, Mr Oliver noted that after many years of service, doing a role that the claimant enjoyed for people she loved, it was sad and unfortunate that matters had come to this situation. He said that his overriding impression was that, at the heart of the grievance, was a breakdown in relationship between the claimant and trustees that had arisen over an extended period. He said that there seemed to be an underlying issue of mistrust and misalignment of expectations given that trustees had changed on a number of occasions. He said this was exacerbated by the pressures on all parties during the early stages of Covid. He acknowledged that the claimant may perceive that she had not been supported as she would have liked but believed that this was rooted

in a misunderstanding of the governance role of the trustees compared to the operational role of the registered manager. He said that the first line of her job description set out a principal duty as the overall supervisor of the day-to-day running of the home. We consider that this finding neglects the fact that the trustees had oversight of what the claimant was doing, although they were not responsible for the day-to-day running of the home. It appears to absolve the trustees of any responsibility whatsoever towards the claimant. Mr Oliver seems not to have been aware of the changes in the level of involvement of the trustees over the years, which had blurred the boundaries of the claimant's role, that the claimant had not been properly informed about the trustees' role and had not, in particular, been provided with the documents to which we were directed in that respect at 1033-34.

119. MO said that as the claimant was the CQC registered manager, that set a very high bar. She was expected to have complete oversight of all areas of the home, particularly health and safety, safeguarding, CQC compliance, the management and performance of the staff team. He said that she was responsible for keeping up to date with current good working practices, legislation and training. He said there were clearly elements of her role that she expected others to have done. Although he had concentrated on the period of the pandemic, he said that over the years are healthy imbalance had developed between the claimant and the trustees such that the claimant had expected or required more support than was appropriate for someone in her operational role. When this had not always aligned with her expectations, she had concluded this to be lack of support. He said that this appeared to have come to a head in 2020, the period covered by her grievance letter of the 28th of January 2021, but from all the evidence he had seen the level of support provided by the trustees during that year far exceeded that provided in previous years, or normally expected of trustees.

120. MO said that the claimant needed to move on and "put this behind her" whilst committing herself to rebuilding trust and relationships with the trustees. He set out various steps that should be taken, jointly with the Trustees, including revisiting and updating the job description to include clarity of responsibilities and alignment with current best practices and expectations, define and clarify the precise nature of the relationships with the trustees so that there is no room for misunderstanding, define precisely what support she required from trustees to fulfil her role and understand the best way to communicate this, develop a training plan to update her skills where necessary to the required level to meet current standards and best practice as registered manager. He suggested that she take time to visit other care homes "to understand what best practice looks like and what learning can be brought back to Abbeyfield". He recommended that she discussed her the plans with Chair of trustees and share any risk assessment she considered relevant. He said they should undertake mid-year appraisal, review her objectives and set new ones for the future.

121. Although such recommendations would seem to go further than the matters raised by the claimant's grievance, we observe that these are all very sensible steps, typical of the type of oversight and strategic goal setting that we would expect from trustees. Unfortunately, this approach was precisely what had been lacking from the claimant's experience of working with the trustees in the past several years. MO's assessment also appeared to us to lack empathy or understanding of the situation the claimant had been in during the worldwide pandemic in 2020, given the acknowledged lack of staff even before the pandemic started. It appeared to focus on what

the trustees had done rather than the difficulties that the claimant had experienced in running the home at this exceptional time.

122. Having received the outcome letter on the 4th of May 2021, on the 5th of May the claimant was informed by the 2nd respondent that she needed to attend an investigatory meeting on the 12th of May. Gaynor Cavanagh from the national Abbeyfield Society would be there to take notes of the meeting.

123. The minutes of the disciplinary investigation are on page 789-794. After outlining her role, the 2nd respondent said that she may need to look at any further evidence discussed in the meeting, but "verbal information" was not sufficient. It is unclear what she meant by this. There was a discussion about the resident who was subject of the complaint, and the claimant directed KD to various documents kept in her office. The claimant said that she did not have detailed knowledge of the care plan as it was looked after by the deputy manager and a carer. She had asked for the care plan to be updated but would have less of an input than the other two. She said she spoke to one of the resident's sons and updated him with information from the CPN (Community Psychiatric Nurse). She said thought the son was happy to talk to her on the 'phone, and she had told him that she was worried about the resident's health. This appears to be a reference to the discussion in July 2020, when she had said that she thought the resident would be better off staying in a dementia registered care home. The son she had spoken to had said this was "fine".

124. The claimant said that she had also given that son the names of other care homes which she thought would be best able to care for his mother. She said that "normally" there would have been a best interest meeting, but it was not possible due to Covid. She said that the CPN had often been contacted about the resident's condition, and that she spoke to the GP about moving the resident on **before** the letter was issued. This does not appear to mean that she told the GP specifically that she was about to issue notice to leave in September 2020, but we accept that she did tell the GP that she was considering this.

125. The claimant said that she did not think about having a "best interests" meeting on Skype. She thought that she had probably spoken to the same son that she had discussed the situation with in July before the letter was issued. She said she told him she was struggling to keep the resident safe. As it was a very busy day, she had asked the carer to write the conversation up in the notes. She said she had not had many conversations with the GP's surgery about the resident and her medication, as it was difficult to get through to the surgery on the phone. She said the CPN was also hard to get hold of. KD asked whether there was documentation about this, and the claimant referred to her notebook and said that in addition there should be details in the handover book. She said that the resident was probably being looked after "one to one". She said that, on night duty, there were checks carried out but that the resident had slept all night.

126. The claimant accepted that she did not notify the CQC or Reading Council when the resident was found in in the basement. She said that she did not report it because it was the first time the resident had been found there and if it had happened more than once she would have reported it. The claimant said that she had not reassessed the resident's care needs us as she knew that the resident had dementia and that the home was only registered for nursing and residential care. She said that the resident did not need a deprivation of liberty safeguard as she was not stopped from

going out, so she did not think it was necessary. The claimant said that as there was no contract between the 1st respondent and Reading Borough Council for the resident's care, she didn't think it was necessary to liaise with them and thought it better that the family should find the resident a home, as the council may find a place they would not like.

127. The claimant said that she had asked one of the trustees (Sonja Sharpe) to update the complaints process previously.

128. The claimant said that although a medication audit was carried out, a lot of the "stuff" regarding audits was "in her head". She said that the CQC had said that when she had the time, she should write it down and share it with the deputy, but that she never got time to do what she wanted to do. KD asked which audits the claimant did in the home, and she said that she walked around the home each week to do them. She kept details of all the maintenance in her head and the CQC inspector had checked and said everything had been done. She said that the administrator also kept a spreadsheet on the computer regarding maintenance, and she would tell the administrator when the lifts had been "done". She said that the deputy manager "kept a good idea" on medication levels and ordering medication. She said that audits may not be written but they were done, and all the staff details were in her head. She said that producing the care plans for residents was not part of her role, she just checked them now and again. She had asked the administrators to keep the staff files up to date. One of the staff documented when care plans were updated.

129. Regarding staff supervisions, the claimant said that she and the deputy manager originally tried to do staff supervision every two months. Later, they shared this task with the senior carers, who supervised them, and the deputy manager and herself supervised the seniors. She said that this system was not working, that she put a senior carer on supervision training but it still did not work - some of the staff were not talking during supervision, just saying everything was fine. She said that she and the deputy manager went into handover daily and discussed any issues. She said that she had told the CQC inspector that she had no time to write up supervisions but that she talked to staff all the time and the CQC had said that it did not matter and that it did not need to be written up. The CQC inspector had spoken to staff on the inspection day. She said that she and the deputy did not have time to write notes of supervisions because they were taking calls from morning until the end of the day and that she had told the Trustees about this. She said that she recorded supervisions about specific things in her notebook, but not on the supervision form because "it's busier than it used to be and residents need more". She said that care assistants have an induction and are shadowed until they are ready to look after residents, and that she gets feedback from a trainer.

130. She said that when the CQC inspectors said that she didn't need to record supervisions in writing, she fed this back to the Executive Committee and told Paul Barton. We observe that the respondent agrees that there were supervision records up until shortly before the CQC inspection in 2019.

131. Regarding fire risk assessments, in respect of the five items that were identified in 2018, the claimant said that she fed this back to the Executive. She said there were some items she could do herself, as there was a small enough cost. We have noted that the claimant was authorised to spend up to £500 only on any irregular expense. There had been some discussion of authorising her to spend up to £1,000 but Paul Barton 's handover notes to KD confirm the claimant's evidence that this was revised back to £500. She

said that if the matter cost “thousands”, this was for the Executive Committee to agree and not for her, and that sometimes she asked them for advice about expenditure. She said that Berkshire Fire, the local fire authority, were happy with what she referred to as the “stay put” policy – meaning that because of the age and health of the residents, they should “stay put” during a fire until rescued. She said that although the fire authority was happy, the assessor did not agree when he returned in September 2020. She said that she had fed back everything to the Executive Committee and took instructions from them. She encouraged the Executive Committee to read the fire risk assessments. She said that she had reverted to the fire risk assessor at one point and told them that the Berkshire Fire Officer was happy with the “stay put” policy. She said there were solid compartments in the home to support this policy. She said that her contact with the Berkshire fire officer should be in the fire logbook. She said the committee made decisions after the risk assessments were carried out by the fire assessor company and they instructed her about what to do. She said that the Berkshire Fire officer had walked through the whole house since the 2018 report and that she had gone back to the Committee to say that he was happy with arrangements. She said it should be documented in the fire box file. She also said that there was a delay in getting the 2020 report which she had just fed back to the committee in late 2020. She added that there had been an impromptu site visit from fire officers from Caversham Fire Station recently. They gave 10 minutes notice, and they said that the 1st respondent was one of the better homes and were content with the arrangements. This was fed back to the committee in 2020. She said that this was not recorded “except maybe in her notebook”.

132. Regarding fire evacuation drills (which we take to mean evacuation of staff and visitors given the “stay put” policy, the claimant said that she tried to do every four months. The fire officer had said he would also like one done at night, but she was not sure how this could be managed. She said that the last drill was carried out just before the Covid lockdown and that during Covid weekly fire checks were done. She said that drills were recorded in one of the folders and the deputy manager should know where all the files were. She said that she also discussed drills at hand over and gave different scenarios for staff to consider. They would know about the “grab bag” and they would take the trolley to the evacuation points. She said that fire checkpoint drills took place weekly and that records were kept in the box folder.

133. KD pointed out that the fire assessment of the 21st of September 2020 stated that an annual full evacuation of all residents should take place at the earliest convenience. The claimant said that she hadn't done one “for a while” and it still needed to be done. She said that she had thought about how to do it “because it would be a nightmare” (given the pandemic restrictions) but she had not done it. She said that evacuation sheets were on the beds and that there were personal evacuation plans in a file in the manager’s office and that all the evidence was in the cupboard in her office.

134. The claimant said that she did not feel that the complaint by the resident’s family should have been handled in this way, that is, formally. She had not been given a copy of the complaint report. This seems to be a reference to the complaint by the family. She said she did not feel there was any need to suspend her to investigate in this way and that the committee should have done more to support her to respond to the complaint. She felt that the matter had been handled in this way to get rid of her. The second

respondent said that once the independent investigator had raised concerns the trustees "had to follow the disciplinary process". She said that she would go away and look for further evidence to inform the investigatory report. If necessary, she would call another meeting with the claimant and that the claimant would receive a copy of the report and appendices.

135. On the 25th of May 2021, the claimant wrote to Mr Oliver and said that she believed that some of the trustees were refusing to be accountable, and that some questions were asked and answered in a way to achieve the outcome they seek. She said that she did not accept many of his conclusions but was willing to discuss his proposals (p795).

136. By the 18th of June, the 2nd respondent had completed her investigation report and had been in contact with the national Abbeyfield Society. At that point, she was advised that the manager who held the grievance, Mr Magowan, could hold the disciplinary hearing, and the chairperson of the grievance appeal, Mr Oliver, could be the line of appeal. She was advised that "a panel could confuse matters" as it would not leave anyone for the line of appeal. Subsequently, page 819 of the bundle, the 2nd respondent spoke to various HR firms about the situation. She had been told that it would not be appropriate for her to suspend the claimant, carry out the investigation and then chair the disciplinary hearing. She said that Mr Howe, who eventually held the disciplinary hearing, had also made this comment and "seemed to be a good fit". She said that his role would be to recommend action to herself and then it would be "my decision" what action to take.

137. This seems to be a change of stance from that discussed with Ms Ainsley (national Abbeyfield) in June 2021, when it was suggested that Mr Magowan could hold the hearing. We can see on page 818 that an HR advisor at the national Abbeyfield society had said that "normally they would suggest a different hearing manager" but the Society "did not have the luxury of having that structure". The HR Advisor referred to Acas guidance and said that the investigation manager can hold the hearing "so it is not bad or illegal practice". This is not, in fact, what the Acas Code of Practice says. It says that "where practicable" different individuals should be involved.

138. By the 28th of July - page 817, the 2nd respondent was saying that Mr Howe would make the recommendation, having heard the disciplinary, but that the decision would be made by herself and (vice chair) Sonja Sharpe. In the end, we know that once Mr Howe had reported on the 6th of September 2021, the full board of trustees met on the 8th of September by Skype and took the decision which is recorded in one paragraph, paragraph 3 on page 888. There is a paragraph which reads "declarations of interest", but none was declared.

139. KD's investigation report is at pages 822 to 828. By this stage she had located the complaints procedure and had decided not to pursue allegation 5, failure to keep the complaints procedure in the resident's handbook up-to-date or to maintain a record of complaints made, although she did make adverse comments about the adequacy of the record keeping. By this time, KD had attempted to look for the claimant's notebook but had been unable to locate it. Although KD was aware that she should not be making recommendations, in her report she made a finding that the complaint against the claimant in respect of the resident who was asked to leave was "upheld" and said that a full and frank apology should be issued by the Trustees.

140. We heard from Mr Howe ("TH") that he was contacted by the 2nd respondent sometime in July 2021 via a contact at another Abbeyfield Society. Initially, he was asked to advise her on the disciplinary process due to her lack of experience. Having heard what she had to say about "her problem" as he put it, he suggested that, as she had carried out the investigation, it would not be appropriate or best practice for her to hold the disciplinary hearing. He suggested that he would be in a good position to hear the disciplinary and make recommendations, having previously being an HR consultant for over 10 years. He told us that during that time, he had been mainly concerned with dispute resolution and mediation. He was also on the board of a different Abbeyfield society which was also affiliated to the national Society.

141. It was not explained to us why, if it was considered appropriate to involve a third party, TH was not asked to make recommendations, and the trustees could simply have agreed to be bound by whatever he decided. There was nothing that we could see in the Articles of Association or the claimant's contract that would have precluded this, and Trustees are told that they have power to delegate their responsibilities – see page 1033. That did not happen.

142. By the 24th of July 2021, TH was able to contact the claimant and suggested that the disciplinary hearing could be held on the 3rd or 6th of August. The claimant was not free on either of those dates and so the disciplinary hearing was rearranged for the 19th of August. The letter sent to confirm this is a page 834 in the bundle.

143. There were no terms of reference given in writing to TH. He told us, however, that he had discussed with KD what he referred to as "the problem" that she was dealing with [i.e. the disciplinary proceedings against the claimant] and that he saw his role as being simply to report to the Trustees and that he did not think he should recommend a particular sanction. On the other hand, his report concludes on page 885 by saying that the five allegations that have been proved are "all serious and in several cases have exposed the Society to the potential of prosecution". He said that in all the circumstances a decision to dismiss would be justified based on the evidence he had seen and heard and that this would be consistent with the provisions of the Reading Abbeyfield disciplinary policy. This seems to us to be a "recommendation" by any other name.

144. The Abbeyfield "Disciplinary Policy and Procedure and good practice guidelines" are in the bundle at pages 481 - 489. As well as the provisions in paragraphs 1 and 2 regarding the background and objectives, the policy and procedure sets out various disciplinary options, ranging from informal action, mediation, verbal warnings, first written warnings, final written warnings, extension of a final written warning and dismissal. In paragraph 4.2 it is said that mediation may be considered where appropriate to help resolve any issues.

145. At paragraph 4.6 it is said that periods of suspension should be kept to a minimum and reviewed after 14 days. KD told us that she did so, although there is no documentary evidence of this, it is not referred to in her witness statement and she did not explain when she did this or what her thought processes were. We do not accept that she gave more than cursory attention to the possibility of the claimant's suspension being ended to allow her to return to work.

146. At paragraph 4.7 it is stated that employers are obliged under the Safeguarding Vulnerable Groups Act 2006 to refer information about certain

individuals to the Disclosure and Barring Service (DBS). This includes where the individual is dismissed on the grounds of misconduct which harmed the resident or placed them at risk of harm. There is a list of the types of misconduct which may result in the referral to the DBS "adult barred list", including neglect, physical harm, emotional and psychological harm. Paragraph 4.5 provides that the levels of disciplinary sanctions range from verbal warning to dismissal and will be consistent with the nature and seriousness of the issues subject to disciplinary action.

147. In the respondent's disciplinary policy, there is no provision for anyone other than the Chairperson of the disciplinary hearing to decide about the sanction. At paragraph 4.12.4, dismissal, it is stated that if the offence constitutes gross misconduct or if the employee has been issued with a final written warning within the preceding 18 months the chairperson or hearing panel may decide to dismiss the employee. It said that if harm or abuse is substantiated or proven the matter will be referred to the DBS and the individual will be advised of this in writing.

148. There is a list of examples of gross misconduct in the policy at page 487. One of those covers acts which have harmed a resident or put them at risk of harm such as neglect, physical harm etc. Serious breaches of health and safety rules or conduct which may endanger the safety of others are also covered. It is stated that this is not an exhaustive list.

149. In respect of appeals, at paragraph 4.14 it is said that the employee has the right of appeal against any disciplinary sanction, and that appeals will normally be considered by a manager not previously involved in the case who is more senior than the chairperson responsible for the decision made at the disciplinary hearing. Appeals should be lodged within seven days of the decision of the disciplinary hearing. The grounds on which an appeal will be heard are that: new evidence has come to light which was not available at the time of the disciplinary hearing; the disciplinary procedure was not followed; the level of disciplinary sanction was not reasonable, that is the severity of the sanction was not consistent with the seriousness of the offence; and that the decision taken by the disciplinary panel was not supported by the evidence. It is stated that it is not the purpose of the appeals process to re-examine the evidence which led to the original decision and, therefore, except in exceptional circumstances, there will be no need for witnesses to re-appear or for the same written material to be reconsidered. Again, the procedure provides that the chairperson of the disciplinary makes the decision.

150. It is said (at paragraph 4.16) that if mediation was not appropriate as an informal process because of the circumstances, it may be considered to help build relationships following any formal outcome.

151. When asked by the Tribunal, TH said that he thought his job was to consider whether the situation justified summary dismissal, and if not, what other sanctions there could be. TH was asked by the Judge about the disciplinary policy and whether he had taken it into account, and in particular whether he had considered **paragraph 2 of the disciplinary policy**. This says that the objectives of the disciplinary policy are that it is primarily designed to encourage employees to improve their standards of conduct when an informal approach either has not worked, or is not appropriate because of the circumstances.

152. TH said that he had not taken this into account and that, if it had been up to him, he wouldn't have written the disciplinary policy in this way. He said that in his view the purpose of a disciplinary policy is not usually to

encourage employees to improve their behaviour. He was then referred by the Tribunal to **paragraph 1,** which says that Abbeyfield is committed to avoiding formal disciplinary procedures wherever possible by addressing issues as soon as they arise. Where some form of informal or formal action is needed, it is said that the Society will ensure that issues are **raised and dealt with promptly, fairly and consistently** [emphasis added] and that any disciplinary action is undertaken in accordance with the provisions of the policy and procedure. TH commented that whilst that may be the case, there were some situations which justified dismissal even though lesser sanctions had not been tried. He had not sought to set out alternative sanctions for the Trustees to consider in his report.

153. TH said that he did not read the documentation attached to the investigation report in full, as he wanted to keep an "open mind" when he spoke to the claimant. He said that he was aware the claimant's grievance had been rejected but did not read that documentation in detail. TH said that his interpretation of the Acas Code that if it was "a small company" and there was "no one else" to investigate as opposed to hear a disciplinary, it would be appropriate for the same person to do it. He said he would usually recommend that did not happen, however.

154. The minutes of the disciplinary hearing are at pages 842 to 866. The claimant was represented by her union representative TKA, and KD was present and questioned the claimant, as did TH. TH clearly carried out some investigation himself before making his conclusions, which are to be found at pages 880-885 in a bundle. There is also an appendix at page 886 which shows the documentation that he referred to. One of the documents that he referred to is a written report from the interim registered manager, dated the 27th of August 2021. We checked with TH as to whether he had ever shown the report, which appears on page 876 of our bundle, to the claimant and asked for her comment. He accepted that he had not and that the report influenced his conclusions. The report is mentioned in the appendix to the outcome letter, but a copy of it was not attached to the report which was sent to the claimant. The claimant made it clear through Mr Swanson that she disputed the contents of this report, and in particular the assertions that there had been no audits within the recent past and that no fire drills had been completed. The claimant also told TH at the disciplinary meeting that she had carried out staff supervisions but accepted they had not been recorded adequately over the recent past. The Interim Manager's reports (of which there are two) are not mentioned in the appendices to KD's investigation report (p824).

155. In his disciplinary report, TH found that allegation 2, which relates to failure to take measures to prevent a repetition of incidents which placed a resident at significant risk, and allegation 4, which was an allegation of failure to follow the Mental Capacity Act 2005 deprivation of liberty ("DOLS") safeguards by completing a DOLS authorizations, were not substantiated. Regarding allegation 4, he thought that as many managers would have come to the same conclusion as the claimant as would not. He found that the other allegations were substantiated, although in relation to allegation 5, failure to carry out audits of the home's services, he found it likely that the claimant was carrying out some audits, but that because of lack of records it was impossible to say whether this was comprehensive or to the standard required by the CQC.

156. He said that the statement from the interim manager "who is probably as independent as one could expect" clearly shows that there is no evidence

of audit since the last CQC visit. This is the report which had not been shown to the claimant prior to the disciplinary hearing (or indeed subsequently) so that she was never able to comment on it. He said that this lack of recording by itself would probably cause the CQC to be unhappy at the next inspection. He said that the failure regarding audits could be viewed as a joint one between the manager and trustees, but that the primary responsibility must lie with the manager.

157. In his evidence before us, TH said that he had been chairperson of another Abbeyfield society and therefore was aware of the responsibility of trustees to ensure that audits were carried out. He accepted that both the claimant and the trustees were equally responsible for this failure. He said that because of this, he had effectively disregarded allegation 5.

158. TH found that allegations 1, 3, 6, 7 and 8 (see page 835) were substantiated and that he should take them into account.

159. Allegation 1 was "putting a resident at risk of harm by failing to carry out the relevant risk assessments and processes to ensure that they were safe within the home particularly in relation to the requirements of the Mental Capacity Act". This was in relation to the resident in respect of whom the complaint had been made and concerned lack of evidence of a formal risk assessment and lack of consultation with those involved in the resident's care. TH also considered that it covered lack of a "best interests" meeting – presumably one of the "processes" referred to. TH accepted that the claimant "probably did" initiate some actions in the best interests of the resident but these were not recorded as they should have been, and he could not be sure that the actions were adequate and comprehensive. He did not accept that it was too difficult to hold a "best interest meeting" due to Covid restrictions.

160. **Allegation 3** was failure to notify the CQC and Reading Borough Council about the safeguarding incidents. The Society's safeguarding policy is at pages 986 to 996. KD criticised the policy because she said it was out of date and unclear. It was approved by the Executive and Mr Barton as the Chairman in January 2020, with review date of January 2021. KD had been a Trustee at that point. The claimant had stated during the disciplinary process that the 1st respondent did not have a contract with Reading Borough Council, so she did not inform them. It is not clear what Mr Howe made of this argument as he simply records on page 881 that it was accepted that the claimant had not informed RBC or the CQC, and he thought that was the wrong decision.

161. Mr Swanson put it to KD and TH during their evidence that the claimant was not the right person to inform the CQC or council, based on the respondent's own safeguarding policy. It is clear from page 989 that the care home manager (i.e. the claimant) is responsible for ensuring the policy is fully implemented. It is also stated, however, that the manager should raise any queries about the application or interpretation of the policy with their line manager. The claimant did not have a line manager. Mr Swanson pointed out that it is stated that if the care home manager was directly involved in a safeguarding incident, then the responsibility for keeping the resident, their relatives or representatives informed will rest with the "business manager". There was no business manager at this care home. As the safeguarding incidents appear to relate to the fact that the resident was found unaccompanied in the basement of the premises, at a time when she was being supervised by carers rather than the claimant, we do not think that the provision relating to the Business manager applies, but it an

example of the lack of clarity of the policy adopted by the Trustees. It is also stated on page 989 that the "Executive Management Team" is responsible for ensuring that Abbeyfield safeguarding policies and procedures are effective in minimising abuse and safeguarding residents from harm. This team will ensure that safeguarding policies and procedures are regularly reviewed and updated, and that changes are effectively communicated throughout the organisation. It is stated that the "team" will ensure that there are suitable systems in place to monitor the effectiveness of safeguarding arrangements and that where things go wrong, lessons are learned to ensure that any mistakes are not repeated. "Executive Management Team" is not defined, but we note that on page 1033, the Guidance on the role of the Trustees and Executive Committee, it is stated that the Trustees draw up the plans and policies, monitors progress towards them, and reports to others on the work that is done. Despite the lack of clarity of the policy, we accept that there was evidence from which TH could conclude that the claimant should have consulted Reading BC about the move and that she should have informed the CQC that the resident was (twice) found on a different floor from her room.

162. **Allegation 6** was the allegation regarding failure to carry out supervision of staff or to arrange for senior carers to carry out supervisions. TH found that it was very likely that the supervisions had not been carried out to the required frequency and standard since at least the last CQC report in January 2019. He said that the claimant's grievance re lack of staff and lack of support had been rejected, although he admitted in evidence that he had not read the grievance documents in detail.

163. **Allegation 7** was failure to rectify items raised in a fire assessment risk carried out on the 5th of June 2018. These included five short term solutions to issues that represent the highest risk "and are judged to impinge directly on the safety of people". The claimant had said that some action re a green exit button had been taken because this was within her expenditure limit and that the other matters had been referred to the Trustees. TH says that there is no reference to this in the Executive Committee minutes. We know that she did supply the 2020 report to the Trustees. There is reference to this on p632, 29 October 2020 when she discussed getting a green exit button with KD. The Trustees were certainly aware that the 2018 Fire Assessment was up for review – see page 604. The claimant said that the issue regarding the consumer unit (page 969) was referred to the maintenance company, SMS. No-one seems to have checked this with that company. As TH records, she also said that the Berkshire Fire Authority had visited after the 2018 report and were happy with the arrangements in the Home, including the position of the hoists, if there was enough space for a wheelchair to pass. No-one seems to have checked with the Fire Authority whether there was such a visit. TH just says that no record of the visit could be found.

164. The relevant fire assessments are found at pages 958 to 963 and 964 to 971. On both assessments it is said that recommendations should be implemented to reduce fire risk or maintain it at a tolerable level. It is said that the enforcing authority may consider the deficiencies to be an offence and that remedial action should be completed as soon as possible. The fire risk assessment dated the 5th of June 2018 included as short-term solutions that the 1st respondent must arrange for the emergency door release units to be installed and positioned on the side approached by people making their escape to two doors, which are named. This is a reference to the green

exit button to which the claimant referred and which she had discussed with KD in October 2020, p634. The claimant said that she had raised these matters with the trustees, as her expenditure limit was £500 per item more than once.TH could not find any reference to this in the minutes, but we have seen KD's note from 29.10.20. KD does not appear to have disclosed this to TH or attached it to her investigation report – see page 824.

165. The next point raised by the fire assessor was that a positive action self-closing device conforming to British standard should be installed to the hairdressing room and 2nd floor washing room doors. The claimant accepted that this had not been done but again said that she had raised the matter with the board and was waiting for them to respond. She had been hoping to get this resolved at the point that she was suspended.

166. The next point raised was that the 1st and 2nd floor landings of the rear escape stairway were obstructed by lifting hoists stored on the 1st and 2nd floor landings and that these must be moved immediately, ensuring that the landings always remained unobstructed. The claimant she had asked the Berkshire Fire Authority about this as she had nowhere else to charge the hoists, and that the fire service had been content with the arrangements provided it was possible to get a wheelchair past the hoists, which it was.

167. The next matter raised by the assessor was that a consumer unit was not enclosed in fire resistant material and he recommended that a competent person should enclose the consumer unit in suitable fire resistant material providing 30 minutes fire resistance and that if there was a door to the unit, it must be of a particular standard and should remain locked at all times. Again, the claimant referred to the limit on her expenditure and said she had raised this with the board and that the maintenance company had been asked to deal with this.

168. In the risk assessment reports from the 21st of September 2020, at page 965, the assessor ticked the box to say that fire drills were carried out at appropriate intervals. He said that it was reported that ordinary quarterly fire evacuation drills were arranged for staff and visitors. We observe that this is consistent with what the claimant said about the "stay put" policy for residents. There is no suggestion that the residents be moved during the quarterly drills. The report continues that since the COVID-19 situation, drills have been suspended. Due to some of the residents' disabilities and in some cases their fragile nature due to age, these individuals did not take part in drills.

169. Items one and two in the 2020 reports are not stated to be matters which need immediate attention. Item 3 required a short-term solution and again related to the need for emergency release units. Item 4 related to the hair dressing room and 2nd floor washing room doors; item 5 related to the hoists, see above. Item 6 related to the consumer unit, see above. This appears to be four items which needed short term attention, rather than five. Two of those were disputed by the claimant and she had said that the other two were outside of her budgetary authority.

170. **Allegation 8** was failure to conduct regular fire evacuation drills in accordance with the regulations. When KD and TH were questioned there was a lack of clarity as to which drills were the subject of this allegation. TH refers at page 884 to quarterly drills being suspended due to Covid. The 2020 Fire Assessor's report at page 970 states that the assessor would like to remind the client (1st respondent) that they have a duty under the Regulatory Reform Order to undertake fire evacuation drills and these drills evaluate the effectiveness of the emergency plan. An **annual full**

evacuation of all residents should take place at the earliest convenience, supporting the quarterly drills that are in place. So in September 2020, fire assessor was not criticising the fact that quarterly drills had not taken place during the pandemic but was recommending the annual full evacuation should take place at the earliest convenience. The report was received in late September 2020 or early October 2020 and this had not been actioned by 5 January 2021, the claimant saying that she had not had an opportunity due to the pressures of understaffing and the Covid pandemic. The claimant said she had requested help from the trustees to carry out a night drill but had not been given support. She said that "break glass" checks were done every week and different evacuation scenarios were discussed with staff.

171. In his overall conclusion, TH said that there was a **widespread failure by the manager to keep adequate records**. He said this was mentioned in most of the allegations. He said that there was some mitigation in the period since March 2019 as the COVID pandemic restrictions made the task of management of care homes considerably more difficult and complex. He says, however, that there is evidence that poor record keeping predated the Covid pandemic. He said that although there had been serious deficiencies in the way that the claimant was running the care home, it seemed to him that this was more a case of the manager finding the task of doing so, with all the current requirements and pressures, too much. He said that he did not detect any deliberate breaching of rules or incompetency by the manager. He said, however, that the five allegations that had been substantiated were all serious and in "several cases" exposed the Society to potential prosecution. He concluded that, in all the circumstances a decision to dismiss would be justified, based on the evidence he had seen and heard, and that in his view this would be consistent with the provisions of the Abbeyfield Reading disciplinary policy. As we have seen from the findings above, TH did not actually consider the alternatives to dismissal and accepted in evidence that he had had disregarded certain sections of the Abbeyfield disciplinary policy.

172. As noted above, Mr Magowan had said that the claimant's complaints of race discrimination could be dealt with at the disciplinary hearing. TH refers to these at the end of the conclusions. It is not clear whether he had seen the emails between the claimant and Mr Magowan. He found that the allegations of discrimination were general and unspecific and interpreted what the claimant was saying as meaning that she disagreed with all the allegations, felt them to be unfair and because of this assumed that the motivation behind them was discriminatory. In particular, she mentioned that the original complaint about the treatment of the resident had widened to include such things as lack of audits and supervision, and issues regarding the fire assessment. She accused KD of deliberately looking for things that could be held against her. TH concluded that all of the additional issues had come to KD's attention naturally during the course of her original investigation or had been raised by the interim registered manager or through the fire assessment report. The claimant had been unable to give any specific examples of race discrimination and he found that the claims of race discrimination were based solely on supposition and did not consider that it was necessary to adjourn to investigate them.

173. TH's report was sent to the board and the claimant on the 6th of September 2021 and was considered at the Board of Trustees meeting on the 8th of September 2021, which was held via Skype. KD, Ms Sharpe, DM and MO were all present. The first paragraph in the minutes allows for

declarations of interest but none were declared. The claimant's dismissal is dealt with in one short paragraph, paragraph 3 on page 888. It reads as follows "The outcome of the disciplinary hearing against the manager was discussed. We concluded that, given the gravity of the allegations that were found to be proven, instant dismissal was appropriate. We hope Bernie will accept our settlement offer by Friday the 10th but if not we will proceed with instant dismissal".

174. KD refers at paragraph 27 of her statement to a letter that was sent to the claimant on the 14th of September 2021 from the Society, which was signed by KD on behalf of the Board. This dismissed the claimant with immediate effect - pages 898 to 901.This included the reasons. The Board included allegation 5, failing to carry out audits, which TH had considered were equally the responsibility of the trustees and told us he had disregarded in his own conclusions. It is fair to say, however, that he did not make this clear in his report, where he considered this to be a joint responsibility - page 882. The letter says that KD had decided that the claimant's conduct had resulted in a fundamental breach of the claimant's contractual terms which irrevocably destroyed the trust and confidence necessary to continue the employment relationship. This was not considered by TH (see page 885 – no mention of whether dismissal would be justified without notice), only the Board.

175. KD said that while she had noted the claimant's representations she was "**not able to find any mitigating factors for a lesser sanction**" [emphasis added]. The letter therefore summarily terminated the claimant's employment but gave the claimant the right to appeal.

176. The claimant was told that there would be a referral to the disclosure and barring service (DBS). Whilst Mr Swanson put it to various witnesses, and in particular to KD that she was "out to get" the claimant and that was why she referred the claimant to the DBS, this possibility is referred to in the respondent's disciplinary process and does not feature in the issues that we have to decide. We were not able to draw any adverse conclusions from the fact that a letter was sent to the DBS or indeed the terms in which it was made. We accept that KD thought that "neglect" was the most apt description for the finding that allegation 1 had been made out, although others may have chosen a different term such as "risk of harm to a resident".

177. It was a curious feature of the respondents' evidence that the statements provided by Mr Magowan (DM) and Mr Oliver (MO) do not refer to the role that they played in the decision to dismiss the claimant. For example, DM's statement refers to his decision on the grievance at paragraph 21 of his statement. He says that he gave the claimant an opportunity to appeal, that the claimant did appeal and, at paragraph 23, says that he had no further direct involvement in the grievance appeal or the disciplinary process. Likewise, MO's statement says that he wrote to the claimant saying that he was not able to uphold the grievance, and informed KD of the outcome. At paragraph 23 he then says, "I had no further involvement in any disciplinary or grievance proceedings with the claimant". It was apparent, however, from page 888 that DM, MO and Sonja Sharpe discussed the outcome of the disciplinary hearing with KD and reached the conclusion that dismissal was appropriate. Neither Mr Magowan nor Mr Oliver referred to this in their statements and did not take the opportunity, when given it by the judge, to correct their statements before commencing their evidence.

178. The tribunal therefore asked DM and MO about this. DM said that he had meant that he had no direct involvement in the disciplinary process after

he dealt with the grievance. He admitted that he was party to the decision. The judge asked DM whether the trustees had discussed other options than dismissal when they considered TH's report. DM said he could not remember "in great detail". He could not remember whether any other options were considered. The judge asked him if there was any discussion about the possibility of target setting and monitoring of the claimant's work over a period rather than dismissal. Mr Magowan said that due to the nature and seriousness of the allegations he felt that the procedures were exhausted, and that dismissal was appropriate. He considered that it was the complaint from the resident's sons that was the matter which influenced him towards dismissing the claimant.

179. MO was also asked whether the trustees had considered any alternatives to dismissal and to the steps he had suggested in his grievance appeal decision, to rebuild the relationship between the claimant and the trustees. He said that the panel had first considered whether dismissal was justified and when they concluded that it was, had not considered alternative options or the ideas he had set out in the appeal letter. Miss Davis was also asked about the discussion on the 8th of September 2021. She said that the discussion started by considering whether dismissal was appropriate; if they had considered that it was not appropriate, they would then have looked at the other alternatives but did not do so. We accept the evidence of MO and KD about this.

180. KD was also asked about the responsibility of the trustees for oversight of the running of the home and asked whether she thought there was a fair balance between asking about it and being told about it by the manager. She acknowledged that both aspects of the interchange were inadequate. She acknowledged that there was a room for improvement in the trustees' decision making. She said that the trustees had taken their own deficiencies into account when considering what sanction was appropriate (but had considered only dismissal).

181. There is no record in the minutes of the trustees meeting of the 8th of September 2021 that they considered the claimants unblemished disciplinary record, her length of service, the pressures of the pandemic or any shortcomings by the trustees in terms of their responsibilities set out in the document on page 1033-1034.

182. On the 20th of September 2021, pages 902 to 904 of the bundle, the claimant appealed against the decision to dismiss her. The bases of her appeal were firstly that the investigation and disciplinary process was unfair, biased and in breach of the Society's own disciplinary procedures and the Acas code. This included the fact that the investigation was conducted by KD who had suspended the claimant, investigated the allegations and then signed the letter dismissing her – she is referred to by the claimant as the dismissing officer. The claimant pointed out that KD had also escalated the allegations from 2 to 8 allegations. She alleged that KD had controlled the whole process and alleged that both KD and TH had predetermined the outcome. She said there was insufficient consideration of her explanation of the circumstances leading up to her dismissal. She alleged that the decision ignored the failure of the trustees to take responsibility for failing to provide adequate support and staffing to carry out her duties and to provide a safe environment for staff and service users. She said that the decision failed to acknowledge her repeated requests for support and staff. She said that KD had acknowledged during the disciplinary hearing that the 1st respondent was required to monitor systems and processes, perform

regular audits and have processes in place to meet CQC requirements and regulations, and that the trustees were responsible for ensuring that those requirements were met. The claimant said that she considered she was being made a scapegoat for the failings of the Board of trustees and KD herself. She said that the decision amounted to victimisation and was because of a protected disclosure in her grievance of the 28th of January 2021. She said the insufficient account had been taken of the fact that she had been employed for over 25 years and had a clean disciplinary record. She said that KD and TH had simply focused on support finding evidence to support the allegations against her. She makes allegations of discrimination which are not now relevant, because they were struck out. The claimant said that the referral of the situation to the DBS was further evidence that KD was seeking to damage her reputation. She also said that her performance rating (or appraisal) conducted by Paul Barton on the 15th of September 2020 (she says 2019 but the most recent one was held on 15 September 2020) was not considered. She considered that the penalty of dismissal was too harsh in the circumstances.

183. By the 22nd of September 2021, the second respondent had been in touch TH and had identified a human resources consultant who was known to TH, JD, to carry out the appeal. On the 22nd of September, KD acknowledged receipt of the claimant's appeal and invited her to an appeal hearing on the 30th of September 2021 via Zoom. The claimant was told the appeal would be considered by JD and that there would be a notetaker. The claimant was given the right to be accompanied. The notes of the appeal hearing are at pages 907 to 913. The claimant was again represented by her trade union representative, TKA. We have set out above the grounds on which an appeal can be brought, which are found at page 488 of the bundle. It seems to us that the latter 3 bullet points: disciplinary procedure not followed, level of disciplinary sanction not reasonable and the decision taken was not supported by the evidence - were those which were raised by the claimant in her letter.

184. JD told us that she had been an independent HR consultant for over 20 years and had dealt with many cases but had only been to the employment tribunal once previously She said that she had taken account of all the circumstances but was aware that a settlement had already been offered to the claimant. She said that she had tried to consider the matter independently and had sent her outcome letter to the claimant at the same time she sent it to KD. We can see from the bundle that JD had asked the 1st respondent for several additional documents, for example at page 914. In evidence, however, she said that she did not think she had seen pages 1033 and 1034, which set out the role of the trustees, and when she was taken to the report of PGH she said that she did not think she had seen that and was unaware of the reference by PGH to lessons needing to be learned.

185. We were not taken to any written terms of reference given to JD, but it appears that the 2nd respondent emailed her on the 9th of September 2021 to ask her to stand by to conduct a disciplinary appeal meeting. This is at paragraph two of JD's statement. The process appears to have been that JD would write a report, which is at page 917 to 922. Unlike TH, however, JD made a decision, which was to dismiss the appeal -see page 920. It is not clear that KD expected JD to write to the claimant in this way, as the outcome was confirmed by KD in a letter dated the 13th of October 2021, which is at page 923, and says that the Board of Trustees had formally ratified JD's findings. She said that the trustees did recognise the years of

service that the claimant had given the Society and wished her "the best for the future". On page 926 are the minutes of a board meeting dated 20 October 2021. All four trustees were present. At paragraph 4, it is recorded that "in an e-mail meeting on the 12th of October 2021" the executive committee ratified the outcome of the appeal hearing and the letter by JD of 6th of October 2021. We were not shown any emails which related to such a meeting and they were not in the bundle.

186. In her conclusions, JD said that although allegation 1 was disputed, the fact remained that a complaint was received which was subsequently handled by "taking the necessary steps of suspension, investigation, disciplinary proceedings and dismissal". She said this was to minimise further risk within the work environment and reputational damage to the charity. JD said that the claimant's length of service had been taken into consideration but could not override the seriousness of the actions and failures that resulted in potential further risk within the work environment and reputational damage to the charity. She refers to advice being sought by KD from the trustees, the interim manager, the national Abbeyfield Society and TD. She rejected the allegation that KD had controlled the whole investigation. She said that she considered there was a properly considered outcome in line with the disciplinary procedure in the Acas Code of Practice. JD found that the claimant had responsibility for policy and procedures to ensure the small smooth running of the home and ensure that statutory regulations and legislation were complied with. She told us in evidence that she had not seen 1033-1034 and was not fully aware of what the role of the trustees was. She said that in 2019 the claimant was provided with an enhanced budget authorization of £1000 for an urgent item, while the £500 limit remained for other resources. This was not put to the claimant by JD according to the appeal minutes, and in evidence before us, KD accepted that the claimant's authority had been revised down to £500 for urgent items. JD noted that authorization was given in July 2019 to use a recruitment agency to get additional staff but has not commented on the other matters that we have covered previously, that is the lack of success in obtaining additional staff and the pressure on the claimant to reduce agency costs. She noted that KD had in 2020 assisted the claimant to try and find additional staff and said that sometimes the claimant did not reply to emails. We have already dealt with these matters above.

187. JD said that because lots of people were on furlough during covid, it should have been possible to get volunteers to cover certain admin or telephone roles within the organisation. She said this would have taken the pressure off the manager and deputy manager and allowed them to concentrate on fulfilling their statutory regulations. We note that this had never been put to the claimant previously.

188. She suggested that the claimant could have made better use of technology for example, using Zoom and Teams. She does not seem to have been aware that at a certain point in the autumn of 2020, the laptop issued to the claimant became unreliable so that KD had to ask the deputy manager to print off emails for the claimant. She said that "communications showed" that the claimant was reluctant to accept support by way of interim managers filling her role to enable her to take time off. We note that this suggestion was made late in the autumn of 2020 and had not been raised previously.

189. The claimant was criticised for not making more use of the resources of the national Abbeyfield Society, but in her evidence the claimant told us,

and we accept, that she had been discouraged historically from contacting the national organisation by CW and therefore felt that she "should not wash dirty linen in public" by contacting them. JD felt that documentation and reporting should have been a high priority to satisfy the responsibilities for policy and procedure. We note again that JD had not seen the guidance for trustees. She noted the Abbeyfield Reading Society had a duty to report certain incidents to the DBS.

190. On the 18th of October 2021, KD wrote to the sons of the resident who was involved in the complaint, apologising that correct processes were not followed when the claimant issued the letter dated the 22nd September 2020. The letter states (on page 924) that although, sadly, it seemed it was necessary for their mother to move to new accommodation, because the first respondent did not have the ability to provide the care she needed, it was clear that the manner in which this was communicated, especially the abrupt way in which the letter was written, was not appropriate and she apologised for the distress caused. Among the actions that were relayed to the relatives of the resident were refresher training for staff concerning safeguarding, dementia awareness, and deprivation of liberty safeguards, and it was said that they were looking into training staff on handling challenging behaviour.

SUMMARY OF RELEVANT LAW:

1. **Detriment due to Public interest disclosure:** Section 47B of the Employment Rights Act 1996 (ERA) provides that a worker has the right not to be subjected to detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. This includes detriment to which the worker is subjected by another of his employer's workers during the course of that worker's employment or by an agent of the employer with the employer's authority– section 47B (1A) – and anything done by another worker or agent of the employer in those circumstances is treated as also done by the worker's employer, whether or not it is done with their knowledge or approval (47B(1C)). Section 47B does not apply to dismissals (47B)(2).

2. A protected disclosure is defined by section 43B as a qualifying disclosure (as defined by section 43B) which is made by an employee in accordance with any of sections 43C to 43H.

3. Under section 43B, a qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show (in this case, see paragraph of EJ Shastri-Hurst's order sent on 15 February 2023) that a person has failed or is failing to comply with any legal obligation to which he is subject (section 43B(1)(b)).

4. So, in order to be a qualifying disclosure, the following conditions must be satisfied:

    - It must be a 'disclosure of information';
    - it must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that there has been a breach of section 43B(1)(b)(in this case);

- it must be made in accordance with one of six specified methods of disclosure – here, section 43C, disclosure to the claimant's employer (paragraph 55.2.1 of the order).

5. The legal obligation in question is specified to be the respondent's obligation/requirement to ensure that the working environment is safe – paragraph 55.1.5.1 of the order.

6. Under section 48(1A) of the ERA, a worker may present a complaint to an Employment Tribunal that s/he has been subjected to a detriment in contravention of section 47B. The detriments here are specified to be (1) lack of support to carry out the claimant's duties as a manager; (2) disciplinary action against the claimant (commencing 5 January 2021) -see paragraph 56 of the Order.

7. Under subsection 2 of section 48, if the claimant establishes that she had done a protected act or acts it is for the employer to show the ground upon which any act, or deliberate failure to act, was done. According to **Ibekwe v Sussex Partnership** EAT 0072/2014, however, following **Kuzel v Roche,** the rejection of the respondent's evidence about the reason for the treatment does not mean that the claimant necessarily succeeds. The tribunal must decide the reason for the treatment based on all the evidence before it. According to **London Borough of Harrow v Knight**, if the respondent does not provide evidence, the tribunal may draw an inference about the reason for the treatment, but the inference must be justified by the facts found.

8. The phrase "done on the ground that" has been subject to judicial consideration and the test is whether any qualifying disclosure of the claimant's had a more than trivial influence on the conduct of the employer about which the employee complains.

9. Section 48(3) of the 1996 Act provides that an Employment Tribunal shall not consider a complaint under this section unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

10. Subsection 4 gives further details of the rules where an act extends over a period, when (a)the date of the act means the last day of that period, and (b)that a deliberate failure to act should be treated as done when it was decided upon. Subsection (b) provides that in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act, or if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the act if it was to be done.

11. In this context, **detriment** simply means that a reasonable worker would think they were being placed at a disadvantage in the circumstances in which they had to work or that their position had changed for the worse -

MOD v Jeremiah 1980 ICR 13 CA. The case of **Jesudason v Alder Hey Children's NHS Foundation Trust**, 2020 ICR 1226 CA provides that the tribunal must decide whether there has been a detriment as a matter of fact, and that causation of the detriment is a separate matter.

12. **Unfair dismissal/Automatically unfair dismissal:** Under section 94 (1) of the ERA an employee has the right not to be unfairly dismissed by his employer. It is accepted in this case that the respondent terminated the contract under which the claimant was employed without notice and that this is a dismissal within section 95(1). The respondent accepts that the claim for unfair dismissal was made in time, and that the claimant has sufficient service to make such a claim.

13. In determining whether a dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal and (b) that the reason falls within subsection 2 or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held – section 98(1). In this case, the respondent argues that the reason was the claimant's conduct or alternatively some other substantial reason justifying her dismissal. Conduct is covered by subsection 2 of section 98.

14. An employee shall be regarded as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure. As the claimant in this case has more than 2 years qualifying service, the burden of proving the reason for the dismissal lies with the employer in the same way as it does for an "ordinary" unfair dismissal under section 98. The respondent asserts that the principal reason was the claimant's conduct or some other substantial reason justifying her dismissal, so the claimant has an evidential burden to show (without having to prove) that there is an issue which warrants investigation and which is capable of establishing that the principal reason was the protected disclosure. If the claimant satisfies the Tribunal that such an issue exists, the burden passes to the respondent to prove, on the balance of probabilities, which of the potential reasons was the principal reason for dismissal (see **Maund v Penwith DC 1984 ICR 143, CA**). See also **Kuzel v Roche**, above.

15. If the respondent demonstrates a potentially fair reason under subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case (see section 98(4) ERA).

16. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the Tribunal must take account of an ACAS Code of Practice when it considers that it is relevant to any question it is deciding. We were referred to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, and to paragraph 6: "In misconduct cases,

where practicable, different people should carry out the investigation and disciplinary hearing"; and paragraph 11 – disciplinary meetings should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

17. According to paragraph 27 of the Code the appeal should be dealt with impartially and wherever possible by a "manager" who has not previously been involved in the case.

18. In a case where the reason for dismissal is conduct, the tribunal should consider, in deciding whether the dismissal is fair or unfair, (a) whether the employer had a genuine belief that the claimant had committed the misconduct in question; (b) if so, whether that belief had a reasonable basis in the evidence; if so, (c) whether that belief had been concluded after an investigation that fell within the reasonable range; (d) whether the procedure adopted to arrive at that conclusion fell within the reasonable range; and if so, whether the sanction of dismissal fell within the reasonable range given all the circumstances and considering section 98(4); See BHS v Burchell.

19. "The reasonable range" means that we have to consider whether any reasonable employer could have formed such a belief, carried out the investigation or process in question and whether any reasonable employer could have decided to dismiss in all the circumstances.

20. Mr Swanson referred us to **Hewston v Ofsted [2023] EAT 109** in which the relevant principles are discussed and set out in the context of the parties' submissions at paragraphs 42-47. We have taken this into account and reminded ourselves in particular of the case of **Brito-Babapulle v Ealing Hospital Trust UKEAT 0358/12, 2013 IRLR 854 EAT** (referred to in Hewston) to the effect that in considering whether dismissal fell within the range of reasonable responses, the Tribunal should examine whether the employer's treatment of any mitigating circumstances fell within the reasonable range, as well as the other cases mentioned.

21. Under section 122 of the 1996 Act, where the tribunal considers that any conduct of the claimant before dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. Only the employee's conduct is relevant here, not that of any other employee or the employer. In order to justify a reduction, the conduct of the employee must be "culpable or blameworthy" (see **Nelson v BBC (No2) 1980 ICR 110, CA**). The Tribunal must (a) identify the conduct said to justify a reduction, (b) decide whether it is culpable or blameworthy, and (c) then decide whether it is just and equitable to reduce the amount of the basic award to any extent – **Steen v ASP Packaging Ltd 2014 ICR 56 EAT**. Under section 122(2), the conduct need not have contributed to the dismissal, unlike section 123(6) regarding the compensatory award.

22. Under section 123 of the 1996 Act, under subsection (1), the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained

by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. Sometimes reductions are made under this section in the circumstances set out in **Polkey v AE Dayton Services Ltd 1988 ICR 142** – that is, there is a reduction where it is just and equitable to do so to take account of the likelihood that the claimant would still have been dismissed in any event had a fair procedure been applied and in all the circumstances of the case. The Tribunal must consider both whether the employer could have dismissed fairly and whether this particular employer would have done so (see **Hill v Governing Body of Great Tey Primary School 2013 ICR 691 EAT).** An employer who wishes the Tribunal to consider making a Polkey reduction should present the Tribunal with some evidence from which it could draw such a conclusion; if the claimant can put forward an arguable case that she would have been retained had a fair procedure been adopted, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed.

23. Under subsection 6, it is provided that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce that amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. As with a reduction under section 122(2), the conduct must be "culpable or blameworthy" to justify a dismissal, but the difference is that, in addition, the respondent must show that there is a causal link between the conduct and the dismissal - see **Steen** above. Culpable or blameworthy conduct can include perverse or foolish conduct or conduct which is unreasonable in all the circumstances.

24. **Wrongful dismissal:** only repudiatory breaches of the contract of employment by the employee will justify summary dismissal. The question is whether, looked at objectively, the employee's behaviour is such as to show an intention to disregard the essential requirements of the contract. The conduct must so undermine the trust and confidence inherent in the contract of employment that the employer should not be required to retain the employee. The question is not whether the conduct relied upon amounts to "gross" misconduct but whether it amounts to repudiation of the whole contract. It is the employee's actual conduct (established on the balance of probabilities) which must be considered.

25. Victimisation: Section 27(1) of the Equality Act 2010 provides that "A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.' The respondent accepts that each of the claimant's grievances of 28 January and 8 March 2021 contained protected acts in that they complained that the respondent had committed race and age discrimination (1st grievance) and race discrimination (2nd grievance) and hence had breached the Equality Act.

26. The respondent does not accept that the claimant was subjected to any detriment because she had done a protected act. The alleged detriments

are (a) escalating the disciplinary allegations from 2 to 8; (b) dismissing the claimant; (c) dismissing the claimant's appeal against dismissal.

27. See above re detriment. An unjustified sense of grievance will not amount to a detriment.

28. In considering whether the detriment was "because of" the protected act, the Tribunal must consider what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? In most cases, this will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed. It is necessary to consider what was the reason for the detriment in question, rather than applying a "but for" test. The protected act must have a more than trivial, that is material, influence on the treatment complained of – see **Nagarajan** 1999 ICR 931**, Igen v Wong** 2005 ICR 931. The protected act need not be the only reason for the treatment in question, so long as the protected act has a significant influence.

APPLICATION OF LAW TO FACTS

1. **Detriment due to public interest disclosure:** the respondents dispute that the claimant made any qualifying disclosures within the meaning of section 43B of the 1996 Act, so we considered that issue first. The claimant bears the burden of persuading us that qualifying disclosures were made.
2. The first matter alleged by the claimant to have been a qualifying disclosure is what she said at an executive committee meeting on the **24th of October 2016**, see pages 243 to 244, to the effect that staff appraisals had not been carried out, that there were issues with fire doors and that the claimant required administrative support - see pages 93 and 94 of the bundle. As Ms Johns reminded us in her submissions, when the claimant was asked about the minutes of this meeting, the claimant accepted that she was not raising concerns at that meeting but simply providing information to the trustees about day-to-day matters in the care home.
3. The minutes of the meeting on the 27th of June 2016 state (at page 244 under the heading "House Manager's report") that the claimant had said that she and her deputy felt dissatisfaction with the lack of appraisals which should have been conducted by a former chair of trustees. In her evidence, the claimant said that she had raised this because she felt "exasperated" as CW had stopped holding house management committee meetings, which had previously taken place about every six weeks. She said that the executive committee meetings became the only avenue for her to raise any concerns. At the meeting in October 2016, two of the trustees offered to undertake the task of conducting appraisals. The claimant went on to say that several of the residents needed considerable care. This was not included in the list of issues as a potential qualifying disclosure. Following some discussion, she said that the closures on the fire doors were being upgraded. In her evidence, she agreed that this was not a concern to her, and that she was simply reporting back on action she had taken. It was also stated that a range of administrative help was needed in the manager's office.
4. In Judge Shastri Hurst's order, it is made clear that in alleging that she had made qualifying disclosures, the claimant was alleging that she had

reasonably believed that the information provided tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation, and she specifically identified the legal obligation in question as being the 1st respondents obligation to ensure that the working environment was kept safe.

5. There was no evidence before us from which we could conclude, and the claimant did not suggest, that in providing that information to the trustees, the claimant reasonably believed that she was disclosing it in the public interest. In the context of those minutes, it seems to us that the matters raised could not reasonably be said to have raised any matter of public interest at that time. The matters regarding **appraisals** were private matters between the members of staff concerned, the claimant and her deputy, and the board of trustees. There was no suggestion that anyone was failing to comply with any legal obligation in failing to carry out the appraisals at that time or that the claimant or her deputy's working environment was being rendered unsafe by that failure.
6. As far as the lack of **administrative support** was concerned, there is nothing in the minutes or in the evidence that the claimant gave us which would suggest that this had become a matter of public interest or had any repercussions for the public at that time. The claimant was not suggesting that there was a breach of any legal obligation by the 1st respondent or anyone else, and in particular there is no indication in the minutes or in the evidence that the claimant gave about it that she believed that the first respondent was not keeping her work environment, or that of her deputy, safe by failing to carry out appraisals or failing to provide them with adequate administrative support.
7. The point being made about **fire doors** was that they were being made safer, rather than any suggestion being made that anyone had failed to comply with any legal obligation to ensure that the workplace was kept safe, or that the fact that they were being upgraded showed that the respondent had failed to ensure the working environment was safe**.** As we have said, the claimant accepted this in her evidence.
8. So, having considered section 43 B and the list of issues in the case management order, we concluded that the claimant did not make any qualifying disclosures on the 24th October 2016.
9. The next allegation is that the claimant had made a qualifying disclosure on the **27th of June 2018**, when she raised at an executive committee meeting that there was no clear process of managerial support, nor appraisal system in place, and that she was not receiving supervision. The minutes of that meeting, which is headed "Reading Society meeting 27th of June" are pages 20 and 21 of the supplementary bundle, and as we have noted it was attended by two members of the national Abbeyfield society, PF and GC, as well as three of the trustees, CW the "acting chair", PB the treasurer and JS, another trustee. The claimant was not present on that occasion. As we have seen, it appears to have been a meeting with the national Society, at which the national Society raised concerns about the governance of the first respondent and the fact that at the time, there were a number of vacancies at the home and there was a lack of trustee and staff resources to manage the associated difficulties. As a result, the national Abbeyfield society had felt that the 1st respondent needed more support. The national Society had sent a confidential document setting out challenges, options and available support to CW before the meeting and he had been asked to circulate it to the board, but he had not done so. This corroborates what the claimant told

us about CW's general attitude to the national and other Abbeyfield Societies when he was the chair of Trustees at the 1st respondent – that is, that he discouraged closer ties with other organisations and perceived any intervention as interference.

10. What is obvious from the minutes, as we have said, is that the claimant did not attend this meeting. We do not understand how it can therefore be said that she had made a qualifying disclosure to her employer on this occasion. It is quite clear from the case management order at paragraph 55.2 that the claimant had alleged that she made the disclosure to her **employer**. The claimant's evidence before us was that she had a prior meeting with GC of the national Abbeyfield Society at which she had raised concerns about lack of managerial support, and lack of an appraisal system or supervision. This is reflected in the minutes at the top of page 21 in the supplementary bundle, which refer to no clear process of managerial support or an appraisal system being in place and that the claimant did not receive supervision, which was said to be a key area of inspection. There was no evidence before us from which we could conclude that the claimant had raised these matters with her employer on that date. We did consider section 43C (2), which provides that, where a worker (in accordance with a procedure whose use by her is authorised by her employer) makes a qualifying disclosure to a person other than her employer, this is to be treated as making the qualifying disclosure to her employer. We were not taken to any procedure authorised by the 1st respondent which would allow the claimant to make qualifying disclosures to the national Abbeyfield society or any of its employees.

11. The allegation was that the claimant had raised these matters are an executive committee meeting on the 27th of June 2018, but the document to which we were taken was not the minutes of an executive committee meeting at all, and the claimant was not present. In addition, there is nothing in the evidence before us or in the minutes on pages 20 and 21 which would suggest that the claimant reasonably believed that the information being raised tended to show that anyone was failing or was likely to fail to comply with any legal obligation to which they were subject or, in particular, that the failure to provide the claimant with appraisals, managerial support or supervision breached the 1st respondent's obligation to ensure that the working environment was kept safe. When she was asked about this in her evidence, the claimant simply said that she could not comment. For the reasons set out above, we cannot conclude about the claimants made any qualifying disclosure on the 27th of June 2018 as alleged.

12. The next matter alleged to amount to a protected disclosure is the content of the claimant's **written grievance on the 28th of January 2021**. This is to be found at page 701-703 in our bundle. The first part of the grievance relates to lack of requisite support staff to run the home. Although we note that on page 702, after setting out the very challenging circumstances that she faced, the claimant does state that this contributed to a very stressful time for the management of the home, there is nothing in that paragraph to suggest that she reasonably believed she was providing information which showed that the respondent was in breach of its obligation to provide a safe working environment, which is the legal obligation relied upon. In the second paragraph on page 702, however, the claimant refers to lack of annual leave, and says that it has been impossible for her and her deputy to take annual leave despite several requests. She said that nothing had been done about that situation for a year by that time. She goes on to say that this has

exerted enormous pressure on her physical and mental health. She said that, as a result of not being able to take leave, there had been a deterioration in her physical and mental health. We consider that in raising this matter, the claimant did reasonably believe that she was raising information which showed that the respondent was likely to be in breach of its obligation to keep her working environment safe.

13. In respect of her lack of annual leave, however, we do not consider that there is a sufficient link between the effect on the claimants physical and mental health and the public interest. In cross examination, the claimant accepted that the matters raised by her grievance were private matters rather than matters which she reasonably believed were in the public interest. There was no suggestion in the grievance letter, for example, that the lack of annual leave was having a wider impact on the running of the Care Home or the care given to residents.

14. We also found that on pages 702 and 703, where the claimant complained that there had been no risk assessments carried out by the trustees regarding the risk to her from COVID, taking account of her age (which was over 60), her health and what she referred to as her BAME group, that the claimant was disclosing information which she reasonably believed tended to show that the first respondent was failing to comply with its legal obligation to ensure that her working environment was kept safe. We went on to consider, however, whether this passage showed that the claimant held a reasonable belief that she was making a disclosure in the public interest. Again, in her evidence to us, the claimant accepted that these were matters of private interest to her and the respondent rather than matters of public interest. We have, however, considered this for ourselves and we have concluded that on the evidence before us, we cannot infer that the claimant reasonably believed that she was raising these matters in the public interest as required by section 43B.

15. We have therefore concluded that in raising her grievance on the 28th of January 2021, the claimant did not make any protected disclosures in accordance with the 1996 act.

16. Finally, we had to consider whether in raising her second grievance on the **8th of March 2021**, the claimant made any protected disclosure. That grievance is brief and is on page 750 of the bundle. It is addressed to the 2nd respondent. She said that that she was writing to add an additional concern to the grievances which were discussed at the meeting on the 1st of March 2021, being that she had been victimised because she did a protected act and raised a grievance about racial discrimination to which she had been subjected by the 1st respondent. She said that the invitation to the investigatory meeting dated the 5th of March 2021 outlined allegations which are not consistent with the reasons stated in the letter of suspension. That document is at pages 741 to 742 and expands the number of allegations from 2 to 9. The claimant said that this appeared to be a “fishing expedition” to find an excuse to dismiss her, because the reasons for her suspension were without foundation. She said she was disappointed by the continuing act of discrimination against her. She complained that an allegation from 2018 was included and that this was motivated to damage her trust and confidence in the first respondent. As we have noted, the claimant accepted in cross examination that in raising her grievances, she considered that these were private matters between herself and her employer, the first respondent, She did say that she thought that the information disclosed in her second grievance as well as her first showed

that the respondent was failing to comply with its legal obligation to ensure her working environment was safe, and the tribunal can see why she would consider that to be the case. We also had to consider, however, whether in raising these matters she reasonably believed that she was raising them in the public interest. Her own evidence indicates that she did not think she was raising these matters in the public interest. In those circumstances, we find that she lacks the requisite belief under section 43B, so that we are compelled to find that she has not made a protected disclosure in her second grievance on the 8th of March 2021.

17. So far as the claimant's grievances in 2021 are concerned, we would observe that the detriments about which she complains (lack of support and disciplinary proceedings commencing 5 January 2021) preceded those grievances in any case. In particular, the claimant told us that the lack of support to carry out her duties as a manager (56.1 in the order) started in 2016, and the allegation at paragraph 56.2 (which we think should read "disciplinary proceedings" rather than "disciplinary action" -no "disciplinary action" was taken until the claimant's dismissal) commenced on the 5th of January 2021 as is stated in the list of issues, but her grievance was not brought until the 28th of January 2021. It cannot be said, therefore, that in any sense the disciplinary proceedings were brought because she had raised a grievance.
18. The claimant also made a complaint of **automatically unfair dismissal** under section 103A of the 1996 Act. To qualify under section 103A, it would need to be shown that the reason (or the principal reason if more than one) for dismissal was that the claimant had made a protected disclosure. As we have found that the claimant did not make any disclosures which were protected under part IVA of the 1996 Act, it follows that this complaint must also fail.
19. **Victimisation:** as pointed out above, the respondents accept that the claimant did **protected acts by raising allegations of discrimination within her grievances on the 28th of January and the 8th of March 2021**. As recorded above, the first grievance on the 28th of January 2021 included complaints that the respondent had committed race and age discrimination and the second grievance on the 8th of March referred to race discrimination and victimisation.
20. The claimant alleges that the respondent subjected her to detriment in three different ways, that is by escalating the disciplinary allegations from 2 allegations on the 5th of January 2021 to "8" (actually, 9) allegations, one of which was subsequently dropped, on the 5th of March 2021. The second detriment is alleged to be the claimant's dismissal on the 15th of September 2021 and the third detriment is said to be the rejection of the claimant's appeal on the 6th of October 2021.
21. We accept that increasing the number of allegations from 2 allegations -see page 690- to 9 (pages 741 to 742) is capable of amounting to a detriment. An individual suspended for the two allegations of which the claimant was notified on the 5th of January 2021 could reasonably hold the view that they had been placed a disadvantage by the addition of a further 7 allegations whilst they were suspended from work and unable to access any documentation in the workplace. In our findings of fact, however, we have considered why KD added the additional allegations in March 2021. We have found as a fact that she did so having sought advice in the form of the report of TD, which was available to her on the 26th of February 2021, from what she was told by the interim manager who was covering the claimants

role, and from her own investigation and awareness of the contents of the Fire Assessment Report provided to her by the claimant in October 2020. By the time these additional allegations were added, we find that KD was also seeking advice from the national Abbeyfield Society about how to undertake the disciplinary process. We accept her evidence (including that contained in her emails to the national Society) that she felt overwhelmed by the task, and that she had not previously been involved in any kind of disciplinary proceedings since about the 1980s, when she had acted for a period as a trade union representative in a local authority. We have considered whether, by the addition of these extra allegations, KD was consciously or subconsciously motivated by the fact that the claimant had raised allegations of discrimination within her grievances. We have concluded on the balance of probabilities that she was not influenced consciously or subconsciously by the fact that the claimant had complained of discrimination as an element of her grievances. Indeed, Mr Swanson did not put it to KD that it was the element of complaint about discrimination which had caused her to increase the number of allegations. He simply put it to her that she had done so because the claimant had raised a grievance and KD denied that.

22. We did not see or hear any evidence that suggested that KD was particularly upset by the fact that the claimant had raised a grievance, and she made appropriate arrangements for the grievances to be heard by individuals who were as independent as was possible in the circumstances. We have examined the allegations that were raised on the 5th of March carefully and can see that they were all the based on either the reports of PGH and TD or on the contents of the fire risk assessments or, in the case of the complaints procedure, what KD had discovered herself. In fact, the allegation of failure to keep a complaints procedure in the residents' handbook up-to-date and to maintain a record of complaints was later withdrawn by KD after the investigatory meeting, when the claimant described where some of the documentation could be found. We would observe that the wording in the initial letter of the 5th of January - dereliction of duties and putting a resident at significant risk of harm- was actually stronger than originally recommended by one of the employees at the national Abbeyfield society - see pages 688 compared to page 690, but this was modified to some degree in the wording of the allegations on the 5th of March 2021, and the change in wording on the 5th of January appears to have come about after further discussion between KD and the national Abbeyfield society.

23. On the evidence before us, we did not accept that KD was influenced to a more than trivial degree by the fact that the claimant had raised grievances after being suspended. As we have said, it was not even put to KD by Mr Swanson that she was specifically influenced by the fact that the claimant had made allegations of discrimination, which is what is required under section 27. During closing submissions, the judge asked Mr Swanson if there was anything else he wished to say about the allegations of victimisation, but beyond reminding us that the claimant's dismissal was said to be an act of victimisation he made little reference to these issues, and they do not have more than a cursory mention in his written submissions. We have asked ourselves what was the reason for the increase in the number of allegations from 2 to 9 on the 5th of March 2021, and we have concluded that the reason was that between the 5th of January and the 5th of March 2021 KD had access to further information in the form

of the report of TD, information supplied by the interim manager who had been appointed, that she had by then had the opportunity to digest and think about the Fire Assessor's report which had been given to the trustees by the claimant in late 2020 and had not been able to find the complaints documentation in the Home. We do not consider that she was consciously or subconsciously influenced by the fact that the claimant had raised matters of discrimination within the grievances that she had by then raised.

24. The next detriment of which the claimant complained was her dismissal on the 15th of September 2021. Again, we must ask her ourselves, what was the reason for the dismissal? Consciously or subconsciously, did the claimant's protected acts, that is her complaints of discrimination within her grievances, have a more than trivial influence on the decision to dismiss her?
25. We heard from TH, KD, MO, DM, and JD. TH regarded the claimant's complaints of discrimination as being broad and general. From the evidence he gave us, he was quite frank that he had not read some of the documentation in detail, and that this extended to the claimant's grievances. We do not consider that the fact that the claimant had complained about discrimination had any influence whatsoever on the recommendation he made. So far as the dismissing panel is concerned, Ms Davis, Mr McGowan and Mr Oliver, we find that Ms Davis was very concerned when she received the complaint from the family of the resident who had been asked to move. It was clear from her evidence that, she did not previous experience of work in care homes before she became a trustee. She was alarmed by having received a complaint and did not quite know how to approach it. She felt that investigating the disciplinary allegations was "too much" for her – page 719. Given her lack of experience, she became over concerned with what the claimant had not done at a time when she was (or should have) been aware that the care home had been chronically short staffed before the pandemic and was more severely adversely affected by lack of staffing after the lockdown began in March 2020. She admitted in her evidence that she was aware that there were deficiencies on both sides, although she did not appear to have looked very far into the history of the matter (prior to the time she became a trustee in 2019).
26. We consider that because she was very concerned about the tone of the complaint from the resident's family and what other repercussions there might be for the care home, and felt overburdened by having to carry out an extensive disciplinary procedure, find a replacement manager etc., by summer 2021 she had lost sight of the positive contribution the claimant had made to the running of the home over many years and had begun to view her as a "problem". Having seen and heard her evidence, we consider that she blamed the claimant for putting her (KD) in this difficult position and the challenges it caused her, rather than considering also what pressures the claimant had been under in the summer and autumn of 2020. She overreacted and, as she frankly admitted, did not really consider any other alternatives to dismissal. She was the Chair of the board of trustees and the committee which dismissed the claimant, and we consider that Mr Magowan and Mr Oliver took their lead from her and the contents of TH's report. They had only been appointed in January 2021 and did not even mention the discussion about the dismissal in their witness statements. Whilst they were at the dismissal meeting in September 2020 (p888), they appeared to be somewhat disengaged from it. We did not hear from Sonja Sharpe but heard no evidence from which we could conclude that she had been influenced by

the fact that the claimant's grievances contained allegations of discrimination.

27. The claimant's dismissal is dealt with in one paragraph of the minutes of the meeting at which she was dismissed. We consider that the reason for the claimant's dismissal was the belief of KD and TH in the claimant's misconduct. We consider that KD genuinely believed that the claimant was guilty of serious misconduct and that she influenced the other members of the panel to accept this also. In reaching this conclusion, we do not consider that any of the panel members were influenced by the fact that among the matters that had been raised by the claimant within her grievance were allegations of race or age discrimination. Again, such an allegation was not put to any of the respondent's witnesses by Mr Swanson.
28. The final detriment which is alleged by the claimant was the dismissal of the claimant's appeal - see paragraph 62.4.3. There is some doubt as to whether this appeal was finally dismissed by the independent HR consultant, Jane Domhill, or whether it was effectively dismissed by the Board, as indicated by the letter from KD to the claimant on 13th of October 2021. The letter dated the 6th of October 2021 from JD is at page 917 to 922.
29. Looking at page 920, JD seems to have thought that the fact that the complaint was received from the resident's family and the upholding of allegation 1 - the "putting [of] a resident at risk of harm by failing to carry out the relevant risk assessments and processes to ensure that they were safe within the home, particularly in relation to the requirements of the Mental Capacity Act" necessitated the suspension, investigation, disciplining and dismissing of the claimant "in line with the Abbeyfield disciplinary procedure". She found that this allegation which had been upheld was sufficiently serious to take priority over her length of service and dedication. In her letter at the foot of page 920, she states that dismissal was necessary to protect the Society's reputation and avoid risk of recurrence. She did not seem to take account of the previous good CQC ratings and lack of complaint under the claimant's leadership. JD does not seem to have considered that there could be any responsibility on the part of the Trustees for the situation which had arisen, where the claimant had been informing the Trustees and KD in terms that she and the deputy manager could not keep up with the volume of work and were unable to take their annual leave. She accepted in her evidence to us that she was not actually aware of the document at 1033 to 1034 and did not really know what the trustees' role was at the 1st respondent. She was also unfamiliar with the care home environment, although she had done work for bodies such as Ofqual and was familiar with steps they had taken during the pandemic. We would have to observe that running a care home is a very different business from dealing with examinations.
30. We have again asked ourselves what the reason for the rejection of the appeal by JD was, and whether it was in any way influenced by the claimant having included allegations of discrimination within her grievances. We find that JD was not particularly concerned by, or interested in, the claimant's grievances. It was not put to her that she rejected the appeal because the claimant had complained of race discrimination (or any other type of discrimination) within her grievances, and there was no evidence before us from which we could infer that this was the case. During her evidence to us, it was clear that JD had not considered the grievances in any detail as they had previously been rejected. We consider that the reason that she rejected

the claimant's appeal was, rightly or wrongly, because she could not see how the claimant had established grounds for appeal within the Abbeyfield Society procedure and because she thought that TH's conclusion was justified based on the information she had.

31. So far as the trustees were concerned, in our findings of fact we have recorded that the trustees had apparently discussed JD's conclusions by e-mail, although that we were not taken to the emails, and they do not seem to be in our bundle. Having heard from three of the four trustees, again we conclude that the reason they ratified JD's decision was because of their belief in the claimant's misconduct (and their failure to consider properly her length of service, good record and other mitigating circumstances). MO and DM did not seem to think they had played any active role in the decisions to dismiss or to reject the claimant's appeal. DM said in evidence that he did not think he had been "directly" involved, although he was clearly a party to the decision (see page 888). In our view, they abdicated their responsibility, having seen the report of TH and the outcome letter of JD, which appeared to show a fait accompli. Again, we do not consider that the fact the claimant had brought grievances had any significant influence on their conclusions or failure to consider relevant matters, and it was not put to them that the fact the grievances contained matters of discrimination had influenced their decision making.
32. So far as KD was concerned, we consider that by this stage she had formed a belief that the claimant should go, as she saw her as a "problem" who had caused her a lot of personal difficulty in dealing with the complaint and disciplinary procedure, and having to find a replacement manager etc. It was not put to her that her dismissal of the appeal was influenced by the fact that the grievance contained allegations of race discrimination as such, and there is no evidence from which we could conclude that this element of the grievance had a more than trivial influence on her decision making.
33. We did not hear from the remaining trustee, Sonja Sharpe, but again there was nothing in the evidence before us to indicate that the fact that the claimant's grievances included allegations of discrimination had a significant influence on her views. Indeed, there was no evidence before us that Ms Sharpe had even read the grievances or knew their contents.
34. For all of those reasons, the claimant's complaints of victimisation are dismissed.
35. **UNFAIR DISMISSAL:** as we have set out above, we accepted that the reason for the dismissal was the beliefs about the claimants conduct that the 1st respondent had formed by 8 September 2021 and, as Mr Magowan identified in his evidence, in particular allegations 1 and 3. This was specifically the fact that in deciding to ask the family of the resident to find an alternative care home which specialised in dementia, the claimant did not attempt to consult first with both of the claimants sons, each of whom had a lasting power of attorney, Reading Borough Council or the GP and CPN and that she did not seek to convene a "best interests meeting" or formally assess best interests under the MCCA 2005 before issuing the letter. In addition, Ms Davis was concerned about the tone of the letter given to the sons (page 943) and the fact that the claimant had asked an administrative assistant to hand the letter to the sons during a visit, rather than dealing with it herself. The trustees were also concerned that the fact that this resident had on 2 occasions before moving been found on a different floor to her room, once in the basement of the care home on 8 September 2021 and once in the lounge on 22 September, when she had

been unassisted but needed a walking frame to get about and had Parkinson's disease, and whether sufficient had been done to prevent this. They were also concerned that the claimant had not reported this to the CQC.

36. Although other matters of misconduct were substantiated, we accepted Mr Magowan's evidence that these were not regarded as equally serious to the conduct related to this resident, and would not by themselves have justified dismissal. The other matters, as we have indicated in our findings, related to (allegation 5) failure to carry out audits, which TH told us he thought were probably carried out by the claimant and her deputy (as she said) but which she had not documented, and which he thought were equally the responsibility of the trustees to ensure. Allegation 6, failure to carry out supervision of staff or to arrange for senior carers to carry out supervisions – again, Mr Howe thought that supervisions probably had been carried out but had not been documented to an adequate standard - and failure to rectify the items in the fire risk assessment which was initially carried out by an assessor on the 5th of June 2018 and repeated in the reports of September 2020, although overall the assessor considered the conditions in the home were “tolerable”, and finally failure to conduct regular fire evacuation drills in accordance with regulations.
37. The reason for the dismissal was therefore conduct, a potentially fair reason within section 98(2) of the 1996 Act.
38. Mr Swanson's submissions focused on procedural matters, such as whether KD should have both investigated and taken part in the decision making on the dismissal and again on the appeal, whether there had been too long a delay in dealing with the disciplinary process, and whether the sanction was in the reasonable range in all the circumstances. He also submitted that those involved in dismissing the claimant had not taken account of all relevant circumstances, including the alternatives to dismissal, the situation at the time of the alleged misconduct, which was at the height of the COVID pandemic with all the added pressures that brought, the length of the claimants service, her previous good record with no previous disciplinary sanctions or warnings, the previous good CQC ratings under her leadership and, as the claimant repeatedly alleged, that she had been given insufficient support with her role by the board of trustees over a number of years and that the home was severely understaffed by the time of the events in question.
39. As a result, we next considered whether the process adopted fell within the reasonable range, that is whether any reasonable employer would have adopted such a process, particularly taking account of the ACAS Code of Practice. There is evidence in the bundle that a particular member of staff at the Abbeyfield Society thought that it was appropriate for KD to both investigate and decide on the disciplinary sanction, but that KD had taken advice from a range of sources, a number of whom advised her that it would not be appropriate for her to both investigate and decide on the sanction. As Mr Swanson put it, it was not appropriate for KD to be judge, jury and executioner. While such terminology may seem overly dramatic, we checked with the parties that they agreed that the paragraphs of the Code of Practice which we should consider were paragraph 6 and 27 in the ACAS Code.
40. As we have noted, paragraph 6 says that in misconduct cases, where practicable different people should carry out the investigation and disciplinary hearing. In his evidence, TH said that when he had advised

small businesses in the past, sometimes it was not practicable for this to happen, but he normally cautioned against it, which is why he had volunteered to hold the disciplinary hearing and make a recommendation. Unfortunately, there were no written terms of reference for him and there was no indication anywhere that the Board of Trustees had agreed to be bound by his conclusions as opposed to making their own separate decision.

41. The parties also agreed that paragraph 27 of the Code was relevant, that is that the appeal should be dealt with impartially, and wherever possible by a "manager" who has not previously been involved in the case. As noted previously, there were no written terms of reference for Ms Domhill. She appears to have taken the view that she had authority to decide the appeal, although her decision was then ratified by the Board. The board considered that they needed to do this for the recommendation to take effect.
42. We have considered whether any reasonable employer would have applied such a procedure in all the circumstances. We have concluded that whilst a reasonable employer may have instructed an independent human resources consultant such as TH to hold the disciplinary meeting, no reasonable employer would, in the circumstances of this case, have permitted KD to take part in the decision making as to the final outcome. The ACAS Code says clearly that "where practicable" different people should carry out the investigation and disciplinary hearing. In this case, we consider that it was entirely practicable for the disciplinary hearing to take place in a way that did not involve KD taking any decisions. There is nothing in the claimant's contract, the first respondent's disciplinary policy or their Articles of Association which says that the Chairman of the Board of Trustees must be involved in any decision to dismiss the manager or any other member of the care home staff. In fact, it was clear to us that KD led the decision making on 8 September when the trustees considered TH's report. DM and MO did not appear to think that they had any active role in that decision making process, according to their witness statements, and in their oral evidence it was clear that they were lead by TH's report and KD's views as Chair and a more longstanding trustee.
43. Mr Oliver and Mr McGowan had not been trustees, nor involved with the 1st respondent at the time of the events for which the claimant was being disciplined. They were involved in the grievance procedure, but it was made very clear that the grievance and disciplinary issues were not being linked. The claimant herself accepted that her grievance was separate from the disciplinary when she was asked that in January/February 2021, but when she issued her second grievance, she seemed to revise that opinion (so far as the second grievance was concerned). She was told that her allegations of victimisation would not be dealt with within the grievance process but could be raised within the disciplinary procedure, which they were. It follows that neither Mr Oliver or Mr McGowan had been involved in the disciplinary procedure up until the point at which a decision was made as to what should happen to the claimant. It would have been entirely feasible for one of them to take the decision on dismissal under delegated authority from the Board, whether or not TH had first held the disciplinary hearing. Alternatively, either of them could have held that disciplinary hearing. Both the Articles of Association and the Guidance to Trustees on pages 1033-1034 make it clear that the Board can delegate its functions, and we heard no evidence to indicate that was not so. It would also have been possible for the Board

to agree that MO or DM could make a recommendation which they would be bound to accept without further consideration.

44. We have referred to the minutes of the meeting at which the claimant was dismissed at page 888. In those minutes, there is a paragraph which asks for declarations of interest. It would have been entirely possible for KD to have declared an interest (because she had investigated the matter) and to have absented herself from any decision-making. The quorum for the committee under the articles of Association is two, and four trustees were present.
45. Alternatively, if the decision making had been delegated to Mr McGowan or Mr Oliver, on the basis that the board would accept their recommendation if that ratification was required, KD could simply have declared her interest and absented herself at that point. Whichever new trustee did not make the disciplinary sanction/recommendation could then have either been given delegated authority to deal with the appeal or alternatively, TH or Ms Domhill could have been asked to make a recommendation to the board, and again KD could have absented herself (as could whichever of MO or DM had made the decision to dismiss).
46. So, we consider that it certainly would have been practicable for the disciplinary decision making to have been carried out without KD's involvement. The process adopted by the Board was in breach of the ACAS Code of Practice, and in any case, we do not consider that any reasonable employer would have wished to disregard the Code or would have permitted KD to take part in the decision making in these circumstances, where she had both made the decision to suspend the claimant and investigated the allegations, and where alternative processes which did not involve her were available. The dismissal was therefore unfair for that reason.
47. It seemed clear to us from the evidence we heard and the lack of any recorded discussion by the Board (beyond the cursory mention in the minutes on page 888 on the 8th of September 2021 and the even shorter reference to their discussion "by e-mail" in October 2021) that the process was very much led and influenced by the Chair of trustees, that is KD. As well as investigating the disciplinary allegations she had already concluded when she wrote her investigation report that the complaint by the family of the resident should be upheld and that they should receive "a fulsome apology". So, the dismissal was unfair because the procedure adopted was outside the reasonable range.
48. There are several other reasons why we would consider this dismissal to be unfair in any event.

49. During his evidence to us, TH told us that he was influenced in his recommendation to dismiss by the reports of the interim manager. Whilst there is a mention of the report from the interim manager dated 27th of August 2021 in the appendix to TH's report at page 886, he accepted that a copy of this report was never sent to the claimant. The report is on page 876 in our bundle. The Interim Manager was critical of the previous running of the home, and for example said that there were no records of fire drills being completed. This appears to contradict KD's own evidence that there were records of fire drills being carried out up to shortly before March 2020. He said that the fire emergency bag was not fit for purpose. This is not something that had been raised at any previous stage. He also said that there was little or no evidence of staff supervisions being undertaken and that some staff hadn't had a supervision for three years. This is at odds with

the evidence given by the claimant, and the findings of the CQC in 2019, who had spoken to several staff members. As the Interim manager's report was admittedly taken into account and influenced TH, we consider that any reasonable employer would have wished to have shared this with the claimant and allowed her to comment on it and perhaps suggest further avenues of investigation if appropriate. This also rendered the dismissal unfair.

50. During the investigatory meeting and then the first disciplinary hearing with TH, the claimant had mentioned that the home had being visited at short notice by representatives of the local fire brigade. She gave quite detailed information about this, including that they had said that the hoist referred to by the assessor need not be moved as it was possible to get a wheelchair past it. The fire officer had also said that the arrangements at the home were better than many care homes and did not suggest any changes. It does not appear as if KD or TH approached the Berkshire Fire Authority to find out if the claimant was correct that there had been a visit between the 2018 and 2020 Assessor's reports, at which a fire officer had been content with the arrangements at home. The role of the Fire Assessor is to alert the 1st respondent to any shortcomings in its arrangements which might attract censure from the Fire Authority. We consider that this would have been an important piece of evidence and it should not have been at all difficult for the first or second respondent to contact the local fire authority to check this matter. The matters of which the claimant was accused had serious consequences for her, including potential referral to the DBS, which could prevent her from working in Care Homes. Given that, and her length of service, we consider that any reasonable employer would have wished to ensure that any line of enquiry that may support her evidence should be pursued.
51. In that context, see paragraphs 164 -168 of our findings – 4 out of 5 (if one includes the allegations re fire drills) were disputed. Contact with the fire authority (or indeed the maintenance company) could have resolved all of the disputed issues except for the self closing doors and annual evacuation drills, which were accepted by the claimant. TH also simply recorded that there was no evidence in the minutes that the 2018 Fire Assessor's report had been shared with the Trustees or that the claimant had followed it up. We were not told of any reason why PB, the previous Chair of Trustees, could not have been contacted about this and it was clear from the minutes of the September 2020 meeting of Trustees that they were aware that another Assessors' report was due.
52. No-one attempted to contact PB to inquire about the level of support given to the claimant before 2019, although he had referred to difficulties in his handover notes to KD, and the lack of support (and staffing) was an important point of mitigation for the claimant.
53. In addition, it seemed clear to us that the opening words of the claimant's grievance on page 701, were wide enough to cover the information she attempted to convey to DM during the grievance meeting, that is that over a period of years there had been a significant reduction in the amount of support and oversight that she had received from trustees. It seemed to us that Mr Magowan was keen to limit the scope of the claimant's grievance, hence his refusal to consider matters prior to the start of the pandemic. The claimant was raising serious concerns about the level of support that she had been given and about KD's attitude to her. Mr Magowan did not attempt to investigate these matters. The claimant continued to refer to the lack of

support she had received over several years at the disciplinary hearing and in her appeal. No one properly investigated these matters or the impact this had on the claimant's ability to do her role effectively. The claimant had even produced the letter that GC had sent to CW in 2018 which set out, in terms, that the National society considered that the claimant was not being given enough support and direction to do her job effectively. TH simply noted that the claimant's grievances had been dismissed, and although the claimant raised these matters and KD knew of the grievances, she did not investigate them in any detail.

54. These allegations were very serious matters from the claimant's point of view as well as the first respondents. They have the potential to affect her future career, because as we have seen the respondent in certain cases is obliged to refer evidence of misconduct to the disclosure and barring service. We have reminded ourselves that where serious allegations are involved, any reasonable employer will want to investigate them thoroughly. Looked at overall, we consider that in investigating, the second respondent was more concerned with the evidence which was adverse to the claimant than she was in looking for evidence to support what the claimant was saying. So for example, she did not ask PB as to whether the claimant had previously discussed the 2018 Fire Assessment with him and did not, apparently, provide TH with her emails to the claimant regarding implementation of part of the Fire Assessor's report. Neither she, TH or JD considered contacting the local fire authority. We consider that these simple points would have been undertaken by any reasonable employer in the circumstances of this case and that the investigation was therefore outside the reasonable range.
55. For the reasons given above, we consider that the investigation of the disciplinary allegations in this case was outside the reasonable range. Given the claimant's good record, length of service and the repercussions for her, we consider that any reasonable employer would have sought to gain information about these matters. So, the dismissal was unfair for those reasons also.
56. We should make it clear that although Mr Swanson suggested that the delay between the suspension and decision to dismiss by itself rendered the dismissal unfair, we do not agree. It took time for the claimant's grievances to be dealt with and there were occasions when she was not available, due to medical appointments and because her union representative was unavailable.
57. Although we have found the dismissal to be unfair, we went on to consider whether there was a reasonable basis in the evidence for the finding of misconduct regarding allegations 1 and 3, and we are satisfied that there was. The claimant accepted that the correct procedure had not been adopted in respect of the notice given to the resident about whom the complaint was made and blamed the pressures of the pandemic, and in particular severe understaffing of the home for her failure to go through all the steps necessary. She had not thought that it was necessary to inform the CQC about the resident being found in the basement and lounge, but there was evidence from PGH, and TD, that she should have. Although the claimant disputed the other allegations which were found to be substantiated by TH, we can see that there is a reasonable basis in the evidence for the conclusions he reached about allegation 5 (which he said he had disregarded given the Trustees' equal responsibility) and 6. Regarding allegations 7 and 8, for the reasons we have given above we do

not consider that there was a reasonable basis in the evidence for THs findings, which were arrived at after an investigation which was outside the reasonable range.

58. We also consider that the sanction of dismissal in this case was outside the reasonable range. Neither TH, nor any of the trustees - KD, MO or DM - from whom we heard considered any of the alternatives to dismissal which are set out in the respondent's disciplinary procedure.
59. TH was quite frank in saying that his approach was simply to consider whether he thought that dismissal would be justified in these circumstances. He also quite openly said that he had not taken account of paragraphs one and two of the respondent's disciplinary policy, because he would not have written a disciplinary policy in this way. He did not take account of the objective of the policy, which was to encourage employees to improve their standards of conduct when an informal approach either has not worked or was not appropriate because of the circumstances.
60. So he did not take account of the procedure to which the claimant, an employee of more than 25 years, was entitled to expect, and in particular that she had been told that where informal or formal action was needed, the first respondent would raise and deal with the matter promptly and fairly, and that any disciplinary action would be undertaken in accordance with the provisions of the policy and procedure.
61. TH approached the matter from the wrong angle. As he told us, he set about considering whether dismissal could be justified in all the circumstances rather than considering what the alternatives were and which best fitted this situation, as the claimant had been entitled to expect. This error was repeated at the meeting on the 8th of September 2020 when, as Mr Oliver, Ms Davis and Mr McGowan told us, the trustees simply discussed whether they thought that dismissal could be justified based on TH's report and did not consider any other alternatives.
62. Both the ACAS Code and the respondent's disciplinary procedure provide for other options than dismissal and, although it is true that both state that in certain circumstances dismissal may be justified even when there has been no previous concern and no previous warnings have been given, the usual process is to ensure, as the respondent's disciplinary process says, that any concern is raised and dealt with promptly. Some of the matters alleged against the claimant such as failure to document audits and hold and document formal supervisions were matters alleged to have occurred over lengthy periods, and for which the Trustees had a responsibility of oversight. The claimant had been telling them for years that she needed more staff and support, but clearly, the Trustees were not troubling to enquire exactly what impact that was having on the claimant's work.
63. As is common in disciplinary processes, at paragraph 4.5 the 1st respondent's disciplinary policy refers to different levels of disciplinary sanctions, ranging from a verbal warning to dismissal, and it is said that the sanction will be consistent with the nature and seriousness of the issues subject to the disciplinary action. At paragraph 4.12 a whole range of sanctions are set out, from verbal warning to dismissal. The possibility of mediation is also referred to in two places, at paragraph 4.2 (for consideration at the stage when it is decided whether or not to bring disciplinary proceedings), and at 4.16, following the formal disciplinary procedure. We consider that in those circumstances, any reasonable employer would wish to ensure that it considered properly any alternatives to dismissal. By its own admission, this employer did not.

64. In her evidence, KD accepted that she was aware that there were deficiencies both on the part of the trustees as well as on the part of the claimant. This is very apparent when one considers the guidance given to trustees at pages 1033 and 1034, where trustees are given a clear responsibility, as KD accepted, to ensure that staff supervision takes place and that generally the home is run in accordance with statutory and regulatory requirements. It was accepted by TH and KD that the trustees also have a responsibility to make sure that audits take place regularly. KD accepted that there was a failure both on the part of the trustees to ask questions and the claimant to give detailed reports.
65. So in addition to considering that the process which was adopted was outside the reasonable range, we consider that this dismissal was substantively unfair. Although some cursory attention was paid to the fact that the claimant was a long serving employee, we do not consider any of the decision makers paid sufficient attention to the circumstances in which the alleged misconduct had taken place. This was the context of the worldwide pandemic, which had a particularly severe impact on the management of care homes such as that managed by the claimant. It was common knowledge that anyone involved in health services or working in a registered care home faced particular challenges during the pandemic, both in relation to resourcing of supplies of essentials and PPE (as the claimant had mentioned during the disciplinary investigation at various points) and in relation to the requirements of testing, distancing, managing communications with the relatives of residents etc. All of these additional tasks would have taken up the claimant's time and attention, and the stresses must have been even more acute in a situation where the care home had been understaffed even before the pandemic, and where the situation was exacerbated by staff becoming ill and having to isolate while other staff were placed on furlough and the volunteers who had helped with reception duties were no longer coming in. The claimant had raised all of these matters during the disciplinary investigation and the trustees of the first respondent were well aware that the claimant had been complaining for many months that she was unable to take any leave because of staff shortages and that she had been saying for years that she and the deputy manager were spending too much time on administration and answering calls, which was detracting from their other responsibilities.
66. We do not consider that any of the decision makers, including TH or JD, paid sufficient attention to the effect the pandemic would have had on the claimant's ability to carry out her responsibilities, and the stress it would have placed upon her. Any reasonable employer would have done so. We find on the balance of probabilities that the decision makers underestimated the impact that running a care home during a pandemic with inadequate staff had wreaked on the claimant by late 2020. Whilst we accept that there may have been ways in which the claimant could have taken some leave, including acceding to the proposal of the 2nd respondent (made in the late autumn of 2020) that an interim manager be appointed, we find that by this stage the claimant was overwhelmed by the amount of work that she had to do to keep the home operating during the challenges of the pandemic. This is exemplified by her failure to reply to emails from KD about additional administrative staff, something which would have helped her, because she felt she had no time to do so. Knowing the pressures the claimant was under, it would have been open to the 2nd respondent at that point to simply tell the claimant to take leave and appoint an interim manager, but this did

not happen before the claimant suspended, even when the claimant was forced to isolate. We note that an interim manager was sourced within two weeks after the claimant's suspension.

67. We consider that KD was very concerned by the complaint that had been received and the tone of it. As a result, she appeared to develop a mindset which disregarded anything that could be said in the claimant's favour. Although these were very serious allegations, as we have said, it was important that in investigating and making any decisions that she should look for matters which would exonerate the claimant or mitigate the situation as well as those factors which counted against the claimant. Any reasonable employer would have done so in the circumstances. We have referred to deficiencies in investigation above, but as an example of this, neither KD, TH or JD appear to have taken account of the fact that Reading Borough Council had been told by the claimant that she was asking the resident to leave, albeit after the notice had been given, and that Reading Borough Council did not appear to be overly concerned by this or the fact that there had been no best interest meeting, in the context of the pandemic, and so took no further action. There was documentary evidence that the claimant had been in touch with the CPN and GP about the resident, and that she told the GP what was happening soon after giving the notice. No one has suggested that the claimant's judgment was wrong – that is, that the resident (whose condition was said by the CPN to be deteriorating) needed to be cared for within a care home which was registered for dementia (for the resident's own safety. TH accepted that the claimant had taken some action to safeguard the resident's best interests, and the resident had come to no harm between 22 September and 2 December 2020, when she left. The 1st respondent was not registered to deal with dementia, and therefore its staff would not be trained in how best to cope with that condition.
68. There was evidence, too, that the claimant had discussed the need for the move with one of the resident's sons in July 2020, 2 months before the "notice" was given, and that he agreed that it would be best for his mother to be moved. We accept, as did the claimant, that she did not follow the correct procedure in "giving notice" to the resident's family, informing the CQC about the resident being found in the basement and lounge and telling Reading Borough Council, but KD knew by the time she concluded her investigation that Reading Borough Council were not going to take action, and that the CQC were quite content that the matter was being investigated. Neither of those organisations were suggesting that the claimant must go. It is true that the wording of the "notice" is rather terse and formal, and that it was not ideal that it was given to the sons by an administrator, but it was not unheralded, the "one month" was not enforced and the claimant helped the family to find another care home that was more suitable. There was no evidence that the claimant had ever failed to follow the relevant procedures before. There is no indication anywhere that the decision makers recognise these matters, which in our view provide powerful mitigation.
69. In addition, the 1st respondent did not seem to place any weight on the fact that in both 2016 and 2018 the care home had been rated as "good" under the claimant's leadership and that compliments had been given about the level of care received by the residents and the claimant's leadership itself.
70. We consider that any reasonable employer in the circumstances of this case would have taken all of these factors into account, including the context of the pandemic and its additional pressures, the historic lack of support and oversight given to the claimant by the trustees, the lack of clarity about their

respective roles (and the fluctuating input of trustees over the years),the impact of chronic understaffing on the claimant's ability to do her role and the previous "good" ratings given to the home, her long service and lack of any previous disciplinary action. In our view, no reasonable employer would have dismissed the claimant at this point and in these circumstances. The dismissal was therefore outside the range of reasonable responses and substantively unfair.

71. We do not consider that the appeal cured the defects in the original dismissal. JD was not aware of the long history of lack of support to the claimant, the lack of delineation between her obligations and those of the trustees and had not seen pages 1033 to 1034. She was unclear about the role of the trustees. She did not appear to have read the grievance materials in any detail. She took account of matters which were not discussed with the claimant, such as JD's views on the potential use of individuals on furlough as volunteers in the care home, fuelled by her experience in a completely different context, that of examination boards. The claimant had no opportunity to comment on this, but we can see that there would be many obvious differences between the ease with which a volunteer could assist a qualifications body compared to the steps that need to be taken before someone becomes a volunteer in a care home. JD's outcome letter seems more concerned with potential reputational damage to the 1st respondent and risk of recurrence than the points being raised by the claimant and the fact that there was no evidence that the MCA (or any other legislative provisions) had been breached by her in the past.
72. This was a limited appeal, and although we are aware of the need to consider the process overall in order to consider whether the dismissal was fair, we do not consider that the appeal was sufficiently wide-ranging to correct the defects in the original dismissal. It did not appear to us that JD was appreciative of the difficulties that the pandemic was causing in the care home, the chronic lack of staffing and lack of support to the claimant over several years and the impact this had on her ability to do her role, and that she did not properly evaluate the mitigating factors.
73. To all intents and purposes, JD's outcome letter concluded the claimant's appeal. As we have noted, we did not see the emails in which the Trustees apparently ratified JD's conclusions, but there is no evidence that there was any substantive discussion of her reports at all. Our conclusion from KD's evidence was that by the 8th of September 2021, and certainly by the time of the appeal, KD had decided that it would be best for the claimant to go, as evidenced by the reference to settlement discussions on page 888. The newer trustees, MO and DM, seemed to consider that they had no active part to play in the decision making. JD also told us in evidence that she was influenced by the fact that there had been settlement discussions, to the extent that she did not "think through" the alternatives to dismissal, although she did not consider that the relationship between the claimant and trustees had completely broken down. For all of those reasons, we do not consider that the appeal corrected the defects in the original dismissal.
74. For all of those reasons, we considered that the dismissal was substantively as well as procedurally unfair.
75. **Section 123(1),** "**Polkey":** as we have set out above, we do not consider that any reasonable employer would have dismissed the claimant in all the circumstances of this case, that is, that the sanction of dismissal was outside the reasonable range of responses. We therefore do not consider

that the 1st respondent could have fairly terminated the claimant's contract of employment at this point and as a result of these disciplinary proceedings.

76. It is for the respondent to provide us with some evidence of the risk that the claimant's employment would have terminated fairly subsequently in any event, but we were not provided with any such evidence. Mr Oliver set out sensible steps in the outcome letter for the grievance appeal, which were directed at repairing that relationship and ensuring that the claimant's leadership was directed properly in the future. Furthermore, whilst the claimant did not accept all of Mr Oliver's conclusions on the grievance appeal, she did confirm her willingness to discuss his suggestions with the Trustees but said that "things would need to change"- p795. As we have said above, JD, an independent person who conducted the appeal, told us in her evidence that she did not consider that there had been a total breakdown in the claimant's relationship with the trustees, even at that point. She said that she could not see a "way through" at that point and did not "think through" how the claimant could return to work. If she had been supplied with or had read Mr Oliver's grievance appeal outcome, she would have seen the beginnings of a "road map" to achieve that on page 786.
77. We consider that had all the relevant circumstances been properly evaluated, the first respondent would not have dismissed the claimant but would have given her a written warning, possibly even a final written warning, would have specified the areas which needed to improve, such as record keeping, compliance, and communication on both sides, and would have set out a series of steps, similar to those set out by Mr Oliver in the grievance appeal outcome letter, to try to avoid any recurrence. There is no evidence that the claimant had been subject to any complaint of this nature or otherwise from the families of any residents in the past, or that she had failed to comply with the relevant legislation and statutory requirements. The first respondent might also, had it considered the matter, have suggested mediation between the board and the claimant to try to improve relationships, as is suggested as an option in the disciplinary procedure. We consider that, had such steps been taken, it is overwhelmingly likely that the claimant's employment would have continued as it previously had for over 25 years, and there is no evidence before us which would lead us to conclude that there was a significant chance that the claimant's employment with the first respondent would terminate prior to her retirement. Subject to the comment set out below relating to the claimant's likely retirement date, therefore, we do not consider it just and equitable to make a deduction under section 123(1) or under the principle in **Polkey.**
78. Neither party addressed us on the likelihood that the claimant would retire at a particular point or a particular age. We are aware that she was aged 62 at the point of her dismissal. If necessary, we will hear submissions about the claimants likely age of retirement and the effect of that on the compensation for unfair dismissal which should be awarded at the remedy hearing.
79. **Contribution:** the 1st respondent suggested that there should be a reduction to both the basic and compensatory awards for the claimants blameworthy or culpable conduct. This was a reference to the allegations which were upheld against the claimant, in particular the circumstances in which notice was given to the resident in question, the tone of the letter, the failure to comply with procedures under the MCA 2005, to inform the CQC of the incidents when the resident was found in the basement and lounge areas, in relation to the alleged failures of the claimant to carry out audits

and supervisions properly and the allegations in respect of the fire assessors report and fire evacuation drills.

80. So far as the treatment of the resident is concerned, we do consider that to a degree the claimants conduct in this respect was culpable, blameworthy or unreasonable. We refer to the fact that the claimant, knowing that both sons had lasting powers of attorney, did not consult both sons, and that she did not consult the GP, KD or Reading Borough Council before giving notice to the resident's sons. We do not consider that the MCA necessarily required a formal best interests meeting, but the claimant should have at least informed KD, the GP, CPN, Reading Borough Council and both sons who had lasting power of attorney that she was considering giving formal notice for the resident to be moved and asked for their comments before "serving notice". She should also have assessed whether the resident had sufficient capacity to comment on the issue , but from the evidence available it seems probable that she would have concluded that the resident did not have sufficient capacity (see the reports of PGH and TD, which refer to the CPN's assessment). Having said that, we do take account of the mitigating circumstances which we have mentioned above, including the pressures of the pandemic and general overwork.
81. TH said that it was a question of judgment as to whether the claimant should have notified the CQC that the resident was found unaccompanied descending the stairs to the lounge and found in the basement on 7 and 22 September 2020 and that in his view (and that of TD and PGH) the claimant had come to the wrong conclusion. We accept that she made an error of judgment, but we are not satisfied that in all the circumstances this by itself was sufficiently unreasonable or blameworthy to result in a reduction of the basic or compensatory award. Again, we take account of the fact that these incidents happened around the time of a further "wave" of the pandemic when the pressure on the claimant must have been high, and we accept her evidence that she did take additional steps to keep the resident safe, including asking for increased nightly checks and 1 to 1 care, although her deputy and senior carer were directly responsible for the care plan.
82. In relation to the failure to properly document supervisions and audits, we accept that the claimant did her best to carry these out. After the CQC inspection in January 2019, however, we find that, having been told by the CQC Inspector that she need not write up supervisions immediately but should do so when she had time (see investigatory minutes) due to the pressure of work and understaffing she did not prioritise the organisation of one to one supervisions (although these were held on an "ad hoc" basis as Mr Belay corroborates) and did not find time to document these. Likewise, although both she and the deputy manager were carrying out audits, they were not documenting them. The claimant was blameworthy in failing to do so. Matters then got out of control after the pandemic struck, with all the extra pressures that created, such as acquiring PPE, dealing with queries from residents' families, additional administrative work etcetera. We consider that the claimant should have made more effort both to organise and document the one-to-one supervisions and document the audits. Whilst she was to some extent responsible for her own failure to document these, we have very much borne in mind the great pressure she was under even before the start of the pandemic due to the chronic and substantial lack of staffing in the home. It is a matter of common knowledge that there are difficulties in recruiting and retaining care staff, and that there have been for several years. This situation was only exacerbated by the pandemic. We

have also taken account of the lack of support and supervision that the claimant had received over several years from the trustees, who are responsible for oversight of supervision and audits according to the document at 1033-34 and as TH accepted, and the fact that the CQC was content with what the was doing in January 2019 (and previously in 2016) so that these failures were relatively recent. As we have set out in our findings of fact, the claimant did inform the Trustees on occasions that she never had enough time to carry out all her tasks and was spending too much time on administrative tasks, but at least until mid to late 2020, this seemed to fall on deaf ears.

83. In respect of fire evacuation drills and the Fire Assessors report, we note that the condition of the home was assessed as "tolerable". As noted above, no-one checked with the Fire Authority whether there had been at least one visit after 2018 when they had accepted that arrangements, including the position of the hoists and the claimant's approach to fire drills, was acceptable. Nor did anyone check with PB whether he was aware of the 2018 report or if the claimant had asked him to sanction the expenditure, most of it being outside her remit. We accept the claimant's evidence that the Executive Committee minutes were not comprehensive, and the Committee minutes from September 2020 show that they were aware that a further Fire Assessor's report was due. We find that there was a short notice visit by the Fire Authority after the 2018 report, probably in 2019, when they expressed satisfaction with arrangements. We find that the claimant had informed both PB and the Committee about the contents of the 2018 report and that she had asked PB for funding to carry out the more expensive work, that some of the work (insulation of cabinet) had been referred to SMS in late 2020 and that the green exit button had been actioned by her. In the circumstances, we do not consider that the fact that some of the other items (for example re self closing doors) were outstanding was such culpable or blameworthy behaviour on the claimant's part that there should be a reduction to the basic or compensatory awards in that respect.
84. The claimant accepts that she had not carried out a full evacuation for a "while" – i.e., since before the pandemic began, and that this was an urgent matter. There had been some confusion about which drills were the subject of the Fire assessor's report, and we observe that although he noted that the usual regular drills were not being carried out and that, despite the pandemic usual regulations remained in place, that it was the annual full evacuation that was regarded as an urgent matter in the autumn of 2020. Again, whilst the claimant bears some responsibility for not doing that before January 2021, and we find that is to some extent blameworthy, we are mindful of the difficulties this would create during the pandemic, the very severe pressures which she was under at the time and the lack of staffing resources available to her, and the fact that she had previously asked trustees for assistance with a night-time drill and had received no response, and the fact that the claimant had provided KD with the report in about October 2020 but KD had not raised any concern with her before the suspension on 5 January, or even until the allegations were added on 5 March 2021.
85. We consider therefore that the claimant's failure to assess the relevant resident's capacity, and to notify all those with a legitimate interest, including one of the resident's sons and Reading Borough Council, that she was considering asking the family to move the resident to a care home that was

registered to deal with dementia, her failure (after January 2019) to ensure that regular one to one supervisions were held with staff and to document those that did take place, her failure to documents audits, and her failure to ensure that a full evacuation drill took place as a priority after receiving the 2020 Fire Assessor's report were all matters which were culpable or blameworthy, but they are mitigated by the matters set out above.

86. Looking at the matter overall, and taking account of the various mitigating factors, we consider that there were more substantial factors contributing to the claimant's dismissal. These included lack of oversight and supervision from trustees over several years (despite Gaynor Cavanagh telling the Trustees in 2018 that these were key areas of concern for the CQC), chronic understaffing and difficulty in recruiting, KD's lack of experience and over reaction to the complaint by the resident's family in a context where there were no known previous complaints about the claimant, the lack of adequate investigation and the lack of proper consideration of mitigating factors. We therefore considered that the claimant's contribution to her dismissal was less than 50% but more than a third, so that it was just and equitable to make a 40% reduction to her compensatory award.
87. As the same matters of blameworthy conduct were relevant to both the compensatory award and basic award, although there is no need for a causal connection between them and the dismissal before a deduction can be made to the basic award, we considered that it was just and equitable that the same reduction should be applied to each. So, we consider that it is just and equitable to reduce both the basic and compensatory awards by 40% to reflect the claimant's blameworthy conduct in these respects.
88. **Wrongful dismissal:** we considered whether, looked at objectively, the claimant's conduct was such as to amount to repudiation of her contract of employment. It was for the respondent to satisfy us of this on the balance of probabilities and, in contrast to the decision as to whether the claimant's dismissal was unfair, we must make our own findings about the claimant's conduct.
89. We have set out above, particularly in our consideration of contributory conduct, our findings about the claimant's conduct. So, we have found that she failed to comply with her obligations under the MCA 2005 to formally assess the resident's capacity to comment on the proposal to move her, to consult both of the resident's sons, or to discuss the question of whether she should ask the resident to move with KD, with GP, the CPN and Reading Borough Council before serving notice (although she did raise the possibility that this may be necessary in due course with the Trustees, the CPN and GP in advance). Although we did not consider it to be just and equitable to reduce the basic or compensatory awards in this respect, she did fail to notify the CQC of the two incidents where the resident was found on different floors of the care home when she should have. She also failed, from some point in 2019, to adequately to document her audits, to carry out or ensure that formal supervisions were carried out and document them when they were. She also failed to carry out a full evacuation drill when told to do so urgently by the Fire Assessor in late 2020, although at this point Covid restrictions were still in place.
90. In the context of a lengthy and successful period of employment of more than 25 years, the claimant had kept a clean disciplinary record and had been praised by the CQC. Taking account of the impact of the pandemic, the severe understaffing of the care home and (at least prior to mid-2020), lack of adequate support and direction from the Trustees, the fact that she

had discussed the issue with the son she saw most frequently over two months before the notice was given, did not enforce the one months' notice, told the GP and Reading Borough Council soon after she had served the notice (and no objection was raised) and helped the family find a more appropriate, dementia registered care home, we do not consider that, looked at objectively, the claimants conduct as identified above amounts to a repudiatory breach of her contract of employment.

91. The claimant had been a good and loyal staff member, whose personal performance was praised by the CQC in January 2019. This was based on the CQC's discussions with members of staff and residents and their families. Her appraisal in September 2020 was generally positive. We do not consider that, looked at objectively, her lapses (as identified above) during a period of extreme pressure due to understaffing and the challenges of the pandemic amounted to repudiatory conduct.
92. TH and MO accepted in evidence that the most significant factor in the decision to dismiss was the claimant's conduct regarding the resident. They did not consider that the other matters would have justified dismissal. As we have found, none of the decision makers took adequate account of the various mitigating factors in respect of the complaint about the resident or the breaches of the MCA and regulations. Nor did they give weight to the lack of any other evidence that the claimant had previously disregarded legislative provisions or been the subject of complaint, or that Reading Borough Council had not objected or taken any action in this case.
93. So, in all the circumstances, we do not consider that the claimants conduct, as we have identified it above, was such that the 1st respondent should not be required to retain her or was justified in dismissing her without notice. The claimant had performed well in the past and there was no reason why, adequately supervised and overseen, she could not do so again. She had responded to Mr Oliver's grievance appeal letter to say that although things would have to change (in the sense of the level of support and staffing etc.) she was willing to discuss his proposals and to work with the first respondent (p793).
94. For those reasons we consider that the claimant was wrongfully dismissed. If necessary, compensation for this breach of contract can be assessed at the remedy hearing.
95. The parties are reminded that there is a preliminary hearing to discuss directions for remedy on **24 April 2024 by CVP**, of which notice has been given.

_____

Employment Judge **Findlay**

_____

Date 23 March 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
26 March 2024

FOR EMPLOYMENT TRIBUNALS

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX

The Issues

51.The issues the Tribunal will decide are set out below.

Time limits

52.Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 4 August 2021 may not have been brought in time.

52.1 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010?

The Tribunal will decide:

52.1.1Was the claim made to the Tribunal within three months (plus early conciliation extension)of the act to which the complaint relates?

52.1.2If not, was there conduct extending over a period?52.1.3If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

52.2If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

The Tribunal will decide:

52.2.1.1Why were the complaints not made to the Tribunal in time?

52.2.1.2In any event, is it just and equitable in all the circumstances to extend time?

52.3 Were the unauthorised deductions/ detriment complaints made within the time limit in sections 48 / 23 of the Employment Rights Act 1996?

The Tribunal will decide:

52.3.1Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of / date of payment of the wages from which the deduction was made etc?

52.3.2[detriment etc] If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

52.3.3[unauthorised deductions] If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

52.3.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

52.3.5 If it was not reasonably practicable for the claim to be made to the

Tribunal within the time limit, was it made within a reasonable period?
Unfair dismissal
53.What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason i.e. breach of trust and confidence. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct. The claimant says that the decision to dismiss was predetermined, discriminatory and on the grounds of protected disclosures.
53.1If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
53.1.1there were reasonable grounds for that belief;
53.1.2at the time the belief was formed the respondent had carried out a reasonable investigation;
53.1.3the respondent otherwise acted in a procedurally fair manner;
53.1.4dismissal was within the range of reasonable responses.
53.1.5The claimant disputes all of the above.
Wrongful dismissal / Notice pay
54.What was the claimant's notice period?
54.1Was the claimant paid for that notice period?
54.2If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?
Protected disclosure
55. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
55.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:
55.1.1.1 24.10.16 -the claimant raised at an executive committee meeting that staff appraisals had not been carried out, there were issues with fire doors and the claimant required administrative support;
55.1.1.2 27.06.18 -the claimant raised at an executive committee meeting that there was no clear process of managerial support, no appraisal system in place, and that the claimant was not receiving supervision;
55.1.1.3 28.01.21 -the claimant's written grievance;
55.1.1.4 08.03.21 -the claimant's written grievance;
55.1.2 Did she disclose information?
55.1.3 Did she believe the disclosure of information was made in the public interest?
55.1.4 Was that belief reasonable?
55.1.5 Did she believe it tended to show that:
55.1.5.1a person had failed, was failing or was likely to fail to comply with any legal obligation, namely the respondents' requirement to ensure the working environment is safe;
55.1.6 Was that belief reasonable?
55.2 If the claimant made a qualifying disclosure, was it made:
55.2.1 to the claimant's employer? If so, it was a protected disclosure.
Detriment (Employment Rights Act 1996 section 48)
56.Did the respondent do the following things:
56.1Lack of support to carry out the claimant's duties as manager;
56.2Disciplinary action against the claimant (commencing 5 January 2021).
56.3By doing so, did it subject the claimant to detriment?
56.4 If so, was it done on the ground that she made a protected disclosure?
Automatic unfair dismissal (Employment Rights Act 1996 section 103A)

57.Was the reason or principal reason for dismissal that the claimant made a protected disclosure?
57.1If so, the claimant will be regarded as unfairly dismissed.

Victimisation (Equality Act 2010 section 27)

62.Did the claimant do a protected act as follows:
62.1 28 January 2021 –raising a grievance.

62.3 8 March 2021 –raising a grievance.
The respondents accept that these two grievances amount to protected acts.
62.4Did the respondent do the following things:
62.4.1 Escalate the disciplinary allegations from 2 to 8 allegations(around 5 March 2021);
62.4.2 Dismiss the claimant (15 September 2021);
62.4.3 Reject the claimant's appeal (6 October 2021).
62.5 By doing so, did it subject the claimant to detriment?
62.6 If so, was it because the claimant did a protected act?

Unauthorised deductions

63.Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?
63.1The claimant says that she was not paid her notice pay or holiday pay for holiday accrued but not taken.