EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Scott**

Respondent: **Delves Court Care Home Limited**

Heard at: **Birmingham**

On: **3, 4, 5, 6, 7, 10, 11 & 24 June 2024 (25 & 26 June 2024 in chambers)**

Before: **Employment Judge Flood**
Mrs W Ellis
Dr G Hammersley

Representation
Claimant: Mr McGrath (Counsel)
Respondent: Mr Brockley (Counsel)

RESERVED JUDGMENT

1. The complaint against the respondent of unfair dismissal (contrary to section 94 Employment Rights Act 1996 ("ERA")) is well founded. The claimant was unfairly dismissed by the respondent.

2. The claimant's complaint of wrongful dismissal is well founded. The claimant was dismissed in breach of contract.

3. The complaint of unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded. The respondent made an unauthorised deduction from the claimant's pay in respect of the period 1 October to 28 October 2021.

4. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's pay by failing to pay holiday pay accrued but untaken as at the date employment terminated.

5. The complaints against the respondent of automatically unfair dismissal (contrary to section 103A ERA) and detriment on the grounds of having made a protected disclosure (contrary to sections 47B and 48 ERA) are not well founded and are dismissed.

6. The Tribunal will decide remedy at a further hearing, the date of which will be notified to the parties separately. However we have determined the following:
    a. No reductions for Polkey or contributory fault are to made to any award for unfair dismissal.
    b. The ACAS Code of Practice on Discipline and Grievance applies and an uplift of 25% to the compensatory award pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992 is applicable.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 12 December 2021 at pages 7-19 (following a period of early conciliation between 29 October and 16 November 2021), the claimant brought complaints of unfair constructive dismissal, disability discrimination, breach of contract (notice pay), unpaid holiday pay and unpaid wages. The respondent defended the claims by a response (pages 19-28) and contended that the claim form was insufficiently particularised.

2. There was a preliminary hearing for case management before Employment Judge Wedderspoon on 14 June 2022 where particulars of the complaints the claimant wished to bring were discussed. The order sent to the parties after this hearing (pages 33-46) recorded that the claimant was bringing complaints of unlawful detriment and unfair (constructive) dismissal on the grounds of having made a protected disclosure. It also recorded that the claimant was bringing a complaint of failure to make reasonable adjustments, breach of contract (notice pay), unpaid wages and unpaid holiday pay. A provisional list of issues recorded the complaints (pages 40-46) identifying the acts of detriment the claimant relied upon and the acts said to constitute fundamental breaches of contract entitling the claimant to resign. The acts said to constitute protected disclosures were recorded as requiring clarification. The claim was listed for final hearing to be heard 20 to 28 March 2023 and an alternative dispute resolution hearing was listed for 8 March 2022.

3. There was an indication at the hearing on 14 June 2022 that the claimant intended to make an application to amend her claim and she was ordered to provide further and better particulars of her claim and indicate whether she sought to amend her claim. The claimant provided particulars by way of an amended grounds of claim submitted on 27 June 2022 ('the Amended Grounds of Claim') at pages 52-64. This provided details of the alleged protected disclosures said to have been made (in two conversations with her manager, C Hayward on 12 and 21 October 2021) as well as further details on the complaints made. It identified that

a number of the matters in the Amended Grounds of Claim recorded were not in the claim form, stating that these were identified in bold. In particular these bolded out sections included allegations that the respondent reported the claimant to the policy and the Nursing and Midwifery Council ('NMC') and that these reports were done because of the making of protected disclosures.

4. The claimant subsequently withdrew her complaint of disability discrimination on 6 July 2022 (page 65) and this was dismissed by way of a judgment sent to the parties on 22 December 2022. The respondent provided a response to the Amended Grounds of Claim on 22 August 2022 (pages 66-78) where it made the point that much of the detail in the Amended Grounds of Claim had not been pleaded and amounted to new allegations. It was suggested that a preliminary hearing may be necessary to consider applications to strike out the claim or to order a deposit be paid. It also made reference to a civil claim that the respondent was about to commence in relation to the alleged "*defrauding*" the respondent to the tune of "*a figure in excess of 61,000 odd*" and suggested that a stay of the Tribunal proceedings might be appropriate. The claimant was asked to provide her comments on this document and on 14 November 2022 sent a letter disputing the points made (page 81-2). The claimant subsequently instructed solicitors and on 2 December 2022 sent via her representatives a letter making an application to amend her claim to substitute the Amended Grounds of Claim for the details set out at section 8.2 of her Claim Form (page 83-4).

5. At the conclusion of an Alternative Dispute Resolution hearing in March 2023, the issue of the outstanding application to amend was raised but the parties were informed that a preliminary hearing to determine this matter would not be listed and it would be addressed at the outset of the final hearing (which at that time was due to take place in a matter of weeks). Unfortunately that final hearing due to take place in March 2023 was postponed by the Tribunal, due to a lack of judicial resource. It was relisted for June 2023 but the parties were unavailable for the dates listed due to pre booked holiday and thus it was not possible to find a date for the hearing to take place until June 2024. The issue of the outstanding application to amend was not raised by the parties subsequently nor was it picked up by the Tribunal and thus it was an outstanding application which we heard and determined at the start of the hearing as follows:

<u>Amendment application</u>

6. The Tribunal's decision was to allow the claimant's application to amend her claim to substitute the Amended Grounds of Claim. The effect of which was to

6.1 allow the claimant to rely on an additional protected disclosure said to have taken place on 21 October 2021 as set out at paragraph 14 of the Amended Grounds of Claim (but only to the extent that it amounts to a

repetition of a previous disclosure said to have been made on 12 October 2021, the claimant having confirmed she does not rely upon the second part of that paragraph about changes to staffing).

6.2 allow the claimant to rely upon the additional acts of detriment that are set out at paragraphs 33 b, d, e and g and paragraphs 36 and 37 of that Amended Grounds of Claim (the claimant confirming that she is no longer relying upon paragraph 33 h).

7. The claimant submitted that she raised such matters promptly raising the possibility of amendment in advance of the preliminary hearing on 24 May 2022 and then addressing this via counsel at the hearing itself on 14 June 22. She contends that in accordance with the orders she sent further particulars of those claims made and applied to amend her claim by the document sent on 27 June 2022. The respondent objected to the amendment on the basis that there are new factual matters not indicated in the claim form and that it is unfair to it to have to prepare a case on the contingency of amendments being allowed before such matters have actually been determined,

8. Rule 29 of the ET Rules together with due consideration of the overriding objective in rule 2 of the ET Rules to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments. In relation to the application to amend, the leading authority is Selkent Bus Co Limited v Moore [1996] ICR 836, EAT which provided as follows:

"(4) Whenever a discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The Nature of the Amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b)The Applicability of Time Limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The Timing and The Manner of the Application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision."

9. We were also referred to the additional authorities of Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA ; Chandhok v Tirkey 2015 ICR 527, EAT, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132 and Vaughan v Modality Partnership 2021 ICR 535, EAT. The latter case of that list very much reminds the Tribunal about the importance of relying on the practical consequences of refusing or allowing the amendment.

10. In deciding the application we considered the factors identified by Selkent before addressing and focusing on (as we are directed by Vaughan) on the balance of prejudice and hardship and the practical consequences of allowing or refusing the application to amend. We set out the analysis we carried out below:

Nature of the amendment

11. The amendment requested here was not a wholly new legal claim in the sense that the claim form refers to matters which were identified at the first preliminary hearing as being the claimant was making complaints of unlawful detriment and unfair dismissal on the grounds of having made a protected disclosure. The amendments sought add additional factual allegations in that they pinpoint a second protected disclosure and seek to add additional acts of detriment said to have been caused by the protected disclosures. To that extent, at least factually, these are relatively significant amendments amounting to new factual allegations

Applicability of time limits and the timing and manner of this application

12. In relation to the detriment complaints, were a new claim form to be submitted now, these allegations would potentially be out of time as these relate to matters that took place in October 2021 (in relation to the additional acts relating to the investigation, suspension and related events) and in January and February 2022 (in relation to the post employment acts of detriment). In relation to the claim for constructive unfair dismissal, this is not such a significant factor as the in time claim arising from the purported date of dismissal already exists. The amendments sought are a matter of additional alleged acts constituting a repudiatory breach of contract. However for the complaints in relation to detriment, as directed by the case of Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT there is no doctrine of relation back and therefore an amendment to the claim takes effect as at the point when permission to amend is given. There may have been arguments about whether the Tribunal had jurisdiction to hear these additional complaints but determined that it would only be possible to consider this once all the evidence has been heard and so we deferred consideration on any issues of time to after the evidence had been heard. As it happened, given the decisions we reached as set out below, this point was not a matter we had to consider.

Balance of prejudice /practical consequences

13. We concluded that putting all these factors together that the balance of prejudice and hardship favoured allowing the amendment. Although there are new and factually distinct complaints, the respondent acknowledged that in reality it was not at a significant disadvantage in having to deal with, and indeed as pointed out has called evidence from all witnesses said to have been involved about such matters. Whilst it is entirely unfortunate that due to issues around delay to these proceedings that this matter has not been addressed earlier, and the respondent points out it has had to prepare provisionally, it has as a matter of fact prepared on the basis that the amendment would be allowed and therefore is not prejudiced at all by having to deal with these complaints. The claimant on the other hand is significantly prejudiced in not being able to pursue additional complaints which she raised relatively promptly at the first hearing listed to identify the issues in her claim. On that basis we decided to allow the amendment.

14. Following the amendment of the claim, there was a discussion on the final form of the List of Issues before the Tribunal. Mr McGrath had produced a draft which was submitted but the Tribunal was not satisfied that this captured all the matters identified by Employment Judge Wedderspoon at the first preliminary hearing. The Tribunal prepared and sent a draft updated list of issues to the parties at the conclusion of the first day of the hearing. Some minor adjustments were proposed by Mr Mc Grath and e mailed back which were not objected to by the

respondent. Therefore the final list of issues to be determined by the Tribunal at the conclusion of such discussions ('Final List of Issues') is set out below and was referred to throughout the hearing.

15. The hearing of the evidence went significantly over the agreed timetable and the Tribunal was only able to get to the end of the evidence in the original time listed. The Tribunal was able to find an additional day for submissions (and further time for deliberations) within a week of conclusion of the evidence (and we thank the parties and the representatives for being flexible in being able to arrange their diaries to attend). However it was frustrating that submissions then took a further full day of Tribunal time, leaving less time for the Tribunal to discuss and make its decision. Given the number of issues in dispute, this meant that although deliberations could be completed in this additional allocated time, there has been a further delay as the Tribunal needed to allocate further time to writing up this lengthy reserved judgment and reasons. The decision of the Tribunal on all matters was unanimous.

Documents before the Tribunal

16. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the main bundle. There was also a supplementary bundle of documents and where we refer to page numbers in that supplementary bundle, they will be prefixed with the letters 'SB'. Additional pages numbered SB 105-136 were added to that bundle at the outset of the hearing by the parties by agreement.

17. During the evidence the respondent tried to rely on a document in the bundle at pages SB28 to SB31 which is said to show the investigations into transactions on the Equals Card with reference to colour coding being made in PC's witness statement. This document was completely illegible (and printed in black and white copy so the colour coding was not even visible). The respondent then during the hearing submitted what it said was a clearer copy which we added to the supplementary bundle and labelled pages SB137-147. However on examination there were some differences apparent between the documents, thus it was impossible to place any real reliance on this document. We did not conclude that this was due to any attempt to mislead by the respondent but rather confusion as to which document this was and when it had been prepared This illustrated a problem we had throughout the hearing that figures said to be contained documents were being stated as evidence in various witness statements with no cross referencing to page numbers in the bundle, rendering many of the unidentified documents in the bundles of no assistance to us whatsoever. Despite drawing this to the respondent's attention right at the beginning of the hearing, we were not ever given a clear picture of what each document was said to show making it difficult for us to place any reliance on these documents. In addition the claimant made many reference to documents that she had

requested during the disclosure process but that had not been forthcoming (we refer to these where applicable in our findings of fact below). We did have concerns as to whether the respondent had provided all the relevant documents it should have done during disclosure and whether all or complete documents were included in the bundle. This made our task in conducting our deliberations extremely onerous.

18. The claimant sought the permission of the Tribunal to call an additional witness Mr C A Scott (her husband) and rely on a witness statement. Mr Brockley did not object to this witness per se but made submissions on the relevance of the contents of his witness statement which we have had due regard to in our deliberations.

19. We also had a Cast List and Chronology and the respondent produced a proposed reading list.

The Issues

20. The final issues to be determined by the Tribunal were as follows:

List of Issues

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the following things:

1.1.1.1 Did Claire Hayward remove an arrangement permitting the claimant to work a four day week during a meeting which took place on 21 October 2021 (and confirm this by e mail on 24 October 2021 by allocating work to the Claimant intended to be done on Fridays thereafter)?

1.1.1.2 Did Peter Cooke instigate an investigation into alleged wrongdoing on the part of the claimant (which the claimant alleges was without justification or merit) by causing Sarah McDonald and Claire Hayward to question her colleagues on 22 October 2021?

1.1.1.3 Did the respondent suspend the claimant on 25 October 2021 without pay and without setting out any valid reason for taking such step or articulating why she would not be paid whilst suspended?

1.1.1.4 Did Claire Hayward make veiled threats to the claimant that information would be passed to her regulatory body (NMC) during a meeting on 21 October 2021?

1.1.1.5 Did the respondent fail to comply with its own policies:

(a) By providing no proper explanation for the suspension;

(b) By providing no proper explanation for suspending the claimant without pay;
(c) By deciding, by its directors, to suspend the claimant?

1.1.1.6 Did the respondent fail to acknowledge and/or deal with the claimant's grievance dated 26 October 2021?

1.1.1.7 Did Claire Hayward fail to act upon the disclosures of information provided and/or investigate matters raised by the claimant on 12 and 21 October 2021 (see below)?

1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.2 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.2 Was the reason or principal reason for dismissal that the claimant made a protected disclosure ?

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

2. Remedy for unfair dismissal

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the claimant?
2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.6.3 If not, for what period of loss should the claimant be compensated?
2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.6.5 If so, should the claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach To be clarified]?

2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

2.7 What basic award is payable to the claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3 If not, was the claimant guilty of gross misconduct?

4. Protected disclosure

4.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

4.1.1 Did the claimant:

4.1.1.1 on 12 October 2021 speak to Claire Hayward and advise her of her concerns about the respondent's use of grant funds obtained from the local authority and that she objected to the use of such grant funds by the respondent for the purposes of maintenance, day to day operating costs and refurbishment?

4.1.1.2 on 21 October 2021 repeat the information set out at 4.1.1.1 above to Claire Hayward during a meeting?

4.1.2 Was this a disclosure of information?

4.1.3 Did she believe the disclosure of information was made in the public interest?

4.1.4 Was that belief reasonable?

4.1.5 Did she believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation, namely to ensure that monies obtained from the Fund were obtained legitimately and used only for the aims, objectives and measures as identified in the relevant guidance?

4.1.6 Was that belief reasonable?

4.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. Detriment (Employment Rights Act 1996 section 48)

5.1 Did the respondent do the following things:

5.1.1 Those acts set out at paragraphs 1.1.1.1 to 1.1.1.7

5.1.2 Report the claimant to the police following her resignation (the claimant contends this was without merit or justification)?

5.1.3 report the claimant to the NMC following her resignation (the claimant contends this was without merit or justification)?

5.1.4 withhold the claimant's pay/salary due for the month of October 2021?

5.2 By doing so, did it subject the claimant to detriment?

5.3 If so, was it done on the ground that she made a protected disclosure?

6. Remedy for Protected Disclosure Detriment

6.1 What financial losses has the detrimental treatment caused the claimant?

6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.3 If not, for what period of loss should the claimant be compensated?

6.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

6.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

6.6 Is it just and equitable to award the claimant other compensation? 6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8 Did the respondent or the claimant unreasonably fail to comply with it?

6.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

6.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

6.11 Was the protected disclosure made in good faith?

6.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

7. Holiday Pay (Working Time Regulations 1998)

7.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

8. Unauthorised deductions

8.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

9. Schedule A2 Trade Union & Labour Relations (Consolidation) Act 1992 cases

9.1 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.2 Did the respondent or the claimant unreasonably fail to comply with it?

9.3 Is it just and equitable to increase or decrease any award payable to the claimant?

9.4 By what proportion, up to 25%?

Findings of Fact

21. In the judgment, the Tribunal has used initials to identify the people listed below rather than their full names in the interests of brevity. Other terms used may also be defined in a similar manner through the judgment.

Witnesses and other individuals

22. The following people attended to give evidence on behalf of the claimant:

    22.1.1 The claimant;

    22.1.2 Mr C A Scott ('CS')(the claimant's husband and director of Mascot Homes Limited).

23. The following people attended to give evidence on behalf of the respondent:

    23.1.1 Mrs K Cope ('KC'), Administrator at the respondent's Delves Court care home;

    23.1.2 Mrs C Hayward ('CH'), Area Manager with responsibility for Delves Court care home from late September 2021;

23.1.3 Mr B Bernard ('BB'), Operations Director of the Select Health Care Group (the respondent's parent company) and nominated individual for the Delves Court care home;

23.1.4 Mr P Cooke ('PC'), Managing Director of the Select Health Care Group; and

23.1.5 Ms R Forrest ('RF'), Purchase Ledger Accounts Clerk for the Select Health Care Group.

24. The following individuals were referred to during the evidence:

24.1.1 Ms Z Hutt ('ZH'), Area Manager with responsibility for Delves Court care home until October 2021;

24.1.2 Ms S Calloway ('SC'), Temporary receptionist at Delves Court care home;

24.1.3 Mr J Wellington ('JW'), Chef at Delves Court care home;

24.1.4 Ms G Grainger ('GG'), Deputy Manager at Delves Court care home;

24.1.5 Mr G Cope (known as Snowy) ('GC'),Maintenance worker at Delves Court care home (married to KC);

24.1.6 Ms M Jones ('MJ'), Operations support/recruitment for Select Health Care Group; and

24.1.7 Ms S McDonald ('SM'), Director of Select Health Group

Credibility

25. There were very many direct disputes of fact in this claim so it was necessary for us to consider the credibility of the witnesses before us. C's written evidence was structured and made reference to the documents she felt supported her case. Her oral evidence during cross examination was straightforward and clear and in general we found her truthful in her answers. However our findings about the alleged disclosures and in particular about the note made by the claimant of a meeting said to have taken place on 21 October 2021 which we found did not occur (see below) led us to have doubts on the reliability of her evidence. To that end, we make the general point (as illustrated by the authority of Clement below) that a witness can be entirely truthful on some matters, whilst not on others. It appeared to us that the claimant had constructed her belief that the respondent had spent grant money inappropriately by looking back after the event at things that had taken place, using documents that she had analysed subsequently, rather than telling us what her view was at the time (see Reynolds below). The

evidence of CS was in general credible and reliable and consistent with any supporting documents.

26. In respect of R's witnesses, the evidence of KC was more difficult as in response to cross examination she admitted that several statements that had been included in her written witness statement were not true. It appeared to us that KC had possibly not written that statement herself, and certainly had not reviewed and read it carefully to ensure that what was set out there as her sworn evidence was correct. She appeared nervous and we accepted in part submissions made on behalf of the claimant that she had difficulty in giving entirely frank evidence due to her many family connections with Delves Court (her husband, daughter, mother and aunt either had worked or still worked at Delves Court) and her long history of employment and continued employment with the respondent. Some of the answers she gave we found were truthful, but her evidence on some of the key matters we had to decide about the receipts and the use of the Equals card was entirely discredited. CH was an entirely straightforward and credible witness and we were able to accept without hesitation much of what she told us as it was consistent with other evidence and in particular the contemporaneous documents. We were not persuaded at all by the suggestion made that she had been 'coached' as a witness. Her answers to questions posed did not change in the break in her evidence and her additional evidence about SM being an area manager and the explanation on the "daughters and horses" comment was entirely credible (and logical) and we did not attach any particular significance to the omission of those matters from her witness statement.

27. We also found BB to be a generally truthful witness and fairly straightforward, although his grasp on the detail of what was taking place suggested to us that his involvement in many of the matters towards the end of the claimant's employment was minimal. We were not concerned by lack of recollection of particular details, given that Delves Court was one of 37 homes he was responsible for. We were not satisfied that his answers were deliberately evasive. PC's evidence was generally truthful on matters of fact that he had direct involvement in, although much of his evidence was about what he believed had taken place rather than his actual knowledge of events. We found that he was at times bombastic and simply unwilling to acknowledge in cross examination that any of the conclusions he had reached on events may be in any way fallible or that there might be another explanation. Mr McGrath suggested that he was delusional and engaging in conspiracy theories and whilst we would not go this far, we did find that his evidence was entirely based around the view he formed very early on in October 2021 that the claimant was guilty of theft (a view he appears to have changed during the hearing to the effect that the claimant and ZH were "*in it together*"). A view that then informed his approach to the entire matter since that date and may have

clouded his decision making. We found the evidence of RF straightforward and credible.

28. We did not hear from ZH, and it would have been helpful to have heard her account of events, given how much she appears to have been involved in the events that ultimately led to the claimant's dismissal. The claimant told us she did ask her to attend but she was reluctant to do so because of connections ZH still had with the directors of Select. BB confirmed that he was still in contact with ZH and also that ZH "*had a lot going on at the time*" of these events "*was not in the best place*" and *"regrets what happened"*. She appears to have had knowledge of and implicitly or expressly approved the actions of the claimant and KC in the way they were managing Delves Court (in relation to the way the claimant was preparing the costed rota and engaging suppliers, including Mascot Homes and Cannock Care). We have some sympathy with the view of PC that the management of at least the administration side of Delves Court was at times "*shambolic*". Whilst the claimant must take responsibility for this, we conclude that the failings of management of her by ZH played a very significant part in allowing that state of affairs to exist.

29. In order to determine the issues, it was not necessary to make findings on all the matters heard in evidence. We have made findings though not only on allegations made as legal complaints but on other relevant matters raised as background. We made the following findings of fact on the balance of probability:

29.1 The claimant (a qualified nurse since 1999) started work on 11 July 2018 with the respondent as a Care Home Manager based at its Delves Court care home in Walsall ('Delves Court'). It was acknowledged by all that the claimant was a good nurse providing excellent standards of care to the residents of Delves Court and never had any disciplinary issues raised against her. The respondent operates Delves Court (which is a specialist nursing home also offering residential dementia care) and is a subsidiary company of Select Health Care Group Limited ('Select'), a company which is responsible for the operation of some 37 care homes across England and Wales. Select employs approximately 2000 employees and at the time of the claimant's employment, the respondent employed approximately 60 employees at Delves Court. Each of the care homes operated by Select has a nominated individual at director level who is responsible for that home and a registered manager (which was the role the claimant performed at Delves Court). The claimant reported to an Area Manager who was responsible for overseeing a number of the Select homes in a particular region. For most of claimant's employment her Area Manager was ZH and the claimant and ZH had a very close and friendly working relationship (as evidenced by the very informal and candid e mails sent between the two in October 2021 – see pages 396 to 406 and pages 427 to 459).

Contracts and relevant policies

29.2 The claimant's contract of employment was shown at pages 88 to 94. We noted and were referred to the following provisions of this contract:

"Hours of Work

Your normal hours of work are 40 per week, or above, to meet the needs of the home and will be worked as agreed with your Area Manager"

and

"***Notice***

You are required to give a minimum of 12 weeks notice to terminate your contract of employment with Select Healthcare Group unless you are still in your probationary period for which 1 week's statutory notice will then apply.

Further terms and conditions relating to Notice are specified in the Select Healthcare Group Staff Handbook."

and

*"**Disciplinary Procedures (Non-Contractual) And Grievance Procedures***

1. Select Healthcare Group's Disciplinary Procedures and Policies are specified in the Select Healthcare Group Staff Handbook."

and

"***Deductions from Wages***

Select Healthcare Group reserves the right to require you to repay to the Select Healthcare Group, either by deduction from salary or any other method acceptable to Select Healthcare Group:

1) Any losses sustained in relation to the property or monies of Select Healthcare Group, client, customer, visitor or other employee of Select Healthcare Group, during the course of your employment caused through your carelessness, negligence, recklessness or through breach of Select Healthcare Group's rules or any dishonesty on your part;…"

29.3 At the time of the events in question, there was an arrangement in place whereby the claimant did not work on Fridays but completed her working hours between 7am and 4pm on Monday to Thursday each week. There was nothing in writing recording this arrangement but we were satisfied that this had been approved by ZH, as the claimant's line manager.

29.4 There were a number of different versions of a disciplinary and grievance policy said to apply to the respondent in the Bundle. Those policies contained at pages 562-574 and 582- 587 were not applicable to the claimant's employment as they dated from January 2022 and August 2022 (after the claimant had left employment) so we did not consider them further. The disciplinary policy that was applicable to her employment was the one contained at pages SB122-126 which contained the following provisions that were relevant or which the parties drew our attention to:

"Suspension

Suspension within Select Healthcare Group may be paid or unpaid, at the discretion of the relevant Area Manager and employees must be advised of this at the time of suspension. Suspension is not a penalty, but a holding action which will be used by a manager only for the following:

• To remove the employee from the work place if thought necessary for the unimpeded conduct of management investigations.

• To prevent the employee causing risk to the welfare of residents/colleagues.

• To cover the intervening period between the announcement of a recommendation to dismiss andits authorisation by a dismissing manager."

And

"Gross Misconduct

Serious breaches of the disciplinary code, which constitute gross misconduct, will result in the final stage of the disciplinary procedure being activated without previous warnings or notice of termination.

The employee will be regarded as suspended while the investigation and hearing take place.

Examples of offences and behaviour, which will be regarded as gross misconduct, include (this list is by no means exhaustive):

• Theft or attempted theft of company or employee property.

• Smoking on Company premises/property or in a company vehicle.

• Use of or threat of violence, abusive or intimidating conduct.

• Falsification of company documents.

• Serious disruptive or abusive behaviour.

• Being under the influence of drugs or alcohol on company premises.

• Wilful neglect or damage to property.

• Serious breaches of health and safety regulations.

• Disclosure of confidential information.

• Prolonged unauthorised absence.

• Serious neglect of duty.

• Gross insubordination or persistent refusal to carry out a reasonable working instruction.

• Harassment of residents or colleagues.

• Unauthorised use or mis-use of company property/vehicles.

• Downloading pornography on the internet.

• Sleeping on duty."

and

"External Reporting:

Dependent upon the severity of the allegations and the outcome of the investigation, it is the managers responsibility to escalate the outcome to all relevant parties including DBS (Disclosure & Barring Service), Safeguarding, local Authority, CQ.C and professional bodies e.g. Nursing Midwifery Counsel (NMC), Health and Care profession counsel (HCPC) etc."

29.5 The respondent contended that other policies were in place in particular a policy on whistleblowing but no such policy was included in the Bundle. It also appeared (as no such policies were included or referred to) that there were no written policies dealing with use of the company credit card, cash handling, compliance with financial procedures, procurement, conflicts of interest or similar. Given the size of the operation of Select, we were surprised by the lack of any such policies which may have been of assistance in the circumstances we heard about during the hearing.

<u>Covid 19 Infection Prevention and Control ('IPC') funding</u>

29.6 With the onset of the Covid 19 global pandemic from March 2020 onwards, UK central government launched The Adult Social Care Infection Control Fund which was initially worth £600 million and was extended into 2021 with an additional £546 million. Several iterations of such funding then took place throughout 2020 and 2021. The primary purpose of IPC funding was to support adult social care providers to

reduce the rate of COVID-19 transmission in and between care homes and support wider workforce resilience. The fund was distributed to local authorities in tranches, with the first being made in May 2020. The relevant local authority then made IPC grants to care providers to distribute the funds. At the time each IPC grant was made, the care provider entered into an agreement with the local authority which set out the conditions attached to the receipt of monies. Broadly speaking the monies issued had to be spent on measures related to controlling the spread of Covid 19. Providers had to record the sums they spent in a spreadsheet with receipts and if monies were found to be spent on non Covid 19 infection control measures, then the local authority would require them to be repaid. The respondent received several such grants from Walsall Metropolitan Borough Council ('Walsall MBC') between May 2020 and March 2022 and BB agreed that approximately £170,000 had been received by the respondent for use in Delves Court alone over that period. He agreed when it was put to him that Select received in the region of £6 million over that period for use in its 37 care homes. The respondent was not required to repay any of the funds issued to it by Walsall MBC during this period.

29.7 At pages 130 to 136 we saw a partial copy of an infection control grant agreement ('Funding Agreement') entered into between the respondent and Walsall MBC on 2 November 2020. This dealt with the second tranche of IPC funding and set out the conditions for the award of two sums of £12,024 in November and December 2020. It was not in dispute that there were several (possibly up to 6) other such agreements entered into by the respondent but these were not disclosed to the claimant or included in the Bundle. Moreover the Funding Agreement was missing Annex C which appeared to contain detail of the conditions which were attached to spending. The Tribunal made a request at the start of the evidence of the respondent to at the very least find this missing part of this agreement and reminded the respondent of this at least once more. This was never forthcoming and we were also informed that the respondent could not find copies of any later funding agreements. This was highly unsatisfactory and meant that the Tribunal had only a partial picture as to what the conditions as to how IPC grant monies should be spent over the whole of the period in question. In any event, the claimant acknowledged in cross examination that the conditions as to use of grant monies contained in the Funding Agreement was similar to those contained in later agreements.

29.8 Our attention was drawn to a number of provisions in the Funding Agreement in particular the following:

"Residential care providers can use the fund to:

2.2.1. ensure that staff who are isolating in line with government guidance receive their normal wages white doing so

……..

2.3. limit all staff movement between settings unless absolutely necessary, to help reduce the spread of infection. This includes staff who work for one provider across several care homes, staff that work on a part-time basis for multiple employers in multiple care homes or other care settings (for example in primary or community care). This includes agency staff (the principle being that the fewer locations that members of staff work in the better). Where the use of agency staff is absolutely necessary, this should be by block booking.

2.4. limit or cohort staff to individual groups of residents or floors/wings, including segregation of COVID-19 positive residents.

2.5. support active recruitment of additional staff (and volunteers) if they are needed to enable staff to work in only one care home or to work only with an assigned group of residents or only in specified areas of a care home, including by using and paying for staff who have chosen to temporarily return to practice, including those returning through the NHS returners programme. These staff can provide vital additional support to homes and underpin effective infection control while permanent staff are isolating or recovering from COVID-19.

2.6. limit the use of public transport by members of staff (taking into account current government guidance on the safe use of other types of transport by members of staff).

2.7. provide accommodation for staff who proactively choose to stay separately from their families in order to limit social interaction outside work.

2.8. support safe visiting in care homes, such as dedicated staff to support and facilitate visits, additional IPC cleaning in between visits, and capital-based alterations to allow safe visiting such as altering a dedicated space.

2.9. ensure that staff who need to attend work for the purposes of being tested (or potentially in the future, vaccinated) for COVID-19 are paid their usual wages to do so"

29.9 The Funding Agreement also required the respondent to have completed a capacity tracker to receive the grant and provide information to Walsall MBC about how the grant monies awarded were spent. There were a number of stated deadlines by which each instalment awarded had to be spent. It also provided that the respondent:

"3.2.6. must demonstrate that the Grant has been spent in line with the infection prevention control measures outlined in section 2 above;

3.2.7. shall repay any Grant not fully spent at the end of the Fund; 31 March 2021

3.2.8. must keep receipts and invoices to prove how it has spent the Grant and must make these available to the Council and/or the DHSC if required to provide reassurances that the Grant has been used in accordance with this Grant Agreement and the Fund;

3.2.9 shall completing the Capacity Tracker or CQC homecare survey (as per government guidance) at least once per week from the first week of receipt of any support from the new Infection Control Fund (which came into place on 1 October 2020).

3.3. If requested to do so, the Grant Recipient must provide the Council and/or DHSC with an explanation of any matter relating to Grant and its use."

and

"3.5. If any information the Council receives from Grant Recipients at any reporting point raises concerns that spending is not in accordance with the conditions of the Grant Agreement and/or the Fund, the Council may withhold further allocations until satisfied, or may recover misused Grant payments from the Grant Recipient.

3.6. None of the Grant shall be used for any purpose other than the measures explained in this document and read in conjunction with the Adult Social Care Infection Control Fund: round 2 Grant Conditions at Grant Conditions at, Annex. C (Published 1 October 2020).

3.7. All expenditure financed by this Grant must be incurred on or before 31 March 2021 and the Grant Recipient shall repay to the Council any part of the Grant not used by that date."

29.10 On 3 November 2020, MJ e mailed all the Select home managers about the latest round of IPC grant funding (page 137-139). This made it clear that homes had to record all items of expenditure of grant money that had been passed via its PO system on a spreadsheet which had to record whether the expenditure was round 1 or round 2. MJ instructed the home managers that the updated spreadsheet had to be sent to her every time a new item was added so that a central spreadsheet could be completed at head office. At pages 256 to 264 we saw a spreadsheet recording the spending of IPC grant monies at Delves Court for the first three rounds of Grants received ('IPC spreadsheet').

29.11 The claimant gave evidence that in "*mid 2020*" she "*became aware that the Respondent was not in fact using the funds for the permitted purposes*". When asked about this she said she was concerned about she stated that she felt that grant money was being spent "*on things not detailed in the agreement*". We were not satisfied that during 2020 the

claimant did in fact hold such concerns as there was no evidence in the Bundle or otherwise to suggest this. She was only able to point to two e mail exchanges from around this time of any relevance. Firstly around the use of IPC grant funding to pay rent (the claimant says for Filipino nurses) in October 2020 at page 123-4. In that e mail KC writes to MJ referring to a request from BB that the sum of £1,100 from the grant be used for rent and asking for evidence of payment. This spending appears on the IPC spreadsheet at page 257. That e mail exchange does not assist us in way in reaching any conclusion about whether that spending was appropriate or not. Secondly an e mail exchange between KC, MJ (which the claimant was copied into) relating to the allocation of spending on kindles, cleaning and activities to a particular round of fund spending (again these items are the last 3 items recorded on the IPC spreadsheet at page 259). It was submitted this showed evidence that the respondent was prepared to shift funds from one expired pot of funding to another but we were not at all satisfied that it showed anything of the sort (KC herself in this e mail to the claimant suggests this spending was correctly allocated). In fact e mails dating from 15 September 2020 detail the claimant seeking to use the funding for spending in the home and challenging why it was necessary to follow the respondent's "*3 quote procedure*" (see below) in relation to purchases for on food and cleaning products (see page 114). It is clear to us that the claimant as home manager was along with more senior managers making decisions about how grant funding was being spent as in her e mail to RF she states, "*These purchases are being claimed back via our infection control budget in line with council guidance"*. In response to her e mail the claimant was informed by PC at this time that it was her responsibility to ensure that the documentation behind a PO requested was correct.

Arrangements for spending within the respondent

29.12 The respondent and Select operated a purchase order ('PO') system to provide funds to the homes it operated including Delves Court for their day to day operations. Any day to day spending in a home was instigated by the home manager (the claimant in the case of Delves Court) raising a PO for the amount they were seeking on an online system which would then be sent to BB as Operations Director to approve. Several of the witnesses told us that in order for a PO to be approved, it had to have attached to it, three quotes for the sums sought. However we were satisfied (on the basis of evidence from the claimant and KC) that that this rule was not enforced and POs were regularly and often passed without three quotes being provided. Again we saw no written policies outlining any such financial procedures in the Bundle. At page 153, BB drew our attention to an example of an e mail sent to the claimant on 7 April 2021 approving a PO which contained a number of rules including one which stated that POs would not be passed without three quotes being attached. However we were satisfied that this may well have been a general rule, that this was not strictly observed (and this may have

particularly been the case during the period we were dealing with when the Covid 19 pandemic was taking place).

29.13 In Delves Court it was KC who generally took responsibility for placing POs on to the online system for Delves Court but it is clear to us that this was done at the instruction or at the very least with the agreement of the claimant as the home manager.

29.14 Once a PO was put on the system, a e mail notification came to BB that this had to be reviewed and passed. If he was content that the spending was appropriate, he approved it and then a message was sent back to care home manager to alert them that the PO had been approved. We accepted his evidence then when approving these POs his concern was whether the spending was needed and he did not at this stage vet any PO which was said to be coming from IPC funding to determine whether its use was in accordance with the Funding Agreement, as this was a matter for the home manager. At Delves Court, there was an arrangement whereby that e mail would be sent to KC, as administrator, rather than the clamant as home manager, to enable KC to then process the matter in the event that the claimant was absent (see e mails at page 141-2).

29.15 An approved PO could be printed out and in the Bundle we saw a number of examples of such printed POs which we refer to through this judgment. The claimant pointed out at paragraph 18 of her written witness statements that certain POs appeared to be duplicates of each other but had "*conflicting details*" on them and thus doubted whether they were genuine. An example was PO 26818 in relation to garden spending of £7,000 which was included at page 489 naming the claimant as Home Manager and ZH as Area Manager, with approval by BB. An almost identical document was shown at page 340 but this time showing a Patricia Burton (who was for a time after the claimant left employment Home Manager at Delves Court) as Home Manager and CH as Area Manager. BB agreed with the suggestion that this appeared to be something that was auto generated at the time the PO was printed and as such would show the actual person in the role in question at the time of printing, not the time the PO was approved. We were satisfied with this explanation as to the apparent difference in what seemed to be identical POs and conclude that the ones showing the claimant and ZH were the correct POs printed at the time of their tenure, with later ones being duplicates of such POs printed later when Patricia Burton and CH were in the respective posts.

<u>Equals Card</u>

29.16 Once a PO had been authorised by BB and notification sent, then the home would contact the Select finance team and ask that the sum authorised by transferred to a company card known as the Equals Card. This card was not a corporate credit card, but was a prepaid card which

allowed for spending of only the sums that had been transferred for use on to the card at that date. Those sums could either be used for card purchases at retail outlets or online or for cash withdrawals. KC gave evidence in her written witness statement that only the claimant could withdraw cash using the Equals card and as far as she knew only the claimant had the pin number to do so. She also said that she "*never*" withdrew cash using the Equals card. During cross examination when challenged on this evidence she admitted that this evidence was untrue and that she had used the card to withdraw cash "*on one or two occasions*". We find that although the claimant was largely responsibility for withdrawing cash on the Equals card, KC did also have access to that card and its pin number and could (and did) make cash withdrawals as well as the claimant.

29.17 At pages 308-311 we saw a spreadsheet which the respondent says was downloaded from the Equals card statement (we did not see an original statement issued from the Equals card and the claimant says this was asked for during disclosure and not provided) which showed cash withdrawals on the card between 10 June 2021 and 18 October 2021. There were a significant number of cash withdrawals many of which were for sums of £250 and £500. There were some discrepancies within this information as multiple withdrawals were shown to have been made in close proximity and seemingly over the restrictions imposed on the number of withdrawals (and cash limits) that could be made within a 24 hour period. In any event, the claimant acknowledged that this was an unusually high number of cash withdrawals but explained this by stating that at the time, Delves Court was being encouraged to spent a large amount of IPC grant money and she withdrew cash to pay suppliers and contractors (including Mascot Homes and Cannock Care -see below) She told us it was also used to pay for residents' petty cash, entertainment in the home and food when trying to use the Equals card directly for shopping did not work. She told us that on every occasion she made a withdrawal of cash she obtained a receipt from the cash machine and passed all such receipts to KC. KC denied that this was the case. We preferred the claimant's evidence here and find that receipts for cash withdrawals were obtained and given to KC but such receipts were not for whatever reason retained or submitted to Select head office (see below).

29.18 The Equals card was also used on a regular basis for online and other card purchases by the claimant, KC, GG, JW, Chloe (the activities coordinator at the home), Megan (another employee engaged in activities for residents) and the previous cook at the home. At page 422 we saw an exchange of messages between the claimant and KC where KC provided the claimant with a verification code that was texted to her for use of the card (the claimant said that she ensured that such verification codes were texted to KC rather than herself). At page 424 we saw a message from the claimant to KC where the claimant provided the Equals Card 3

digit security number to her to enable GG to do shopping for the home. It was clear that numerous people around Delves Court had relatively free use and access of the Equals card to pay for items needed at the home with KC admitting that it was "*generally available to staff*".

29.19 We heard large amounts of evidence about the Equals Card and its use at the respondent and within Select. However we did not see any evidence of a written policy detailing how the Equals Card was to be used by any of the respondent's employees. We found this astounding given the sums involved that were routinely being approved and transferred for use by the respondent's employees on this card.

Issues with the provision of receipts October 2020

29.20 Once a purchase is made on the Equals Card (or cash was withdrawn), then a receipt was expected to be provided for each item of expenditure and sent to the Select head office so that the sums spent could be reconciled with the amounts authorised by the PO.

29.21 At Delves Court, KC had responsibility as the home's administrator for the collection of receipts to be sent to the Select head office. In her written witness statement, KC gave evidence that up until April 2021 there were no problems with receipts being provided by the claimant for spending on the Equals card as they were being provided by the claimant to her. During cross examination, KC then withdrew this evidence admitting that it was untrue. We find that from at least October 2020, there were difficulties around the provision of receipts by Delves Court to the Select head office. At page 125 we saw an e mail from RF to KC stating that there was paperwork missing on the Equals card from April 2020 to September 2020 and listing 25 separate PO numbers which were missing receipts or invoices and asking KC to provide them as soon as possible. It is clear that with the onset of the Covid 19 pandemic spending on the Equals card increased, not least because the homes including Delves Court were also spending the IPC grant money that had been allocated to them. KC had some difficulties in keeping up with the record keeping in relation to receipts that were being received. The claimant gave evidence that we accepted that she was meticulous in keeping receipts for any spending that she undertook and had a separate "*work purse*" containing the Equals Card which she stored such receipts in, before passing them to KC to be sent on.

29.22 The Covid 19 pandemic continued with various stages of restriction during 2020. For context we note that the initial restrictions imposed in March 2020 started to be lifted from June 2020 onwards. Further restrictions on gathering started to be introduced again from September 2020 (including tiered restrictions in different regions from 14 October 2020) and a second national lockdown came into force in England on 5 November 2020 lasting 4 weeks. A third national lockdown came into force in England on 4 January 2021 which was lifted on 29 March 2021.

Restrictions on gatherings and travel restrictions remained in force until July 2021. Plan B restrictions including the use of face masks in public spaces and Covid passes were in force in December 2021. The claimant gave affecting evidence to the Tribunal about the difficulties faced by those working in care homes over the Covid 19 pandemic which we accepted entirely. Delves Court also differed from many care homes during this period as they were admitting patients (in particular from hospital) who were Covid positive and had a separate and designated Covid suite to care for such patients.

Allegations of 'inappropriate' grant spending in 2021

29.23 The claimant gave evidence about spending at the respondent that she allegedly felt was inappropriate from April onwards and referred us to a number of POs which she alleged showed "*grant money being misused*". These included two POs dated 12 April 2021, PO26191 requesting £867 for spending on "*rugs for summer house outside visits*" (page 498); and PO26197 requesting £712.50 for spending on "*bladeless fans to cool outside when visiting is outside*" (page 494). Both contained comments that the respondent "*Can claim this back from lateral fund*". She also referred us to two POs dated 20 May 2021, PO26819 for £7000 for "*decorating items for the home – to be purchased from our IPC monies*" (page 488) (which is recorded on the IPC spreadsheet at page 264) and PO 26822 for £1500 for "*cleaning products as Budget is insufficient due to price increase/covid. This Money will be claimed back from additional expenses*"(page 486)".

29.24 The claimant further referred us to spending authorised by POs in June 2021 on 10 June 2021 on "*specialist cutlery aids*" and "*seat belts for wheelchairs*" in the sum of £275.10 (page 480 and is included in the IPC spreadsheet at page 264) where it was noted "*We will claim this from IPC round 3*". She also referred us to PO27032 for £2,733.38 for the refurbishment of two toilets in reception (again recorded in the IPC spreadsheet at page 264). These matters were also recorded in the spreadsheet for IPC spending which was prepared by KC to send to head office at page 224. We were also directed to PO 28020 for £7,168.98. On 23 and 26 August the claimant submitted POs for additional spending (as KC was on holiday – see page 230). The first PO 28020 for £7168.98 (page 468) related to "*refurb of the meeting room; decoration of the stairwell and decoration of the toilets in reception*". It was noted on the PO "*unable to get three quotes as it is decoration this money will come out of the infection control rtf totalling the above amount*". the second PO 28066 related to the sum of £2700 in relation to PPE (page 467). At page 415 we saw a text message from the claimant to KC on 17 September 2021 instructing her to place a PO stating: "*Can you put a po on for the other half of the grant money. Which we were going to use for agency but now need for ppe and carpark and décor for the home and activity stuff. Towels sheets etc*" That was placed by KC

and approved as PO 28326 on 20 September 2021 (page 465). These were all approved by BB.

29.25 We firstly did not accept at all the suggestion made at the hearing for the first time that the annotations that the claimant asked KC to put on such POs about claiming back from funding were in fact "*untutored/naïve*" attempts by the claimant to "*blow the whistle*". Rather we find the opposite and that is that on any logical interpretation of such documents, these are POs prepared at the instruction of the claimant herself with such annotations being indications from her as home manager that it was appropriate for the spending on such items to come from the grant.

29.26 The claimant alleges that all such spending was inappropriate making a general allegation that the spending had nothing to do with infection control and states that the respondent has shown no evidence that all this spending was required for infection control purposes. The respondent says that all spending was appropriate and in line with the rules. BB gave evidence that the full amount of money that was paid in grant money was spent appropriately and in fact the respondent spent much more than it was allocated by way of grants in addressing issues relating to Covid and infection control. He explained that all returns sent to Walsall MBC were audited by them and nothing was ever challenged despite a number of visits by Walsall MBC. He also stated that it was primarily the responsibility of each home manager to decide what grant money would be spent on and to keep records and whilst he did monitor spending on POs that came before him, in doing so, his primary concern was whether the home in question needed the amount of spending being sought by the PO, not whether it was coming from grant funding. He told us that the largest portion of grant money received was spent on staff costs and that this was entirely appropriate and within the requirements. CH also gave evidence that agency costs and overtime was at its height during the pandemic as there were many more staff absences, agency staff were being block booked and it was perfectly valid to spend the grant money on such costs. We accepted all of this evidence.

29.27 BB also said that capital expenditure on improvements to the home was also within the rules even for works that had been planned before the pandemic. If those works fit within the criteria for funding, it was acceptable for this to take place (this was in particular reference to the conversion of a bedroom to a bathroom which was paid for by IPC funding but had been anticipated in early March 2020 (see page 98). He told us that the improvement works to Delves Court and other homes were to try and improve the environment for everyone in the care home, particularly in a period where residents were not leaving the home and conditions were difficult and this spending was encouraged by local authorities. Spending on items needed for the home such as seat belts for wheelchairs he felt could well have been required for infection control purposes but he largely left the decisions as to appropriate allocation to

the home managers (in conjunction with area managers). We also accepted all of this evidence.

29.28 Whilst we did not need to make findings of fact about whether the respondent was or was not complying with the terms of the Funding Agreement (and other similar agreements) as our conclusions on this have to rest on the reasonable belief of the claimant, we did not see any items of expenditure which represented (without further clear evidence) an obvious breach of any of the conditions as we understood them to be. The conditions were general in the way they were described and we could see that providers had considerable leeway to spend grant monies. We also take note that the respondent was not required by Walsall MBC to repay any of the sums awarded to it despite providing detail of the spending over the period. This would suggest that Walsall MBC did not have any concerns with the way that the respondent was spending its grant monies.

Head Office chasing KC for outstanding receipts

29.29 On 13 April 2021 KC received an e mail from RF querying a particular PO which then went on to ask her to send outstanding paperwork for other POs dating back to September 2020. KC replied that she had sent over all the receipts she had to RF the previous day and asked RF to provide details of all the POs where receipts were missing, asking her to clarify if the missing POs were for grant spending as those were kept separately. RF responded that she thought the majority of POs with missing receipts were for grant spending and said that there were *"nearly 100 outstanding PO's over several months"* with missing paperwork. KC replied:

"Ok I have them all separately I tried my very best to keep up to date but obviously not. There was so much money to spend on different things and soooooooo many receipts. It will be a matter of working through them."

When asked about this in cross examination, KC admitted that she had been *"very overwhelmed"* in processing and dealing with the IPC grant spending and providing the supporting receipts to head office. We find that there was an almost complete failure by KC to keep track of the receipts being given to her by the claimant (and others) and send them in an organised manner to the Select head office. This may have been because of pressures in the home during such a difficult time and indeed the claimant must take some responsibility for failures in management of KC as part of her overall responsibility as Home Manager.

Select Group Managers Meeting at the Mount Hotel 21 April 2021

29.30 The claimant placed much emphasis on a meeting held involving home managers and area managers of Select on 21 April 2021. The claimant

did not attend this meeting but the minutes were circulated to her and other shortly after the meeting (pages 180-192). Our attention was drawn in particular to a section where grant funding was discussed as follows:

"SMc: There is another set of money coming through and a new system. We have put this through to staff wages etc. You do need to have this last grant money as this is the last one. This is forecasted for Autumn. Predictions from CCG is there will be a round 3.

Advice where to put it is the same as the LFD grant. Put it through as staff time/agency/overtime.

Is there any homes that have lots of outstanding grant to spend?

ZH: Greenleigh do, they have a lot let over that hasn't had anything spent on it

SMc: Could that be transferred over to Jubilee Court as they aren't getting asmuch from the LA even though they are a complex home? Let me ask the question

ZH: Yes because they have nothing to spend other than the garden but that can't be done at the minute

SMc: Ensure logs are up to date, ensure they are nice and neat to send to Mary."

29.31 The claimant suggested in submissions that this exchange was evidence that the respondent was prepared to spent surplus grant monies on staff costs generally and that unspent funds could be shifted between home which was an example of the respondent "*playing fast and loose with grant funds*". The respondent suggested that this was simply a question being posed in a meeting by SM about whether it was possible to transfer grant funds allocated to one home to another and nothing more than this. We preferred the submission of the respondent on this and find that this minute simply recorded a question being asked as to whether it was possible to transfer grant funding between homes but that no answer was given. BB told us that he recalled this question being put to him after the meeting by ZH and he told her that the answer was no and it was not possible for grant funding to be transferred and this was the end of the matter. He also told us that the reference to using grant funding for staff costs was entirely appropriate as Select were being pushed to use the money that had been allocated and it was perfectly acceptable for it to be used to cover additional staffing costs incurred at this time. We accepted this evidence and conclude that the minutes of this meeting showed nothing more than a question being posed about the allocation of IPC funding.

<u>Use of B&Q Card</u>

29.32 As well as the Equals Card, the respondent provided the claimant with use of a card to enable spending up to a limit at B&Q for purchases of supplies for the home's maintenance. At page 385 our attention was drawn to a list of purchases using this card which the respondent says was downloaded from the statement from B&Q (again we note we did not see the original statements from B&Q). The clamant was challenged about one item of spending on the card which took place on 16 June 2021 which was a Friday and thus a day when she was not in work. The claimant could not provide an explanation as to what this related to, other than saying that other people within the home had access to the card and used it other than her. At page 420 we saw an exchange of messages between the claimant and KC on Saturday 8 May (again presumably a day she was not working) referencing the fact that 'Snowy' needed a new strimmer and that the home needed bird food with KC then sending a picture of a container, asking the claimant if this was the bird food she required. We note that there was also spending in B&Q shown on this date on the respondent's spreadsheet. We were entirely satisfied that other staff members in the home including KC and GC had access to and use of the B&Q card and it is highly likely that the use on this date and perhaps others was entirely legitimate spending by them for Delves Court. It would be entirely logical for GC who was employed as the maintenance worker to be able to purchase (potentially accompanied by his wife KC) items he needed to do his job.

<u>Mascot Homes - garden renovations July 2021 and other renovation works October 2021</u>

29.33 We heard much evidence during the hearing about the renovation of the garden at Delves Court. This appeared to originate when KC sent a text message to the claimant on 7 May 2021 asking here whether it would be possible to renovate the garden (page 421). She states that this was raised by Chloe who mentioned that the current layout made it difficult to manoeuvre wheelchairs. At page 581 we were shown a photograph of the garden before work was done (including Thomas the cat) which showed a small paved area, a circular cobbled area, flower beds and a sloped lawn. The claimant replied stating that she agreed with this suggestion. KC then arranged for a very basic quote for the work done from a friend of hers who was a builder and at page 346 we saw a text from Worley Paving and Building quoting the sum of £6500 to *"take up grass area paving area replace with 450 x 450 slabs would be £6500".* KC discussed this with the claimant who thought it was too expensive. The claimant told us that she then asked her husband to provide a price to carry out the job as he was also a builder trading by way of a limited company called Mascot Homes Limited ('Mascot Homes') and felt that he would be a good choice to carry out the work as she knew his standard of work. She said that Mascot Homes agreed to do much more work than was quoted for by Worley Paving as he also did landscaping. She told us that before he even started the work it was approved by ZH. We

accepted this evidence. A PO was approved by BB in the sum of £7,000 (page 489) to cover the works stating that this was for "*Various Items for the garden, including paving, slabbing, raised beds, hard core, building (pergola) to facilitate multiple visits in the garden. Monies will be reclaimed from IPC grant*."

29.34 It was put to the claimant that it was inappropriate for such a large amount of work to have been given to a company wholly owned by the claimant's husband and that there may have been a conflict of interest. The claimant said she did not consider this and thought he was an "*excellent choice for the job and he did an amazing job*". We believe that it was perhaps unwise for the claimant to have instructed Mascot Homes to carry out this work without having some sort of confirmation in writing from her employer that this was acceptable. In addition, it may have been better for the name Mascot Homes to have been added to the PO raised and a written quote for the work from Mascot Homes attached. Nonetheless, there was no policy which apparently prevented the engagement of Mascot Homes (we saw no copies of any procurement policies or any policies dealing with conflicts of interest) and importantly we accepted that the claimant had the verbal approval of her line manager, ZH to instruct Mascot Homes to carry out the works.

29.35 The respondent's submissions on the garden renovations is that no work was carried out by Mascot Homes in the garden at Delves Court. In KC's written witness statement she mentioned that "*only a few yellow additional slabs*" were added to the garden which she "*assumed*" were laid by CS. During cross examination she agreed that CS had carried out all the work that had been instructed, that she saw it being done and that the work he did "*maybe*" represented better value for the respondent. The clamant and CS said that KC and GG were fully aware of what was going on and together with the claimant provided CS with instructions as the work was being carried out. We accepted this evidence. Our attention was drawn to the photographs at pages 118 to 120 and pages 391 to 394 which shows an extensive paved area where the beds and cobbled area had been together with new raised wooden plant beds. We were satisfied that significant garden renovation works were carried out by CS and Mascot Homes in the garden at Delves Court.

29.36 The claimant also instructed Mascot Homes to carry out additional internal and external works in Delves Court and told us that POs were approved for these works. In response to questions she said she believed one of those POs was the one at page 470 dated 23 August 2021 which was for "*Refurb of the meeting room, Decoration of the stairwell, decoration of toiles in receptions*" for the sum of £7168.98. This was notated as coming out of the IPC grant and that she had been "*unable*" to get 3 quotes. She told us that although this amount was authorised by the PO, Mascot Homes only charged for the amount up to £4,250 as shown in the invoice at page 337. Secondly she believed that

the PO shown at page 465 for the total sum of £7,044.96 which covered a number of items but included "*Tidy up the car park*" was the one which authorised further spending with Mascot Homes and that this reflected the invoice from Mascot Homes shown at page 338 for £1,290..

29.37 The claimant told us that the works in the garden were carried out by Mascot Homes in July and took about one month and that Mascot Homes then invoiced Delves Court for the work at the end of July/early August. The invoice for this piece of work she says was shown at page 339 and was for the sum of £6,500. She said the other works were carried out in October and Mascot Homes invoiced and paid for those works in October, although she could not remember when. We accepted this and the evidence of CS that this was around 15 October 2021.

29.38 CS told us that he insisted on payment by cash on completion of the works and that he did not offer any credit terms. He said that once the works were completed he was paid by his wife who took the cash from the safe and counted it out in front of him (and KC was also present). KC denied this but again given that her evidence had been largely discredited, we preferred the evidence of CS. Other than the invoices, no other receipts were provided to show that cash had been received or paid. It was suggested by PC that it was "*totally unacceptable*" for such large amounts to have been paid to a supplier in cash and in particular given that this was to a company operated by the claimant's husband. We have some sympathy with this view and it was very unwise of the claimant to have agreed to pay Mascot Homes in cash with no record of payment or receipt being kept by her. However once again, we could find no policy or provision anywhere which prohibited the claimant from doing this and accept that her line manager ZH was aware and approved her actions. It was at best incredibly naïve of the claimant to have allowed matters to proceed in this manner and this has exposed her to the risk of allegations of dishonesty given that no accurate paper trail is in place to show where and how this money arrived and departed from her possession. However we do not conclude that the claimant behaved in a dishonest manner in her dealings with Mascot Homes in relation to the garden renovation and additional works.

<u>Cannock Care Company</u>

29.39 We heard much evidence about spending for the total sum of £19,558 that the claimant says she carried out for the respondent on PPE with an entity called The Cannock Care Company ('Cannock Care'). There is a significant dispute of fact about what took place so it is necessary for us to examine what each party submits took place and make a finding on the facts in order to determine the complaints before this Tribunal. It is not in dispute that POs were placed on the system and approved by BB for such purchases and at page 349 were a list of 5 POs for Cannock Care for the total sum of £19,558, with copies of 3 of the 5 listed POs being shown at page 350 to 352. At pages 353, 359 and 363 we saw

copies of a typed invoice from Cannock Care from September 2021 for the sum of £3636 for the supply of various items of PPE (boxes of gloves, aprons and wipes) marked as 'Cash on Delivery' (which the respondent accepts were given by the claimant to KC – see paragraph 17 PC witness statement). PO 27024 had a word document attached to it reading "*PPE TO CLAIM BACK ON LATERAL FLOW FUND; GLOVES; WIPES £5950*" (shown at page 482). It appears that one of the POs placed did not have anything attached to it.

29.40 The claimant's evidence is that she was cold called by an individual called Aziz from Cannock Care who was offering to sell PPE to Delves Court. The claimant said that at this time, there was still a shortage of PPE and it was difficult to get hold of in the quantities required, particular for the respondent which operated a Covid suite admitting residents who were Covid positive. She explained that during the first wave of the Covid pandemic, PPE had been in very short supply and over the summer of 2021, there were predictions that a further Covid wave would materialise in the autumn and winter. She told us that she started to 'stockpile' PPE in order that Delves Court would not be short and therefore agreed to purchase PPE from Cannock Care. She told us that there were 5 deliveries of PPE from Cannock Care and she paid cash on delivery which was withdrawn from the Equals Card by her and this explained why large number of cash withdrawals were made during this period of time. She believed that delivery notes were provided which were passed to KC. She said that the PPE delivered was then used by the staff at Delves Court stating that at times there was so much PPE around that it was stacked in reception like a "box fort" waiting to be used or stored. In support of this, she relied on a letter from Ms C Dos Dantos, a nurse that worked with the claimant at Delves Court at the time (page SB 98) which included the following statement:

"*During the Covid 18 outbreak she was on top of her game, making sure PPE was available for use. Sometimes there was so much sitting in the reception area await a safe place to store*."

We were also directed to the monthly Area Manager report prepared by ZH on 26 August 2021 (page 243) which referred to Delves Court having to use "*a vast amount more PPE*".

29.41 Essentially the respondent's position as stated by PC is that all the sums that were paid to Delves Court in respect of Cannock Care are unaccounted for, that the invoices submitted by the claimant were fictitious and no such PPE was ever delivered to Delves Court; and that the claimant withdrew the sums of cash downloaded on to the Equals Card once these POs had been approved and appropriated those sums of cash herself. It points to the lack of any delivery notes and the fact that the invoices supplied included amounts for VAT but no VAT registration number was supplied and that they could not find a company registered at Companies House with the name shown and the address was "false".

PC also contends that there were no shortages of PPE at the time and that the respondent had numerous suppliers that could have supplied PPE on a credit basis at a comparable price.

29.42 However we also take note of the contradictory written evidence BB gave to the NMC in the investigation conducted into the claimant's conduct at page SB80, where he noted that although care homes in the Select Group would generally use one company, Berwick Care Equipment to supply its PPE, that, "*during the time that the purchase orders for the Cannock Care Company were submitted everyone was battling to get PPE and as a result all of the care homes would use different PPE suppliers in order to get the PPE they required*", further noting that another care home had submitted POs for a different supplier and that these POs, "*also did not have the required quotations but on account of the pandemic and the necessity for PPE, especially in a care home environment I would approve these purchase orders*." BB told us that he recalls seeing these specific POs coming to him for approval from the claimant and though it was a "*bit weird*" as it seemed to be an excessive amount to spend on PPE and so he phoned ZH who confirmed to him that Delves Court was struggling to get PPE and needed this additional PPE, so on the basis of what ZH told him he approved all the POs. KC confirmed in cross examination that Delves Court required huge amounts of PPE and that the price of gloves and aprons doubled in price during the pandemic. She said that there were a lot of PPE deliveries but did not recall Cannock Care in particular or an individual called Aziz or that there were any delivery notes. KC's written evidence however suggested she had seen 4 "*receipts*" for Cannock Care and RF's written evidence for the NMC investigation (page S98) suggests there were "quotations" attached to the POs, albeit no copies of any of these documents were disclosed or in the Bundle.

29.43 We find as a fact that the claimant did make 5 purchases of PPE from Cannock Care (as listed at paragraph 29.37 above) which were paid for by cash withdrawn by her on the Equals Card that had been transferred following the approval of the relevant POs by BB. We preferred the claimant's evidence on this matter rather than the evidence of PC whose belief of what had happened was based on speculation and conjecture relating to the lack of documentation rather than any direct knowledge of events. We take note of the fact that the POs were queried by BB before they were passed and he was satisfied after speaking to ZH that they were appropriate. The claimant and KC record shortages of PPE, large amounts being delivered and used and price increases at the time. The written letter from Ms Dos Santos supports the claimant's evidence that she was 'stockpiling' PPE. There is no doubt that the documentation submitted was woefully inadequate and we can understand why this looked suspicious to PC and warranted investigation. However this is not conclusive proof of dishonest activity on the claimant's behalf. The fact that there was no company registered with this name, no VAT number

and the address did not appear correct may have reinforced his suspicions but does not really tell us anything about whether the claimant was responsible for such irregularities. It was entirely possible (indeed more probable given what was taking place in terms of PPE provision at that time) that Cannock Care may not have been a legitimate registered company but was still operating providing PPE for cash sums to the claimant at Delves Court and others on this basis. Whatever the failings in terms of quality control and the provision of the required internal paperwork, we were satisfied that the claimant did purchase this PPE for use at Delves Court with funds approved by BB on behalf of the respondent.

Employment of SC as receptionist

29.44 In order to assist KC resolve the backlog of administrative duties at the home, KC sought permission from the claimant (which was given) to recruit a temporary receptionist and SC started employment on a 6 month contract on 1 July 2021. Her role was to cover reception, answer telephone calls but also to assist with the logging of results of covid tests and with the collation and logging of to the backlog of receipts to send to Select head office. This appointment was not successful with KC describing SC as *"hopeless*" and she was dismissed just two weeks later on 15 July 2021. In her written witness statement, KC stated that the claimant had dismissed SC but she admitted in cross examination that this was untrue and she in fact had been responsible for the recruitment, training and dismissal of SC although the claimant was fully aware of this. As well as concerns about telephone skills and manner, there was a concern that SC was failing to correctly register Covid tests and had left used and unregistered Covid swabs in her drawer. It was also suggested that a laptop she had used had gone missing (although later found by KC in a drawer)

29.45 There was a dispute of fact in relation to another alleged reason for dismissal. Following her departure, SC wrote an e mail complaining about dismissal to SM on 2 August 2021 (page 227). This was forwarded by SM to ZH to deal with and she sent her reply on 3 August 2021 (page 226). This e mail set out the above concerns with SC's performance generally but in particular stated the following:

"You also removed all receipts regarding infection control grants and have not returned these to the home."

The claimant gave evidence that she provided ZH with the information to write this e mail but that it was KC who provided her with the information in it, including about the receipts being missing. KC agreed that she told the claimant about the other problems with SC's employment (telephone use, failure to register swabs and hiding swabs in a drawer) but that she did not say anything at all about receipts and it was the claimant that told her that receipts were missing and that she thought SC had taken them

(along with a laptop that was missing). We preferred the claimant's evidence on this, not least because evidence already given on this same issue by KC was agreed by her to be untrue. In addition as it was KC's responsibility to collate and document receipts (albeit delegated to SC) it would not be logical for the claimant to have reported these items as being missing to KC.

29.46 There was a brief response from SC including the statement "*I do question the infection control grants".* PC also gave evidence that SC had been contacted by SM in preparation for these and the other legal proceedings and she had denied taking receipts. Whilst we accept that this is what SM (and PC) was told, this does not really add a great deal as it is likely that SC would deny such an allegation in the circumstances. The matter was further referred to in an e mail sent by the claimant in response to RF raising with KC a problem with the provision of receipts (see below) when the claimant explains the lack of receipts by stating that they believed that SC had taken them. We find that KC informed the claimant that receipts had gone missing when SC left with the conclusion that SC had taken them. It is impossible to state whether or not SC did in fact take them home (or whether she was in fact a convenient person for KC to blame for the fact that KC had become so overwhelmed with the paperwork and was unable to provide them). However we were clear that the claimant was told by KC that the receipts had gone missing at the time of SC's dismissal.

ZH Monthly report August 2021

29.47 ZH as Area Manager completed a monthly report for each of the homes she was responsible for and at pages 243 to 249 was a copy of the report she completed for Delves Court for August as at 26 August 2021. This referred to having conducted visits on 4, 10 and 26 August. It gave a detailed narrative about what was happening in that month but our attention was drawn to entries made which appear to be relevant to the matters we had to determine. It referred to occupancy at the home having "*increased drastically*" over the previous few weeks with step down patients being admitted on a short term basis. It mentioned the need for a "*vast amount more PPE*". It made reference to the home having an occupancy of 60 (including 7 beds in the covid suite, of which 5 were currently occupied) and that there had been an agreement with Walsall MBC related to 10 step down beds at a rate of £600 per bed. It noted that contracts were in place for all funding residents.

Spending whilst claimant was on annual leave

29.48 It was put to the claimant during the hearing that she has used the Equals Card to make purchases for herself and in support of this, the respondent drew to our attention spending and cash withdrawals which took place when the claimant was on annual leave. Firstly at page 309 an entry in the Equals Card spending spreadsheet showed that £320 had

been withdrawn in cash on 30 August 2021. The claimant admitted that she had withdrawn this amount in cash and told us this was a refund to her of money she had spent on her own card on food shopping for the home (when the Equals Card had been declined). She told us that from time to time this did happen when although a PO had been approved, the relevant funds had not been transferred on to the Equals Card when they went to carry out the spending. At pages 105 to 106 we saw an exchange of e mails between KC and RF on 13 July 2020 where KC was reporting that the card had been declined and that this had happened "*on a regular basis*". We accepted the claimant's evidence on this matter.

29.49 At page 309 was a summary document prepared by the respondent of all spending which it alleged had taken place when the claimant was on annual leave. She was asked in particular about spending on the Equals card on four further occasions on 30 August 2021 including two entries in Cirencester and two shown for Malvern and Fairford. The claimant said that she was in Cirencester that day but had never been to either Malvern and Fairford. She told us that these looked to her like spending in charity shops and explained that often at weekends and when she was on leave, she would look out for items that the residents of Delves Court might like such as jigsaws, books and ornaments and often bought these in charity shops. She told us that it was likely that all such spending that day was spending in charity shops in Cirencester and suggested that the reference to Malvern and Fairford could be because that was where the charity running the shop was based and thus where the spending showed up. She told us she always kept receipts for such spending and handed them to KC to be recorded. She gave the same explanation for 5 items of spending shown in Bakewell on 5 October 2021 also shown in this document. KC agreed when asked that the claimant did purchase items from charity shops for the residents in in her own time. We accepted the claimant's evidence and found her completely convincing in her explanations on this matter.

<u>Issue of lack of receipts August/September 2021</u>

29.50 In August 2021, RF informed PC that she had not been sent the receipts to support spending on the Equals Card at Delves Court. She had already informed him about difficulties with this in the past and PC then instructed RF to write again to and mention that company auditors were due in and that receipts needed to be sent. RF sent an e mail to KC on 23 September 2021 (page 250) asking her to send the outstanding PO paperwork she had not "*received anything from April 2021 onwards*" and asked her to get up to date in the next couple of weeks in time for the auditors visit. KC showed this e mail to the claimant who then sent an e mail to RF apologising for the lack of receipts, stating as follows:

"*Unfortunately when we had [SC] the very temporary receptionist she was tasked with attaching receipts to a spreadsheet once she had prepared the spread sheet. After giving her copious amounts of receipts we never*

*saw them or the spread sheets again. We believe she took them home with her (along with used Covid swabs that she stated she had registered and hadn't and we believe a laptop that was never seen again)."She was dismissed from service due to her failing to meet any of her objectives (and basically being c**p).*

[ZH] is aware of the above and was informed at the time. We are really hoping that the council doesn't ask for the receipts. [KC] will send what we have over the next few weeks. Please forgive us if these are slow in coming but we have 17 step down beds currently which means we have multiple admissions and discharges every day and are losing our minds."

RF responded stating that Select Group head office were unaware of this issue and requested that all receipts that the home did have were sent and she would discuss the issue of missing receipts with a manager. It does not appear that KC sent any further receipts at this time.

More queries raised by Select Group head office re IPC spreadsheets and records

29.51 On 30 September 2021, MJ sent an email to the claimant and KC raising queries about the records for the IPC grant spending (page 275). She made reference to 5 separate rounds of grant funding awarded in the home in April, June and September 2021 in respect of which spreadsheets had not been submitted. She added:

"*As advised previously, spreadsheets with itemised purchases for each leg of the grant must be created and kept. Therefore, can these please be sent over to me asap*"

This e mail was then forwarded to GG on 6 October 2021 (again copying the claimant, KC and ZH) (page 274). She referred to spreadsheets not having been provided and then added:

"*If this money has been spent I need the spreadsheets ASAP if not the agency will need to go against this grant money remaining*".

The claimant suggested that this e mail exchange was "*unequivocal* evidence of a breach of a legal obligation in that the respondent would use surplus grant money to pay for agency costs which had not been incurred to prevent it having to be refunded and was "*plainly*" a breach of a legal obligation. We did not agree that this e mail showed anything of this nature, particularly as it rests on the premise that firstly agency costs had not been incurred by the respondent and secondly that agency costs were outside the scope of grant funding. We cannot say that this is the case and having accepted the evidence of BB that staff costs (including agency costs) was the main and legitimate use that Select put its grant funding to, it would not seem impermissible for such grant money that had not already been spent to be utilised towards legitimately incurred agency costs.

29.52 In response to MJ's request above, ZH asked KC to send to MJ the spreadsheets requested and in reply KC stated (page 272-3):

"I have no spread sheets from the below dates as the receptionist took them when she took the other paperwork to sort she was going to do the spread sheets but never returned.

we only had paper forms so we could write in as it was spent.

ASC provider additional expenses April - £19,394.59

DCCHO4 & DCCH05 Care 7.6.21 - £8,959.36

Rapid testing top up June- £7,790.08

These two spread sheets have not been done yet as I have been busy catching up on my work from my holiday

Rapid testing top up September- £7,168.98

IPC extension September - £7,044.96

They are on my list to do and will send as soon as they are complete."

This again shows the difficulties KC was having in keeping sufficient records and also confirms that it was her view that it was SC that took not only the receipts but also the spreadsheets themselves.

29.53 In response to this, MJ e mailed on 7 October 2021 stating that a new spreadsheet would need to be created from the paper records kept stating that Finance had to have something to account for spending as it may get picked up by the auditors when they visited (page 272). ZH responded stating that she had already discussed this with GG and when the claimant was back from her holiday that her and KC would "*sit down and create them*" (page 271). On 8 October 2021, KC replied to the claimant only stating *"I have taken all inform home to do these spreadsheets for Mary so you don't have to worry about them".*

<u>CH appointment as Area Manager</u>

29.54 CH was appointed to take over as Area Manager for the region covered by ZH towards the end of September 2021. ZH was still in post at this time and there was a handover period where CH started to assume responsibilities. On 28 September 2021, CH asked MJ to send her the copies of the IPC grant spreadsheets for the four homes she was responsible for including Delves Court (page 254-5). MJ responded attaching them and made a few comments about three of the homes, in relation to Delves Court stating:

"*Delves I do struggle with, I have asked a number of time for spreadsheets detailing their additional expenses grant money but the*

always tell me they don't have one or they will send and it never comes through."

It was suggested that the Tribunal could infer from the fact that the very first thing that CH asked for in her role as Area Manager was the IPC spreadsheet that the respondent's priority was to ensure grant monies were spent and to avoid returning free money. We were not able to make such an inference. It was entirely appropriate for a new Area Manager to start to gather information about the home she would take responsibility for including IPC grant spending and we accepted CH evidence that she already had other information that had been provided by ZH including about costed rotas. What we can conclude from this e mail is that MJ was sharing concerns with CH about failings on the part of those responsible for the spreadsheet at Delves Court to send it in a timely manner.

Claimant pay rise 30 September 2021

29.55 The claimant's pay was increased from £54,000 to £58,000 with effect from 30 September 2021 which was confirmed in writing by ZH as at this date (page 265). BB attended a meeting with ZH and the claimant at this time agreed to this increase. BB said that the claimant had said during this meeting that she had attended interviews and would leave her position if he pay was not increased (so he felt "forced" to provide one). The claimant denied this but said that at this time BB had praised her work ethic and commitment and disparaged the competition (see page 325). Nothing in particular turns on this dispute of fact but we find that it is likely that the claimant did mention the possibility of her leaving and this may have influenced BB in agreeing to a pay rise (an entirely non-controversial conversation and one which takes place in very many discussions between employees and managers about pay) A supervision was conducted by ZH with the claimant on this same date which made positive comments about the claimant's performance concluding that the claimant "*runs a good home and will not compromise on standards of care*" (see supervision record at pages 266-9). This supervision made reference to the claimant having been the preferred supplier with the local authority for the Covid suite (which had 16 beds and now had 7) and also noted that the local authority had "*approached [claimant] to become a step down placement for her remaining beds in the home*" meaning that "*the home has been full now for the last 5 weeks*".

CH first visit to Delves Court 8 October 2021

29.56 CH first attended Delves Court on a brief visit on 8 October 2021. The claimant was not in (as it was a Friday). We accepted CH evidence that this visit had been supposed to take place on 7 October, but had to be changed at the last minute due to her having car trouble. During that visit, she met with KC and GG and had a look at the costed rota and weekly report information and at staff files kept at the home.

29.57 We heard much evidence about the completion of the costed rota by the claimant and issues arising around us. This was a document which dealt with staffing hours and costs and also recorded the number of residents and the fees payable to work out the difference between income received and outgoing costs to calculate a weekly profit. We accepted the claimant's evidence that she always completed this in the way she had been instructed to do by ZH.

<u>CH first meeting with the claimant at Delves Court on 12 October 2021– alleged first PID</u>

29.58 CH next visited Delves Court on 12 October 2021 and the claimant was working that day. This was the first time that CH and the claimant had met. There were no minutes of any meeting that took place. There is a significant dispute of fact about what took place when the two met that day.

29.59 The claimant contends that during this meeting with CH she first raised the concerns that she held at the time about the respondent's misuse of grant funding. Her written witness statement says that she was becoming increasingly concerned and that she, "*decided I needed to say something about it*". Although not mentioned in her witness statement, the claimant gave evidence at the Tribunal that she had tried to raise these concerns with ZH "*numerous times*" telling ZH that the home did need the grant money, but that ZH told her that it was "*free money*" and the directors of the respondent told her that the homes had to spend it. We were not satisfied that the claimant raised any such concerns with ZH prior to this point as there was simply no evidence that this was the case. We know that the claimant and ZH frequently exchanged messages with each other as evidenced by the many text messages we were referred to at the Tribunal. The first reference in any exchange of text messages to grant spending was in messages which are undated but the claimant says were exchanged between the two on 22 October 2021 (see pages 438.440). We accept that the two might have discussed grant spending on an informal basis given the large sums of money that were being awarded and spent at the time. We also accept that the claimant may have privately had some concerns about whether all spending was appropriate. However we were not satisfied that these were articulated to anyone as such, not least because we have found as a fact above it was the claimant herself as Home manager that was making decisions as to how the IPC grant money should be spent.

29.60 The claimant says that during the meeting she made a protected disclosure to CH as follows:

"*I told her that I was very concerned that the Respondent was wrongly using grant funding for maintenance, general day to day operating expenses and general improvements and that this was not allowed*".

The claimant said she was told by CH that the directors had said that the homes had to have the grant money as it was "*free money*". She did not make a note at the time of this meeting.

29.61 CH's account of the meeting was that it was not a lengthy meeting as the claimant, GG and KC had arranged to take ZH for a leaving lunch that day (which is supported by the receipt submitted by KC for the cost of such a lunch at page 278) she discussed staffing with the claimant and the potential need for overseas staff to be recruited and that other topics discussed included, "*costed rota weekly reports, homes master action plan, IPC grant spread sheets as they were not in order*". She said that at no point in the meeting did the claimant raise any concerns about grant spending and that the IPC grant was "*discussed in the form of ensuring all receipts were available and an up to date spread sheet with all costs and items purchased in line with grants allocated*". She also went on to state that the claimant's working hours were discussed as was the effective use of Asda shopping and deliveries. We find that it was at this meeting on 12 October 2021 when the issue of the claimant's working hours came up that CH expressed surprise that the claimant did not work Fridays, but did not at this point make any comment about whether this arrangement should or could continue under her line management.

29.62 On this important dispute of fact we preferred the evidence of CH and find that the claimant did not raise any concerns with CH on this date about grant misspending. We conclude this for the following reasons:

29.62.1 There was no contemporaneous evidence other than the account of the claimant that such matters were raised. The only reference to the visit at all in text messages between the claimant and ZH on this date was a reference to CH having "*turned up again*" and that the claimant was "*unimpressed*", none of which sheds light on whether a disclosure was made. We believe that had the claimant raised concerns to CH, this would have been at least mentioned to ZH in text messages, particularly given the significant number of messages exchanged after the next meeting that the claimant attended with CH (see below).

29.62.2 CH sent an e mail after the meeting summarising the discussions and there was simply no mention of concerns being raised. We wholly accepted the evidence of CH that had the claimant raised matters of such nature she would have immediately escalated it stating that if someone raised a concern she had a "*duty*" to escalate it.

29.62.3 The claimant relies on the fact that IPC spreadsheets were referred to in CH's follow up e mail as evidence that the claimant did in fact make disclosures. However this does not in fact support this contention as CH acknowledges that she raised the issue of the keeping of IPC spreadsheets and receipts with the

claimant in that meeting herself. This was something flagged as a concern to her by RF on 28 September 2021 (see paragraph 29.54 above) and we think that this concern was in fact why IPC spreadsheets were mentioned, not any raising of concerns by the claimant. It is suggested that as CH had already been sent spreadsheets by MJ, she would not have needed them again but the problem was that the spreadsheets did not appear to be complete. MJ had asked KC to create a new spreadsheet on 7 October and this was only in fact sent to MJ on 22 October 2024, after the meeting between the claimant and CH.

29.62.4 The claimant's points to the fact that CH agreed in cross examination that if the claimant had said to her what was alleged that this would have been a protected disclosure. This does not advance the claimant's case at all as CH strongly denied that such words were said.

29.63 Following the meeting with the claimant ZH sent the claimant an e mail at 16:16 that afternoon (page 277) as follows:

"As discussed during todays visit.

• Weekly report to contain clinical data

• Costed rota template to be shared by CH

• IPC grant spreadsheet to be sent

• Homes master action plan to be updated and shared, areas of non-compliance from QA audits to be added to action plan so it is a live working document."

It then mentioned a handover meeting with ZH due to take place on 19 October and that audits for October would be conducted the following week.

29.64 It is clear that the claimant was unhappy with the way in which CH approached their meeting as manager. CH had a completely different management style than that which the claimant experienced with ZH. CH took a more formal and structured approach wanting to introduce standardised ways of management across the homes (as evidenced by asking the claimant to produced her costed rota in line with a template she provided). It appears that it was more relaxed and informal with ZH. It is perhaps understandable that CH wanted to introduce changes as a new manager, but also that the claimant may have been resistant to this.

29.65 On the same date, KC at 16:03 e mailed MJ (page 280) sending her a copy of the IPC spreadsheets for the last 3 rounds of grant spending (shown at pages 281-3) stating that these had been done "*the best we can going off the POs on the system*". We find that this e mail was not in

response to any request from CH but rather in response to the earlier e mail chain between KC, MJ, the claimant and ZH between 30 September and 8 October 2021 (see paragraphs 29.51 to 29.53 above). MJ then forwarded this e mail to CH (page 279) and resent the spreadsheets she already held for the first three rounds of spending (pages 285-293) to SM and CH.

29.66 On 14 October the claimant completed and submitted a weekly report to CH (shown at pages 295-6). This included details as to occupancy but also stated in the box about purchase orders and costs, "*Grant money has been spent on new chair for resident, décor (wall paper, paint etc) large new kitchen counter/fridge, TV's.*" It was put to CH that this was again the claimant repeating an allegation that grant money was being misspent, but she denied this was the case stating that all such items could be validly funded from grant money as items such as chairs that were damaged could harbour infections, as could décor that was damaged or not able to be cleaned properly as they could come under the ambit of infection control. She said that at this time when residents were mainly inside the home, it was also valid for items such as TVs and iPads to be purchased with grant money as the grant could also be used to combat the effects of social isolation. We accepted this evidence. CH responded to this report on 14 October 2021 (page 294) asking the claimant to review and complete all areas and to check NVQ applicants and also stated that she would sent a template for the completion of a costed rota for her to use which she felt would be more accurate. This was sent to the claimant on 15 October 2021 (page 297).

<u>CH handover meeting with the claimant, ZH, and SM on 19 October 2021</u>

29.67 It is not disputed that the claimant attended a meeting with CH, SM and ZH on 19 October 2021. When asked why SM had attended this meeting, CH said that SM was her line manager and was overseeing the handover between CH and ZH and had also attended meetings at the other homes she took over from ZH including Chapel Lodge. The claimant made no mention at all of this meeting in her written witness statement.

29.68 CH told us this was an "*in depth*" discussion about the effective management of staff, beds and budgets. This included discussions on blocked and contracted beds and what the fees were for each and what contracts were in place. She told us that "*information was not readily available*" and she informed the claimant that budget for food could only be claimed from the respondent's budgets for beds occupied with "*physical persons not blocked empty beds*". CH told us that she had been informed that there was a contract for blocked beds with Walsall but that it did not appear to be in place. The claimant's evidence was that as far as she was aware there was a contract in place with Walsall MBC that they would pay a 'holding fee' for the beds they had reserved rather than the full fee, which would be payable if and when the bed was filled. This meant that should a need arise urgently, there would be a bed available

for Walsall MBC at Delves Court. The claimant told us that historically for those beds, as they were contracted out even if no patient was using a bed, they would count that bed as occupied for the purpose of the costed rota because at any point those beds could be filled. She said that the food budget was also claimed for such beds for this same reason. She also told us that ZH was aware of this practice and approved it and was common practice throughout Select. We find that the claimant did believe (perhaps mistakenly) that a contract was in place for these step down or blocked beds and this was the basis upon which she completed the costed rota.

29.69 Following the meeting CH sent an e mail to the claimant at 15:51 on 19 October 2021 (page 298) asking the claimant to provide "*a list of every admission between 1st May and 31st August*" with the name, date of admission and discharge and the funding source and fee. She gave the claimant a deadline to complete this of 1pm the following day. The claimant responded stating that this would not be possible in the timescale mentioning that there had been 32 admissions in that period to which CH simply responded "*Thanks Jackie*". The claimant alleged that this was an impossible deadline with CH stating that it should not be as each home administrator should hold a list of who comes in and out and a daily tick sheet showing the number of residents. We acknowledge that this was a very tight deadline for the claimant to meet.

29.70 There were a number of text messages between the claimant and ZH on the evening of 19 October 2021 referencing this meeting. The claimant stated that she felt "*a bit interrogated*" (page 447) and that CH was "*strutting about*" (page 448). ZH used abusive language to describe CH during this exchange describing CH as a "*twat*" and a "*knob*" and that she was "*aggressive*" (page 448). ZH also expressed a view that she could not "*wait to get out of this company now think they are a bunch of wankers*" (page 450). The claimant made a comment that she was unsure what was going on but felt she and her team had worked hard over the last 3 years. The full exchange of messages had not been included but later on apparently in the same exchange, ZH stated that "*Sarah just wants to get the fees right so you know what your working towards and what the business plan is*"(page 451) again stating that she wanted to leave the company and the claimant expressing that she was not looking forward to working without ZH. The claimant later stated, "*Atmosphere was so tense and [KC] in a right state again. Feel like she's trying to catch us out or up to something and now we have to send all admission since may to her and Sarah before 1 tomorrow Think Walsall might not have being the right fees*".

29.71 The messages continued with ZH expressing that she intended to look for a new job and the claimant stating "*Might be right behind u*". ZH stated "*Don't blame you!! She's going to be a nosey nightmare and I doubt it will be long before they start marking you work Fridays!*". The

claimant replied stating, "*Not working Fridays so they will have to find another manager if they try it*".

Disputed meeting between CH and C on 21 October 2021– alleged second PID

29.72 The claimant says that she attended a further meeting with CH on 21 October 2021 and during this meeting she repeated the disclosures made to her on 12 October 2021. The claimant also alleged that during this meeting she expressed a concern about a proposed reduction in staffing levels could compromise safety and would not be approved by the CQC (the claimant does not rely on this as being a protected disclosure in these proceedings). The claimant alleged that CH said when the claimant indicated that she did not want to seek any more grant money that it was "*free money and "the Respondent would continue to claim it and if the home didn't require it then it would be used by the parent company to cover other expenditure or would be retained in the bank*". CH's evidence was that she did not attend Delves Court for a meeting at all that day and such a meeting with the claimant never took place. This was an enormous dispute of fact on a key issue in this claim so we have carefully examined all the evidence to determine the facts.

29.73 In support of her contentions, the claimant relies upon a handwritten note which she says she completed after the meeting which was shown at pages 299 to 301. This records a detailed account including that on arrival CH sat in the claimant's office on her laptop not talking; that she asked about occupancy and that staffing would need to be reduced which is when the claimant said she raised concerns about this. The note went on to mention the costed rota being too high (with the claimant noting that ZH had never raised concerns). The note further recorded a discussion on grant money with the claimant allegedly stating it was not needed and CH allegedly making the comment about free money and if it was not spent the respondent would use it for agency fees or would keep it in the bank. It then records "*I told Claire that I was uncomfortable with the way the company was making us use the grant money for things that we shouldn't*" and CH stating "*moneys money"*. It then records the claimant saying she would be letting the council know of her concerns. It then records CH stating that she would speak to SM. The note then records a discussion which is said to have taken place on working hours when the claimant informed CH of her hours, with CH expressing surprise and stating that she would need to work 5 days a week and work on Fridays. It records the claimant saying this was not possible, at which point CH ignored her, and "*talked about her daughters and horses*". The claimant then recorded that CH "*went on to brag about sacking staff @ chapel and gloated about reporting staff to the DBS system and NMC*".

29.74 The respondent's case on this matter rests on CH's recollection but also contends that the claimant was absent from work that day taking time off in lieu ('TOIL'). However to that end, it did not produce any actual records which showed that the claimant did not attend and it is accepted by all

that such records could have been produced as the respondent has an electronic signing in system (Max time). This was hugely frustrating and we found was another example of the respondent not adequately addressing the question of disclosure and the relevance of various documents. The claimant pointed to an e mail sent by her at 16:01 on 21 October 2021 to Carol Jones the commissioning manager at Walsall MBC (page SB20) as "*proof*" that she was in fact working on 21 October 2021 and was not taking TOIL. At this time the claimant had no way of sending e mails remotely. We accept that the claimant sent this e mail and that she did so from Delves Court at 16:01 on 21 October 2021. However this does not assist any further than this as to (a) whether the claimant was or was not actually working or on TOIL that day; or (b) whether the meeting took place. We know that the claimant did attend Delves Court on her days off from time to time, presumably to check on things as she told us she did this after attending a christening on 24 October 2021 (see below). We also find it striking that this e mail asks a question of Walsall MBC of the very issue that was being discussed at the meeting held on 19 October 201, namely the costing of beds. The claimant in this e mail asks whether Walsall MBC had in fact paid for occupied Covid beds and refers to some confusion taking place. This suggests the claimant was trying to get to the bottom of the questions being asked of her about costed rotas at the meeting held on 19 October by SM and CH.

29.75 We find having considered all the evidence, that this meeting did not take place as the claimant alleges on 21 October 2021 and prefer the evidence of CH on this matter for the following reasons:

29.75.1 The claim form submitted by the claimant on 21 December 2021 makes no reference whatsoever to a disclosure being made on 21 October 2021 despite containing a fairly detailed timeline of other key events taking place at the time (including the meetings on 12, 22 and 25 October 2021). Whilst the claimant was unrepresented at this time, we believe this to be a striking omission and find that if a meeting had taken place, the claimant would have mentioned it. This meeting was mentioned only in the amended grounds of claim submitted on 27 June 2022. The respondent did not formally plead its position following the amended grounds of claim but noted in its response to the amended grounds of claim of 22 August 2022 that the reference to this meeting on 21 October 2021 was a "*wholly new factual allegation*".

29.75.2 In her defence to the civil claim brought by the respondent in relation to alleged missing funds dated 28 November 2022, the claimant states that she made a number of protected disclosures "*on or around 12 October 2021*" (page 555). There is no

reference to 21 October 2021 or a meeting on this date anywhere in this document.

29.75.3 The evidence of CH was clear and consistent on whether this meeting occurred, despite being subject to detailed cross examination challenging such evidence. We also take note of the absence of any follow up e mail or mention of a meeting having occurred on 21 October 2021 from CH. In respect of all other meetings we know she attended, there were e mails sent by her to the attendees of the meeting.

29.75.4 The only text messages between the claimant and ZH on 21 October 2021 are the claimant asking ZH if she will act as a reference and her telling ZH that she had an interview on Saturday. She also messaged ZH stating, *"time to get gone me thinks. I'm not gong to be a punching bag for [PC] or [CH].*" We have considered whether this provides any credence to the claimant's suggestion that a meeting occurred on this day, which might have led her to say this. However we feel that if a meeting of the nature described by the claimant above had taken place it is certain that she would have mentioned some of the quite striking comments said to have been made by CH in such a meeting. In particular, comments that the respondent would keep grant money in the bank and also that CH told he she would have to work Fridays. This is particularly so, given that the very issue of working hours and the possibility of these being removed was raised by ZH in a message exchange just two days earlier.

29.76 Given that we have reached the clear conclusion on the facts that the meeting alleged to have occurred on 21 October 2021 did not exist, the note said to have been made of this meeting by the claimant is troubling. It occurred to us that this note may have been a fabrication on the claimant's part setting out a false record of a meeting that simply did not take place. It is our considered view that the claimant when making this note (perhaps at a much later stage) recorded what she wanted this Tribunal to believe had occurred all on this date, perhaps drawing on parts of conversations that did actually take place in meetings before and after 21 October 2021. For example we are content that some dissatisfaction with the claimant's working arrangements was expressed at least by implication by CH on 12 October 2021 (although she did not go as far as informing the claimant she could not continue with these). In addition, we also conclude that at one of the two meetings that did take place, CH may have been sitting in the claimant's office on her laptop. In relation to where the alleged disclosure itself is noted down, we find this may have been an account of what the claimant in fact said following her suspension on 25 October 2021 (see below). The existence of this note was damaging to the claimant's overall credibility which on very many

other matters that the claimant gave her account of, we found to be honest.

29.77 On 21 October 2021, CH told us that she received a copy of the costed rota from KC and had not been completed using the template she had asked the claimant to use. We did not see a copy of this e mail but we saw a copy of an e mail CH then sent to SM, copying PC and BB at 19:30 on 21 October 2021 . This attached the costed rota and made reference to an "*in depth conversation on Tuesday*" (Tuesday that week was 19 October). She stated that this had not been completed correctly and stated "*I will complete an accurate costed rota with [KC] tomorrow*" She also mentioned that a weekly report had not been sent and the one last week was incomplete (and that her request to the claimant to complete it had not been responded to). She finished her e mail by stating:

"*Any suggestions would be gratefully received as I can only see this as a complete lackadaisical approach to the effective management of the home*."

Meeting at Delves Court on 22 October 2021– CH, SM, KC and GG

29.78 A meeting took place at Delves Court attended by CH, SM, KC and GG which took most of the day on 22 October 2021. The claimant was not in work that day because it was a Friday. We accepted what CH said that the main issues discussed that day were issues of occupancy and staffing levels because the hours recorded on the Max Time system did not match those on the costed rota. During the course of the day, SM e mailed PC with information about the costs of beds at Delves Court (see page 312). No notes of this meeting were contained in the Bundle, although CH made some notes which she recorded in a note book (but was not asked by anyone at the respondent for copies). CH used her written notes to write the e mail to the claimant and others on the Sunday evening after the meeting (see below).

29.79 CH agreed that this was a meeting that PC had instructed her and SM to have because of concerns he had about discrepancies in the figures shown in the costed rota for Delves Court. PC said that discrepancies with the home's occupancy came to light in early October 2021 when the accounts department contacted Walsall MBC for payment for beds that were recorded as being occupied at Delves Court. He alleged that the beds were "*fictitious*" and no such contract existed. He told us that as the beds were being recorded in the costed rota as occupied (when they were not) that the food budget allocated for each resident (of £19.10 per week) was being allocated and paid to Delves Court (on to the Equals Card) on the basis that all beds were occupied, when 17 of these beds were not occupied, and thus did not require a food budget allocated. PC alleged that these beds that were not filled were set aside for Walsall MBC but never paid for.

29.80 The claimant was in contact with KC by text around 22 October 2021 and we saw messages between the two (albeit the chain was incomplete) at pages 396 to 406 which referenced the meeting. During that message exchange, the claimant reassured KC that "*we have not done a thing wrong*" (page 397) and that the homes was the "*jewel in [ZH's] crown*". It also referred to a receptionist "*stealing stuff*" and that she was unsure how "*they can suggest we sit on empty beds when we had more than 35 admission in August*". In messages sent after the meeting on 22 October 2021 took place, the claimant again reassured KC stating, "*Can't understand how were were doing an amazing job last week and now I'm crap lol. Just remember if they are after anyone its me xx*", with KC responding "*Team till the end x*". The claimant again stated that they had done nothing wrong and that she had "*done everything the same*" since starting and would not "*go down easy or without a fight*".

29.81 We also saw text messages between the claimant and ZH on the evening of 22 October 2021 starting at 19:36, with ZH wishing the claimant good luck for tomorrow (as the claimant was attending an interview).. She referred to the respondent cutting staff and ZH stated to her "*I'd get out now you'll lose your best staff*" to which the claimant responded "*I'm off as soon as I can x*". There were a further series of text messages which were undated on their face but the claimant had identified in handwriting as having been exchanged on 22 October 2021 at 19:36 hours (see pages 434 to 440). The timing of such messages were a little puzzling as they appeared to be at precisely the same time as the set of messages between the two we have just addressed. In this second set of messages the claimant expresses to ZH, "*Think they know I'll be off now x*" It goes on with ZH mentioning that she thought, "*they are going to try and stich us all up for the food money like we've frayed the company…*". The claimant then responds with a comment about being disciplined for having enough money to feed residents and ZH and the claimant then exchange messages about not getting petty cash without receipts and that all POs were passed by BB. The exchange went on with ZH saying, "*The next think will be that we've lied about that woman taking all the receipts for the grant money….*" with the claimant replying, "*Why would we do that. And the company lied about what they used the grant money for so it's them that should be worried not us*". ZH then replied "*yes especially when I ring Dudley and tell them Sarah has forged all of hers*" The exchange finishes with the claimant saying that on "*our po's it says coming out of grant money*" and "*Not sure how converting a bedroom to a toilet is related to covid 19 lol*". It was really unclear when these messages took place but we accept that this records a discussion between the claimant and ZH probably after 22 October 2021 where the claimant expresses a view about grant spending being connected to Covid and other misuse by the respondent. We conclude that the claimant started to crystallise her views on this at this time (and not before) and she then first communicated these at the meeting with CH on 25 October 2021 (see below).

E mail re CH concerns on 24 October 2021

29.82 Following the meeting that took place on 22 October 2021, CH sent a lengthy e mail to the claimant, KC and GG (copying PC, SM and BB) at 15:59 on the Sunday afternoon after the meeting. This made reference to the meeting and said it had been requested by PC because of "*multiple discrepancies*". It gave instructions as to how the costed rota must be prepared and that it must match up with Maxtime. It included the following comment:

"*The costed rota and weekly report are the responsibility of the home manager who prior to it being sent should also be checking against Maxtime for discrepancies. [KC] as discussed, you need to ensure Maxtime is correct, and the hours are in the costed rota for [claimant] to check prior to sending these on a Friday."*

The claimant alleged that this statement amounted to an instruction that she now had to attend for work on Fridays to carry out these tasks (admitting in cross examination that this was the inference she took from this part of the e mail). CH denied that this was the case but was making reference to the fact that the costed rota for the week running from Monday to Sunday had to be submitted on Fridays and this was KC's job (but she had to check it with the claimant before she submitted it. We were not satisfied that this is what this statement says at all, rather it says that the claimant must have checked the hours in the costed rota before they were sent (by whoever was sending them not specifically the claimant) on a Friday.

29.83 The e mail went on to address the completion of the NHS capacity tracker (stating that this was a task that the claimant must complete and not KC). It further addressed issues relating to files and the working hours of GG. She suggested changes to staffing requirements for days and nights. It further added the following:

"[KC and GGG], as discussed your main priority on Monday is to review all PO's attached to the IP grants and produce the receipts for every item, the board and accountant have requested this so it is a major priority.

Kitchen; the kitchen budget is currently being claimed for as full! We can only legitimately claim for residents in occupancy I hope that this has been an oversight and will be accurately updated as required as we currently now have a deficit of over £4000 that should not have been claimed for and we have got to get this back."

She went on to discuss issues as to buying food and stating that the claimant had to be in the building managing and not *"shopping on a daily basis".* It instructed that the reception area had to be decluttered. It finished by stating:

"Please note that all finances including the IP grant spends will be subject to a full financial investigation.

I will be in in Monday morning to discuss further"

29.84 CH was asked a number of questions about this e mail and from these we find that firstly CH at the time of sending this e mail fully anticipated that the claimant would be returning to work as usual the next morning. She agreed that she at this time intended to address all outstanding matters and continue to work with the claimant to *"put the ship in order"* but subject to the fact that there was an ongoing investigation about the finances in the home.

29.85 The claimant said that she saw this e mail on Sunday afternoon (24 October 2021), explaining that she had been to a christening which KC also attended (during which the meeting that had taken place on the Friday had been discussed) and that she had popped into work that day. It is also clear than on 24 October 2021, the claimant forwarded two e mails from her work e mail address to her personal e mail address (see pages 123 (e mail re payment of rent from grant in 2020); 225 (e mail re SC dismissal) which presumably she did whilst attending the office. There were then a number of text messages between the claimant and ZH on the evening of 24 October 2021 at pages 428 to 433). This starts with ZH asking the claimant how here interview went to which the claimant replied, "*Good x hopefully second interview tomorrow*". During the exchange the claimant states "*They clearly want me gone*" and "*I fully expect to be suspended tomorrow".* She asked ZH if she would still be prepared to do a reference for her and ZH agreed and asked the claimant to send any request to her personal e mail address. ZH then stated*, "If I was you I'd they say they're suspending you tell them you resign instead don't let them screw stuff up for you x I feel like the same is coming for me to".* The claimant then said that she thought the respondent had already advertised her job, to which ZH replied if they were she should "*have them for constructive*" to which the claimant responded, "*Oh I will x*". It is clear that the claimant had a strong suspicion that she would be suspended at the meeting and had already taken steps to prepare her response and possible legal claim in respect of this. It is also clear that she had taken steps towards obtaining new employment, having attended a first interview.

<u>Decision to suspend the claimant (and decision not to pay during suspension)</u>

29.86 The position as far as CH understood it to be having sent her e mail on Sunday evening, changed on Monday morning when she was instructed that the claimant would be suspended without pay. CH told us that this decision was communicated to her by SM but that she was aware that both PC and BB had been involved in the discussions. PC told us that it was him who decided to suspend the claimant. He also explained that he did not access the e mail from CH on the Sunday afternoon (as he did

not religiously open every e mail across the weekend) but saw it on Monday morning and at that point he decided that the claimant should be suspended and it should be suspension without pay. He told us he believed that "*monies had been misappropriated*" and this why he decided to suspend without pay. PC said that he did not believe he spoke to SM about this decision but that he did discuss it with BB.

29.87 The claimant submitted that it was not PC who decided to suspend the claimant but SM and that she made this decision because she felt under threat that the claimant would expose her wrongdoing in the misuse of grant money. It was suggested that PC had in effect *"come to the rescue of SM"* and was taking the blame for this decision which was one made by SM. We could find no merit at all in these submissions and in fact find as a fact that it was clearly PC who took the decision that the claimant would be suspended without pay. Having read the e mail sent by CH on Monday morning, PC acted on the suspicions he already held about the claimant claiming food monies for unoccupied beds (and also concerns emanating from RF related to the failure to provide receipts for grant spending). PC reached the firm conclusion that the claimant was behaving dishonestly and had *"misappropriated"* monies from the respondent. We find he then instructed that the claimant must be suspended and that this should be without pay. He agreed that no discussion would take place about this as the decision to suspend had already been made by him. It is not clear how this decision was communicated but it appears that both BB and SM were made aware and that it was then SM who informed CH of what she must do on the morning of 25 October 2021. The information that CH was provided with by SM was limited other than there were would be an investigation. She was already aware of issues relating to the costed rota and beds and the provision of receipts for IPC money, but had not at this time been given any further information as to why the claimant would be suspended.

Meeting C and CH on 25 October 2021– C suspended

29.88 This meeting took place on the morning of 25 October 2021. The notes of the meeting taken by KC were shown at pages 316-317 and a note taken by the claimant after the meeting was shown at pages 318 to 319. We were taken through what were said to be discrepancies in these two documents, but in fact find that other than a few issues which we deal with below, both notes broadly represent what was discussed in the meeting, but with perhaps different interpretations and recollections leading to differences in what was recorded. If anything we find that the note taken by KC was likely to be the more accurate given that notes were taken by her during the meeting that she was not participating in. The claimant (who was in the meeting and the subject of it) could not make notes at the time and must have necessarily completed them after the event. In addition, our findings of fact about the note said to be a record of a previous meeting (which we have found to have not taken

place) lead us to treat with some caution this similar note taken by the claimant.

29.89 The claimant's note does set out what took place before the meeting, mentioning the arrival of CH and being asked to find KC by CH, which she did. At this time KC and GG were on the floor at Delves Court conducting an audit (at CH's request) of the items which were said to have been purchased by the IPC grant funding (in particular electrical items such as TVs and iPads). None of this is contentious. Her notes record that the first thing she was told was that she was being suspended and it was a decision of the directors (also recorded in the KC notes). The claimant then mentions CH being in the car park for 30 minutes talking to the directors, but we find this was an observation of the claimant rather than anything that CH said. We find that all that was said at the start of the meeting by CH was that the claimant would be suspended and that this was a decision made by the directors and that there would be an investigation.

29.90 The claimant then asked whether she would be suspended with pay and was told by CH that she would not at which time the claimant said this was contrary to ACAS guidance to which CH responded that it was the message she had been told to give to the claimant. The claimant then asked what the grounds were for her suspension and CH stated that there was an investigation and a conflict of interest was mentioned. The claimant then asked what the allegations were against her and CH said, "*Costed rota isn't accurate you were saying you were full and you weren't*". The claimant responded by saying she had done the costed rota in the same way for 3 ½ years and no one told her she was doing it incorrectly.

29.91 She then asked for specifics in a letter and was told by CH that these would be provided then saying "*there are discrepancies around the money for the beds, food money, and IPC money*". At which time the claimant stated she had always been open and honest about what was being claimed for and mentioning a glowing supervision a few weeks earlier and being awarded a pay rise. The claimant is then recorded as saying:

"*I will defend myself fully you throw stones I will throw them back. I know Select hasn't been spending the IPC money on what it should have been spent on. I know Sarah Mcdonald took £30,000 from Greenleigh IPC money and spent it at Jubilee. I have done nothing but support this company and if you make a malicious DBS of NMC referral against me, I will be contacting the council and the CQC regarding reducing the staff, now my cards are down on the table*."

The claimant's notes differ in that the claimant states:

"*I went on to say that I felt that I was being suspended as I had raised concerns about staffing level reductions and the companies use of grant money".*

29.92 On this point, we find the note taken by KC to be more accurate and the recording of the striking phrase "*throwing stones*" has a clear ring of truth to it. This was agreed by all to be a fraught and emotional meeting, with the claimant (understandably) becoming upset at the decision to suspend her on no pay. The claimant recollected that CH appeared nervous during the meeting which we can also understand as she had been instructed to suspend the claimant without pay by the directors (which would naturally provoke a reaction) and perhaps did not have all the information to hand as to the reasons why this was being done.

29.93 The note then records CH denying that stones were being thrown and the claimant asked her whether she had actually walked around the home to see what it is like to which CH responded that it was not malicious but was a company decision. The claimant then said that there was no evidence to suspend her on no pay (to which CH responded that she had been told this). The claimant then said "*I won't be here*", going on to say she was aware of the respondent advertising jobs behind managers backs and that she had been compliant. She asked for details of the investigation in writing by the end of the day. The meeting ended with the claimant walking out and all agree that as she was doing so, she tripped over the telephone wire

29.94 CH then gave evidence that before leaving that the claimant re-entered the office and shouted to her:

"I know all of the things that you've done at the Lodge reporting nurses to the NMC and DBS don't think you can do that to me! You come at me and I'll come at you! I'm the best manager in this company, I was told I'm the best manager now what, I'm the worst! If I wasn't the best manager in this company Brett wouldn't have given me a 4000 pay rise"

This is not recorded in KC's note, but as it was something said after the meeting had actually ended by the claimant leaving, this is perhaps understandable. The claimant also makes a note of a similar type of statement being made by her

"I stated I was aware of what she had done at Chapel and I would not allow the company to scapegoat me for their illegal actions. I stated I would not sit back and allow then to make false allegations about me to the DBS or NMC, Claire stated that she wouldn't be contacting anyone. I told her again that I would be raising my concerns about issues with grant money".

We accepted this statement was made by the claimant as recalled by CH.

29.95 CH gave evidence about the circumstances she had encountered at another care home operated by the respondent, as she started to take over the role of Area Manager from ZH. She told us that at the beginning of September 2021 an allegation of sexual abuse of a resident had been made by an employee at the home against another member of staff. She also said it had come to light that the matter had been reported to that home's manager in February 2021 but had not been investigated. She told us that when it was reported to her, she took immediate action involving the police and she also made a referral to DBS and the NMC in respect of that manager. She said that she did not mention any of these circumstances to the claimant but that ZH was aware of the matter. We accepted CH's evidence on this matter.

29.96 KC gave evidence that on the morning of the claimant's suspension, the claimant submitted the three invoices from Mascot Homes (shown at pages 337-339) with KC stating that these had been left on her keyboard and she then handed them to CH. KC also told us that the Equals card had been left in the safe by the claimant. However the claimant said she handed the Mascot Homes invoices to KC that morning, as she had them in her possession (although they had already been paid in full in cash). She also stated that she did not have the Equals card in her possession as JW was out of the home that morning doing shopping. We preferred the evidence of the claimant on this and also note the handwritten statement submitted from JW at page 580 confirming that he had been given the Equals card by KC and was out doing the weekly shopping when the claimant was suspended.

C grievance 26 October 2021

29.97 The following day, the claimant e mailed BB of the respondent raising a grievance (pages 324-6). She started her grievance with the following:

"*As you are aware I have been suspended from work without pay. Claire was unable to fully articulate why and made bogus and untrue allegations against me which have not been actually investigation or proven. ACAS guidance is clear on suspension of staff and Select healthcare have levied punitive action against me with no tangible evidence to support these allegations. I feel this is a step towards constructive dismissal. As such I wish to raise a formal grievance. I have not been involved in any investigation process which is in breech of ACAS guidelines."*

29.98 She then went on to complaint about the "*interrogation*" of KC and GG and that they were asked to count items in the home, with the inference being that the claimant had stolen items. She also stated that she had always completed the "*costed rota and occupancy in the same manner I was taught for my entire employment*" and mentioned her surprise that it had not been raised before. She then went on to say that she had been "*repeatedly asked for receipts for grant moneys*" mentioning that these

had been removed from the home by SC, and this had already been reported to management. She went on to state:

"I will not be held responsible for the actions of an incompetent ex-employee or be the fall guy for the company spending grant monies inappropriately. You have authorised all spends for grant monies via the PO system."

and later stated,

"I believe that all allegations and suggestions have been made to erode my position in the home and to try and prevent me from whistle blowing. In our first meeting Claire openly gloated that she had made NMC and DBS referrals about staff in Chapel Lodge. I now feel this was a thinly veiled threat."

29.99 The e mail concluded with the claimant stating that she had taken legal advice (she confirmed from a friend who is a solicitor) who had suggested reaching an amicable agreement to avoid a lengthy legal battle. She mentioned her desire to move on and start a new chapter and to prevent mental health recurrences.

Suspension letter 27 October 2021

29.100 The claimant's suspension was confirmed in a letter sent to her on 27 October 2021 (page 320-21) by e mail (page 121). This e mail included two attachments being the disciplinary policy referred to above and what appeared to be an out of date document containing details of the previously in force compulsory statutory disciplinary and dismissal procedure (which was abolished in 2009). The e mail also asked the claimant to return any outstanding receipts she had by the end of the week. The letter was from CH but she told us she did not sign it personally but it was sent from head office. That letter stated that the claimant had been suspended pending an investigation into "*allegations of misconduct which include:*

- *Non-compliance with policy*
- *Poor documentation*
- *Poor financial management*
- *Non completion of documentation requested by company*
- *Potential falsification of documentation"*

Claimant's resignation

29.101 On 27 October 2021, BB e mailed the claimant at 09:19 (page 322) stating that he had just spoken to ZH who had confirmed that the

claimant had accepted a new post which would start on Monday. He asked her to confirm whether she had resigned and if so that he would "*agree to supply you a reference*." On 28 October 2021, the claimant sent an e mail to BB (copying her solicitor friend), also forwarding the grievance she had submitted on 27 October 2021 (pages 324 to 326). She stated:

"Thank you for your email. You are correct I have secured a new position and as such am resigning from Delves Court Care Home. Due to current events I am tendering my notice with immediate effect. I trust my salary including any owed holiday pay will be paid in full on the 5th November?"

She went on to state that she reserved the right to take matters to an employment tribunal but was happy to enter into a compromise agreement to draw a line under matters. She mentioned the 3 month deadline for submitting a claim and suggested that the respondent contact her solicitor who was copied.

29.102 Following this e mail there was a conversation between the claimant and BB on the morning of 29 October 2021. A note of this conversation taken by the claimant was at page 330. During this conversation the possibility of reaching an agreement was discussed but BB also stated that investigations into the financial irregularities would continue. Later that day, BB e mailed the claimant accepting her resignation and stating that she would be paid up to her last day together with any outstanding holiday pay. He also stated:

"*We are continuing to investigate financial irregularities and may need further information from you, we hope to get all this from administrative staff at the home"*

<u>Report to police (and referral of claimant in relation to safeguarding) 29 October 2021</u>

29.103 We heard evidence about a discovery made on 29 October 2021 that money was missing from the safe at Delves Court which had been withdrawn and left there to pay a chiropodist who attended the home. The claimant had not been in the home since 25 October 2021 and we know that at least KC had access to that safe. Following this discovery, a report was made by CH to West Midlands police and CH made a safeguarding referral in relation to the claimant to the local authority. She confirmed this by an e mail sent on the same date to PC (page 105) and stated that a police number had been provided (595291021). She was asked why she did not consider whether anyone else could have been responsible for the missing money (as the claimant had not been on site since 25 October 2021) and CH said she was reporting the service as the claimant was the registered manager. On this date, the claimant also commenced a period of early conciliation with ACAS. An ACAS early conciliation certificate was issued on 16 November 2021.

29.104 The respondent had continued its investigations into what it felt were financial irregularities at Delves Court throughout the period. We accepted the evidence of RF that she had been asked by PC in early October 2021 to carry out a full audit of the spending on the Equals Card at Delves Court and to download the transaction history from January 2020 to October 2021. She said that having done this no irregularities were shown up to December 2020 so she was asked to focus the attention to the period January 2021 until October 2021. At pages 308 to 311 we saw a document listing all cash withdrawals on the card from 10 June 2021 until 18 October 2021. We also saw a list of food receipts submitted by Delves Court which were paid for in cash at pages 378-9. RF was also asked to look into purchase orders and at page 335 we see an e mail from her sent to PC attaching a PO in respect of the garden items. She also emailed PC again this date including the POs for Cannock Care company and stating that there was no paperwork submitted and was outstanding on the grant spending spreadsheet. There was also some investigation into the use of the B&Q card by the claimant and at pages 384 to 385 we saw a document which was said to be a list of transactions on that card between 8 October 2020 and 20 September 2021. The respondent tried to rely on a document in the bundle at pages SB 28 to SB31 which is said to show the investigations into transactions on the Equals Card with reference to colour coding being made in PC's witness statement. There were difficulties with this documents and its reliability as we detail above, but we accept that RF did produce a document of this nature at this time at PC's request.

29.105 PC told us that he reached the conclusion from the investigations carried at this time in late October 2021 and early November that there were card purchases for food being made with no supporting receipts and significant cash withdrawals being made again with no receipts being provided to show what the cash was being spent on. He calculated that for the period 7 June 2021 to 18 October 2021 that £45,253 had been drawn in cash with no receipts provided and direct purchases of £8,679.59 had been made with no receipts. He also discovered that purchases were being made and cash withdrawn when the claimant was on holiday. He reached the conclusion that the claimant was submitting fake purchase orders, in particular in relation to the Cannock Care company and Mascot Homes (see above). When asked about these matters in cross examination, PC said he discovered that this was a "*scam*" and in the final paragraph of his witness statement, PC set out his theory about the claimant's activities alleging that she was making multiple withdrawals of cash on false purchase orders and was also making false occupancy returns in order to get money for a food budget put on to the Equals card which she then withdrew. He suggested that the suggestion that receipts had been stolen by SC was a "smokescreen" and that she resigned her employment when she "*knew that the net was closing on her and her illegal actions would be uncovered*" We were satisfied that PC indeed reached this very conclusion at this time and has

doggedly stuck to the same conclusion ever since, effectively looking for further documentary evidence to support the view already reached.

Letter PC to C confirming salary withheld 3 November 2021

29.106 On the basis of his conclusions, PC decided to withhold the payment of salary to the claimant in respect of her employment up to 28 October 2021 when she resigned. He wrote to her on 3 November 2021 informing her and stating that this was due to:

"*serious financial concerns and irregularities that have come to light in relation to both the corporate card account and the B&Q Trade Card account, for which you personally were the sole user*",

and mentioned that a full audit was being carried out.

29.107 On 8 December 2021, the claimant wrote to C Jones, the Commissioning Officer at Walsall MBS raising concerns about the misuse of grant monies (page 368-9). As far as the claimant is aware she did not receive any response to this and no action appears to have been taken by Walsall MBC against the claimant in relation to such matters. The claimant presented her claim form to the Tribunal 12 December 2021.

CH referral of claimant to NMC

29.108 As well as making a referral to the police and the DBS, CH also made a report to the NMC in relation to the claimant and her fitness to practice as a registered nurse on 24 December 2021. On 30 December 2021, the NMC wrote to CH acknowledging that referral and asking for further information (pages SB112-3). In February and March 2023, KC, BB, PC and RF prepared and submitted statements on this matter to the NMC (see pages 74 to 97). On 17 August 2023 the NMC wrote to the claimant relating to the referral informing her that there was a case to answer and that its Fitness to Practice committee would be adjudicating on this. We accepted the evidence of the claimant that she was never referred to the interim order panel of the NMC and had no restrictions on her practice at the present time.

Report, arrest and investigation by West Midlands Police

29.109 Following the report made to the West Midlands Police of theft by CH on 29 October 2021, it appears that PC attended at a police station (he says this was in Bloxwich) to discuss the allegations. PC produced a detailed statement dated 21 December 2021 which was submitted to the police which we saw at pages SB 22 to SB26. This gave similar information as the evidence he now gives to this Tribunal. It had 15 attachments, one of which was a statement from KC (at pages SB 21) and the rest of such attachments (pages SB26 to SB 73 were the same type of documents that were included (although not clearly identified) in the Bundle. This

was e mailed to West Midlands police on 22 December 2021 (see page SB109).

29.110 On 4 January 2022, the police attended at the claimant's home, arrested her and took her to the police station in Wolverhampton where she was interviewed. The claimant's home was searched and electronic devices and bank statements were taken. The police informed the claimant that their banks would be contacted and CS offered to provide full access to the accounts for Mascot Homes (although this was not taken up by the police). The claimant and CS also gave the police passwords and codes to allow access to e mail and social media accounts. The claimant was released under investigation later the same day (see document issued to her at page 370-2 which records the alleged offence as being 'Theft from employer'). On 1 May 2022 the claimant received notification in writing that the investigation was complete and that no further action would be taken against her and she should consider the matter to be finalised (page 373). On that same date CH received notification by e mail from West Midlands police of this which included the following:

"*The investigation has now concluded the outcome of this Is that there Is insufficient evidence to support a police prosecution. This decision has been taken after reviewing all of the evidence available to us at this time. As you are aware witness accounts were obtained and the suspect was arrested and Interviewed.*

I am aware that there Is a civil matter continuing to court and It is my belief that this is where this matter sits and not within a criminal court."

29.111 The respondent issued proceedings on 11 October 2022 against the claimant in the County Court claiming the sum of £61,751.60 as damages in respect of fraudulent misrepresentation, breach of contract and unjust enrichment (pages 530 to 541). The claimant has defended these proceedings and her defence was shown at pages 543 to 559.It is clear that there is considerable overlap between the matters that form the subject of the County Court proceedings and the claim before this Tribunal. Nonetheless as this Tribunal has jurisdiction to consider and must determine the claims before it, the findings of fact above have been made.

The Relevant Law

30. We considered the following sections of the Employment Rights Act 1996 ('ERA'):

13. Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue

of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(3) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

43B Disclosures qualifying for protection.

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

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

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person.

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

(a) to his employer,

47B Protected disclosures.

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

(1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the

ground that W has made a protected disclosure.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

48 Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
(2) On a complaint under subsection …. (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

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

(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

94 The right

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

95. Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

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

98 General

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

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

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

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

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

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

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

(3)In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

122 Basic award: reductions

….

(2) Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice

was given), 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.

123 Compensatory award.

(1)Subject to the provisions of this section and sections 124 [, 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 in so far as that loss is attributable to action taken by the employer.

(2)The loss referred to in subsection (1) shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b)any expectation of such a payment,only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5)In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—

(a)calling, organising, procuring or financing a strike or other industrial action, or

(b)threatening to do so,was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

31. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides:

"Extension of jurisdiction

3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b)the claim is not one to which article 5 applies; and

(c)the claim arises or is outstanding on the termination of the employee's employment.

32. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides

"***207A Effect of failure to comply with Code: adjustment of awards***

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

33. It was established in the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show:-

- that there was a fundamental breach by the employer;

- that the employer's breach caused the employee to resign;
- that the employee did not delay too long before resigning, thus affirming the contract of employment.

34. Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The implied term of trust and confidence was summarised as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

35. If the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole in establishing constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence (Omilaju v Waltham Forest London Borough Council[2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75).

36. It was confirmed by the Court of Appeal in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 in an ordinary case of constructive dismissal tribunals should ask themselves:

- What was the most recent act (or omission) on the part of the employer which the employee said caused, or triggered, his or her resignation?
- Has he or she affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
- Did the employee resign in response (or partly in response) to that breach?

37. Gogay v Hertfordhsire County Council 2000 IRLR 703, CA made the point that suspension can in some circumstances amount to a repudiatory breach of contract, if there was no reasonable and proper cause for doing so in the individual circumstances. A more nuanced view was taken by the Court of Appeal in London Borough of Lambeth v Agoreyo [2019]IRLR 560, where the test of suspension being necessary was not accepted but that Tribunals should consider whether the employer had reasonable and proper cause to suspend the employee, not whether it was necessary. Foskett J in the Hight Court also took the view in this case (citing Lord Justice Sedley's observation in Mezey v South West London and St George's Mental Health NHS Trust 2007

IRLR 244), that suspension is not a neutral act but it changes the status quo and inevitably casts a shadow on the employment relationship. The Court of Appeal in Agoreyo thought this was an unhelpful question and the question to consider was whether there was reasonable and proper cause for the suspension.

38. Wright v North Ayrshire Council [2013] EAT 0017/13 – The unsatisfactory handling of a grievance can amount to a fundamental breach of contract and in order to succeed in a claim for constructive dismissal, there is no requirement for the employee's resignation to be solely or primarily in response to the employer's breach of contract. So long as the breach of contract is part of the reason for the employee's resignation, a claim may be made out.

39. If a dismissal is asserted to be on the grounds of conduct, then the test laid down in British Home Stores –v- Burchell [1978] IRLR 379 requires an employer to show that:-

(a) it believed the employee was guilty of misconduct;

(b) had reasonable grounds to hold that belief;

(c) it formed that belief having carried out a reasonable investigation, given the circumstances.

40. Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - Software 2000 Limited v Andrews [2007] IRLR 568; the nature of the exercise is necessarily "broad brush" - Croydon Healthcare Services v Beatt [2017] IRLR 274; and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).

41. When considering contributory fault the conduct must be "culpable or blameworthy" - Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148. The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault - Gibson v British Transport Docks Board [1982] IRLR 228.

42. In a claim for breach of contract, the question for the Tribunal is whether there has been a repudiatory breach of contract justifying summary dismissal. The degree of misconduct necessary in order for the employee's behavior to amount to a repudiatory breach of contract is a question of fact for the Tribunal to determine. The test set out in Neary and anor v Dean of Westminster [1999] IRLR 288 is that the conduct:

"must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain [the employee] in his employment".

43. In Briscoe v Lubrizol Ltd 2002 IRLR 607, CA, the Court of Appeal approved the test in Neary above and stated that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.

44. In the case of West London Mental Health NHS Trust v. Chhabra [2014] IRLR 227, the Supreme Court confirmed that in order for misconduct to amount to gross misconduct there does need to be some sort of "willful" or deliberate breach of the employee's duties.

45. Mgubaegbu v Homerton University Hospital NHS Employment Foundation Trust UKEAT/0218/17 (18 May 2018, unreported) Choudhury J The Tribunal must make its own findings of fact in relation to the breach in order to determine whether that breach was sufficiently serious to warrant immediate termination.

46. Where relevant we have also considered the ACAS Code of Practice on disciplinary and grievance procedures ("the ACAS Code"), which provides

"4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act consistently.*
- *Employers should carry out any necessary investigations, to establish the facts of the case.*
- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to appeal against any formal decision made.*

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory

meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.

8.In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action. "

47. The non-binding ACAS Guide to Discipline and Grievances at Work provides further clafification on suspension with or without pay and provides the following guidance:

"Investigating cases

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

It is not always necessary to hold an investigatory meeting (often called a fact finding meeting). If a meeting is held, give the employee advance notice of it and time to prepare.

Any investigatory meeting should be conducted by a management representative and should be confined to establishing the facts of the case. It is important that disciplinary action is not considered at an investigatory meeting.

If it becomes apparent that formal disciplinary action may be needed then this should be dealt with at a formal hearing at which the statutory right to be accompanied will apply. See also 'Use of external consultants'.

Suspension

There may be instances where the suspension of an employee is necessary while investigations are carried out.

Employees must always receive their full pay and benefits during a period of suspension unless there is a clear contractual right for an

employer to suspend without pay or benefits. Disciplinary procedures should specify how pay is to be calculated during any period of suspension.

Employers should seek advice if they are considering suspension without pay. A period of unpaid suspension is more likely to be viewed as a disciplinary sanction and could lead to accusations that the disciplinary procedure was not fair."

48. In relation to approaching whether an uplift is applicable under section 207A TULRCA, we have considered the guidance in the authorities of Lawless v Print Plus EAT 0333/09 and Slade and anor v Biggs and ors 2022 IRLR 216, EAT.

49. The relevant authorities which are relevant generally in relation to the claims for PID detriment were as follows:

Williams v Michelle Brown AM/UKEAT/0044/19/00 where HHJ Auerbach considered the questions that arose in deciding whether a qualifying disclosure had been made

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT [2010] ICR 325, [2010] IRLR 38 made it clear that to be a disclosure there must be a disclosure of information, not an allegation.

Fincham v HM Prison Service EAT/0925/01 confirmed that the disclosure of information must identify, albeit not in strict legal language, the breach of the legal obligation that the claimant is relying on.

Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 - paragraphs 31 and 32 on the irrelevance of the distinction between 'allegation' and 'information' in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

Chesterton Global Ltd v Nurmohamed [2017] ICR 731 CA The following guidelines were suggested as to determining whether the worker genuinely believed the disclosure was in the public interest and whether it was reasonable for him to have done so:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing

directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e., staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, though this should not be taken too far.

Korashi v Abertawe Local Health Board [2012] IRLR 4 EAT, para.62 & 64 the reasonable belief of the person making the disclosure takes into account the characteristics of the claimant, i.e., what a person in C's position would reasonably believe to be wrong doing. In the case of multiple disclosures, it is not enough that C believes that the gist of the multiple disclosures are true, there must be a reasonable belief in respect of the particular disclosure relied upon.

Eiger Securities v Korshunova [2017] IRLR 115 EAT) - The ET must identify the breach of legal obligation (if that is relied upon). Conduct which is immoral, undesirable or in breach of guidance is not enough without also being in breach of a legal obligation

Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT) - When considering a claim of detriment for multiple disclosures the ET should be precise as to the detriments and disclosures in question and should not just roll them all up together

Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64 [2012] ICR **372** – *"section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower".*

International Petroleum Ltd & Ors v Osipov & Ors [2017] the EAT determined that "*the words "on the ground that" were expressly equated with the phrase "by reason that in Nagarajan v. London Regional Transport 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference*."

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL - for a disadvantage is to qualify as a "detriment" , Tribunals should take the broad and ordinary meaning of detriment from its context and from the other words with which it is associated. It confirmed De

Souza v Automobile Association [1986] ICR 514, 522G, that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Jesudason v Alder Hey Childrens NHS Trust [2020] IRLR - Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. The causal connection of "on the ground that" is satisfied if the protected disclosure materially influences (in the sense of being something more than trivial) the employer's treatment of the whistleblower. It is more aptly described as a "reason why" test, it is not a "but for test.

50. Mr Brockley referred us to the following additional authorities at the outset and in his closing submissions, namely:

O'Laoire v Jackel International Ltd (No.2) 1991 ICR 718, CA which is authority for the proposition that the decisions of employment tribunals may be binding on the civil courts in respect of findings of fact (not on propositions of law), on the basis of 'issue estoppel' if they relate directly to proceedings between the same parties.

Reynolds v Stanbury [2021] EWHC 2506, a decision of ICC Judge Barber in the insolvency division of the High Court, where at paragraphs 9-14 a summary is given about approaching evidence in particular commenting on the fallability of memory and the importance of contemporaneous documents. A review of the case law suggests that memory is especially unreliable when it comes to recalling past beliefs and that the process of litigation subjects the memories of witnesses to powerful biases because of their stake in events. It suggests that factual findings are best based on documentary evidence (in particular contemporaneous) internal documents and messages) and known or probable facts rather that solely a witness recollection of what was said. It also reminds us that where a party's sworn evidence is disbelieved a court should say why this is the case.

Chandhok v Tirkey 2015 ICR 527, EAT, on the importance of the claim form in setting out the essential case to which a respondent is required to respond noting that 'an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.'

Saha v Capita plc EAT 0080/18 which cited with approval Mummery LJ in Parekh v London Borough of Brent [2012] EWCA 1630 stating that the duty of an Employment Tribunal is to determine the case in accordance with

the law and the evidence and "*is not required to stick slavishly to the list of issues agreed"* where to do so would impair that duty.

Clement v Lloyds Banking plc and others UKEAT/0474/13/ - where at paragraph 19, we are reminded that Tribunals are primary fact finders and that the fact that a witness is untruthful in respect of one matter "*does not carry as a necessary implication that the witness is untruthful as to others. It raises the possibility that he might be, but it is always likely to be too cavalier an approach for a fact-finder to reject all of that which a witness says merely because on one point he is thought clearly to be telling an untruth. What is required is a careful and conscientious examination of all the facts. It is not the usual case that a witness is so discredited in his testimony that a Tribunal considers that it must reject all that he says, unless persuaded by corroborating independent evidence that in some respects it is accurate. Far more usual is the case where for a variety of motives or reasons or problems of recollection, a witness will be unreliable in part, but reliable in other parts."*

Waghorn v George Wimpey & Co Limited [1970] 1 All ER 474 – where the Tribunal was invited to read the section between paragraphs b and g at page 479 which we did.

Conclusion

51. The issues between the parties which fell to be determined by the Tribunal were set out in the Final List of Issues. We have approached the issues in a different order than set out but our analysis and conclusion on each identified issue as follows:

Issue 4 - Protected disclosures

52. In relation to the alleged disclosures identified at paragraphs 4.1.1.1 and 4.1.1.2 in the Final List of Issues, if made these were all made to the respondent, being the claimant's employer for the purpose of s. 43(C)(1)(a) ERA 1996. Therefore, in each case, if the disclosure was a qualifying disclosure, it was a protected disclosure.

53. To determine whether each disclosure was a qualifying disclosure, the Tribunal was required to determine in the case of each disclosure relied upon:

53.1 What was said or written to whom and when?

53.2 Did this amount to a disclosure of information?

53.3 Did the claimant believe the disclosure of information was made in the public interest?

53.4 Was that belief reasonable?

53.5 Did she believe it tended to show (as applicable) that a person had failed, was failing or was likely to fail to comply with any legal obligation:

53.6 Was that belief reasonable?

54. As the respondent did not admit that either amounted to a disclosure (on the basis that they were never made) it was necessary for us to examine all the evidence and to make the required findings of fact above and conclusions below on all the evidence heard. In relation to each alleged disclosure relied upon we set out our conclusions on as follows:

Issue 4.1.1.1 -alleged disclosure on 12 October 2021 – the claimant to CH - advising her of her concerns about the respondent's use of grant funds obtained from the local authority and that she objected to the use of such grant funds by the respondent for the purposes of maintenance, day to day operating costs and refurbishment

55. We refer to our findings of fact at paragraphs 29.58 to 29.62 above in relation to issue 4.1.1 above. We found that the claimant did not raise any such concerns with CH on 12 October 2021. Therefore there was no disclosure of information (issue 4.1.1.2) and thus we are not required to answer the remaining questions as set out at paragraphs 4.1.3 to 4.1.6 of the Final List of Issues.

Issues 4.1.1.2 – alleged disclosure on 21 October 2021 - the claimant to CH - repeating the information set out above during a meeting

56. We refer to our findings of fact at paragraphs 29.72 to 29.76 above, again in relation to issue 4.1.1. We found that there was no meeting between the claimant and CH on 12 October 2021 and no disclosures were 'repeated'. There was no disclosure of information (issue 4.1.2) and again we were not required to go on to address the remaining issues set out at paragraphs 4.1.1.3 to 4.1.1.6

57. We did make considerable findings of fact about the belief that the claimant said she had formed which she says led her to make disclosures. We refer to paragraphs 29.6 to 29.11 and 29.23 to 29.28 addressing this matter more generally. In mid 2020 we were not satisfied that the claimant even held such concerns about inappropriate IPC grant spending as alleged. let alone communicated them. We acknowledged in our fact finding at paragraph 29.59 that by early October 2021 the claimant may well have harboured some concerns privately about the way she (on behalf of Delves Court) was spending IPC grant money but we were satisfied that these were never disclosed to the respondent as alleged(see paragraph 29.59). Probably on the evening of 22 October 2021 and certainly before the meeting on 25 October 2021, the claimant expressed her view about misuse of grant monies in informal text messages to ZH (see paragraph 29.81). She

then communicated a similar view to CH during the meeting of 25 October (see paragraphs 29.91 to 29.92). However neither of these two later communications are relied upon as a protected disclosure in this case. On this basis we were able to reach the conclusion that the claimant did not make the protected disclosures as alleged.

Issue 5 - Detriment

58. As the claimant did not make the protected disclosures relied upon, it was not necessary for us to go on to consider whether she was subjected to any detriment as a result of doing so. Any such detrimental treatment cannot have been because of any protected disclosures as we have concluded they were not made. As the acts pleaded as acts of detriments, are in large part the same acts said to be acts of repudiatory conduct, entitling her to resign and treat herself as dismissed, we address those only as part of our consideration of the constructive unfair dismissal complaint. There were three additional acts of detrimental treatment relied upon at paragraph 5.1.2 to 5.1.3 of the Final List of Issues. Our factual findings on such matters as set out at paragraphs 29.108, 29.109-29.110 and 29.105-29.106 above. However again any such detrimental treatment cannot have been because of protected disclosures as these were not made. Therefore the claimant's complaints under section 48 ERA as set out at paragraphs 5.1.1 to 5.1.4 are not well founded and are dismissed.

Issue 1 - Unfair dismissal

59. As there was no express dismissal in this claim, we had to consider whether the claimant has established that she was dismissed by virtue of section 95 (1) (c) ERA in that she resigned in circumstances in which she was entitled to treat herself as dismissed.

60. We considered each of the matters relied upon as being a fundamental breach of contract (issues 1.1.1.1 to 1.1.1.5 above), looking at whether such events happened as alleged (issue 1.1.1 above) and then whether they amounted to a breach of the implied term of trust and confidence (issue 1.1.2), deciding for each matter whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent (issue 1.1.2.1); and whether it had reasonable and proper cause for doing so (issue 1.1.2.2). We considered the question of whether there was a breach of the implied term of trust and confidence on each allegation individually and on all cumulatively.

61. Dealing with each matter relied upon in turn we conclude the following:

Paragraph 1.1.1 – Did Clare Hayward remove an arrangement permitting the claimant to work a four day week during a meeting which took place on 21 October 2021 (and confirm this by e mail on 24 October 2021 by allocating work to the Claimant intended to be done on Fridays thereafter)?

62. We refer to our findings of fact at paragraph 29.61, 29.72-29.76 and paragraph 29.82. On the basis of our findings, we conclude that CH did not remove any such arrangement on 21 October 2021 (as this meeting did not occur) or in an e mail sent on 24 October 2021. CH did have a conversation with the claimant about working hours with the claimant on 12 October 2021 and expressed surprise that the claimant did not work Fridays. The claimant may have felt that this meant that the arrangement was under threat, but this was not articulated by CH at the time. It was in fact ZH who made a suggestion to the claimant that the respondent would be "*after her working hours next*" during text messages between the two on the evening of 19 October 2021 (see paragraph 29.71 above). The claimant's response to that suggests that this had not happened by this date as she suggests the respondent would have to find a new manager if they tried to do that. We simply did not accept that the interpretation that the claimant put on the section about completing the costed rota in the e mail from CH on 24 October 2021 was objectively what was said in that e mail (see paragraph 29.82). The claimant acknowledged that this was an inference she made (perhaps on the basis of worries fuelled in part by ZH's text message). However the words actually used by CH in her e mail do not in any way remove or change any of the claimant's working arrangements. This alleged breach is not made out on the facts and is dismissed.

Paragraph 1.1.1. - Did Peter Cooke instigate an investigation into alleged wrongdoing on the part of the claimant (which the claimant alleges was without justification or merit) by causing Sarah McDonald and Claire Hayward to question her colleagues on 22 October 2021?

63. We refer to our findings of fact at paragraph 29.77 to 29.79 above. We were firstly satisfied that the meeting on 22 October 2021 was instigated at the direction of PC as a result of concerns he had about discrepancies in the costed rota figures and the lack of receipts for the spending on IPC grant monies. Although not termed an investigation meeting as such, it was clear that the main purpose of the meeting was to gather information about the way that Delves Court had been operating under the claimant's management and the claimant's role in providing financial information to Select head office which triggered the various payments for food for residents. We accept that this was in part (at least from the point of view of CH) to enable CH to become familiar with the way the home was operating, but it was the fact that this took place on a day when the claimant was not there (and the respondent's managers knew this) which leads us to believe that this was mainly about starting to investigate issues of conduct in relation to the claimant, in particular around the costed rota and discrepancies around this.

64. Whilst the respondent was right to be concerned about discrepancies and lack of paperwork, and the claimant acknowledged that it was entitled to investigate such matters, the investigation meeting that took place on this date entirely excluded any input at all from the claimant. The respondent commenced its investigations (and in truth had already started to reach a firm conclusion about what had happened) without seeking any input at all from the claimant or seeking her views as to why the discrepancies were as they were. On any view, this was grossly unfair and was in no sense an even handed investigation into potentially very serious allegations of misconduct. The respondent sought the views of two other employees that worked in Delves Court and were heavily involved in the home's administration, but at no time sought the view of the claimant herself. We conclude that this was conduct which when taken together with the other matters we go on to discuss was conduct likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. We do not consider that there was an reasonable and proper cause for excluding the claimant from such investigations. It is correct that the claimant was not scheduled to attend work that day but that we do not consider explains the decision to completely exclude her from any investigation meeting. The claimant could have been invited to a separate meeting (either before or after this meeting on 22 October 2021) at which time she could have had the opportunity to put her explanations to the discrepancies forward before she was suspended without pay. That meeting never took place and the respondent appears to have accepted entirely at face value everything that KC and GG told them on 22 October 2021 without seeking the view of the claimant herself.

<u>Paragraph 1.1.1.3 Did the respondent suspend the claimant on 25 October 2021 without pay and without setting out any valid reason for taking such step or articulating why she would not be paid whilst suspended?</u>

65. We refer to our findings of fact at paragraphs 29.88 to 29.93. The claimant was suspended without pay by CH on 25 October 2021. We were satisfied that CH gave a reason for that suspension i.e. that it was to conduct an investigation, mentioning discrepancies with the costed rota and IPC grant money. However no explanation was given to the claimant as to the basis upon which she had been suspended without pay. When asked about this, she was told by CH that this was a decision of the directors (which was correct, it was the decision in fact of PC, but with the approval of BB and SM). Whilst there may have been some valid basis for suspending the claimant in order to conduct an investigation (as the claimant herself acknowledged that the respondent was entitled to investigate the discrepancies it had found), there appears to be no valid basis for the decision that the suspension should be without pay. The respondent correctly points out that the disciplinary policy that applied to the claimant expressly provided that suspension may be with or without pay (see paragraph 29.4 above). However it is also abundantly clear that

such policies were expressly non contractual (see paragraph 29.2). We are therefore firstly satisfied that there was no express term in the contract of employment entitling the respondent to suspend the claimant without pay. We have also considered whether the fact that suspension without pay is provided for in the disciplinary policy means that the respondent can at any time decide to do this and we conclude that this is not the case. In support of our conclusions on this, we firstly refer to the ACAS Code which quite clearly anticipates that any suspension should be with pay. This is expanded on further in the ACAS Guide which indicates that suspension should be on full pay and benefits in the absence of a clear contractual right to suspend without pay and even then should be treated with caution.

66. The authorities briefly referred to above (Gogay and Agoreyo) make the point that suspension can in certain circumstances amount to conduct likely to seriously damage the relationship of trust and confidence, with the key question being whether there was reasonable and proper cause for it. We conclude that the decision to suspend the claimant without pay here was clearly such conduct and also conclude that there was no reasonable and proper cause for suspending the claimant and stopping her pay. There were no doubt matters that needed to be investigated, but to have taken such a draconian measure to suspend and stop an individual's pay without any real discussion as to the reasons why this was done is categorically conduct likely to destroy or seriously damage trust and confidence. The claimant was not given even a basic opportunity to put her side across as the decision had already been made by PC before the meeting had already started. This is a clear breach of the basic provisions of natural justice.

67. Suspension without pay should in our view only be necessary in the very rarest of circumstances (with the claimant and CH both confirming that they had suspended employees in their role as manager at the respondent but that this had always been on full pay). Here it was never explained to the claimant why she should be suspended without pay. It was entirely possible for investigations to have been conducted into the claimant's conduct without stopping her pay and the fact that this was done was a clear statement of intent from the respondent that it had already decided she was responsible for the financial irregularities. PC confirmed as such himself in his evidence (paragraph 29.86) and we conclude that PC had already reached a conclusion as to the claimant's guilt and dishonesty (paragraph 29.87). Whilst it may not be a helpful consideration, we do not accept the contention by the respondent that suspension in this case was a 'neutral act'. It clearly was not as the claimant from that point on was no longer receiving her contractual pay and benefits. There was no reasonable and proper cause for taking such draconian action as the fact that pay was being stopped had no relevance at all to the requirement to investigate. The claimant was given no valid reason why she was suspended on no pay and we conclude that

this was because the respondent had no reasonable and proper cause why this should be the case. This was repudiatory conduct by itself and coupled with the issues at paragraphs 63 to 64 above, was a fundamental breach of the implied term of trust and confidence entitling the claimant to treat the contract as being at an end.

Paragraph 1.1.1.4 Did Claire Hayward make veiled threats to the claimant that information would be passed to her regulatory body (NMC) during a meeting on 21 October 2021?

68. We found as a fact that a meeting did not take place between the claimant and CH on 21 October 2021 (see paragraph 29.75), so this part of the allegation fails on the facts. We have considered more generally the allegation made that veiled threats of this nature were made by CH towards the claimant but do not conclude that this occurred. This appears to be in relation to the incident at Chapel Lodge and were refer to paragraph 29.94 and 29.95 for our findings of fact about this. Even if CH had made passing reference to having made a NMC referral, we do not see that this could be interpreted objectively as a 'veiled threat'. This part of the complaint fails on the facts.

Paragraph 1.1.1.5 Did the respondent fail to comply with its own policies: (a) By providing no proper explanation for the suspension;(b) By providing no proper explanation for suspending the claimant without pay; (c) By deciding, by its directors, to suspend the claimant?

69. In relation to points (a) and (b), we refer to our conclusions at paragraphs 65 to 67 above which relate to the failure in particular to provide an explanation for suspending the claimant without pay. We conclude that this was conduct (in particular when taken together with the matters referred to in paragraphs 63 to 64 above that was likely to destroy or seriously damage the relationship of trust and confidence, and there was no reasonable or proper cause for doing so. In relation to (c) much focus and time was spent on this matter at the hearing and it is correct to say that the respondent's disciplinary procedure does state that a decision on whether suspension should be paid or not is "at the discretion of the relevant Area Manager" (see paragraph 29.4). However, in our view this was likely to be more of an indication that this is a decision that must be made at least at this level of seniority, rather than reserving it solely for this level of seniority and making it impossible for a decision to be made at a more senior level. The decision was made by PC who was managing director of Select, and clearly at a more senior level than Area Manager. Even taking the wording at face value, we do not consider that this of itself was a matter which was likely to destroy or seriously damage trust and confidence without reasonable and proper cause.

Paragraph 1.1.1.6 Did the respondent fail to acknowledge and/or deal with the claimant's grievance dated 26 October 2021?

70. Our findings of fact in relation to the claimant's grievance are at paragraphs 29.97 to 29.99 above. The grievance was not acknowledged or dealt with by the respondent and 2 days later, the claimant resigned her employment (see paragraph 29.101). A failure to properly investigate and address a grievance can amount to a breach of trust and confidence, but we conclude that in the very short window of time between the claimant submitting her grievance and her resignation, any failure to act cannot be considered conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence. It is not necessarily clear whether BB had seen the grievance (submitted to his personal e mail) when he became aware that the claimant had resigned. However even if he had a delay of in reality less than 48 hours is insufficient to amount to repudiatory conduct. Had the claimant not resigned and there was then no acknowledgment or action in the following 7 days, then possibly this might have been straying into this territory, but for the short period of time in question, we do not conclude this conduct meets the threshold.

Paragraph 1.1.1.7 Did Claire Hayward fail to act upon the disclosures of information provided and/or investigate matters raised by the claimant on 12 and 21 October 2021 (see below)?

71. We refer to our conclusions at paragraphs 55 to 57 above in relation to the alleged making of disclosures. As we have concluded that no such disclosures were made, there can be no consequential failure to act or investigate. This allegation is not made out on the facts.

72. As we have concluded that the respondent had fundamentally breached the claimant's contract, we have gone on to consider whether the claimant resigned in response to any breach that was found (issue 1.1.3). It was not suggested by the respondent but we have also considered whether the claimant affirmed or waived any such breaches (issue 1.1.4).

Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

73. In order for the claimant's complaint of constructive dismissal to succeed, the claimant must also show that she resigned in response to the breach i.e that this was a reason for the claimant's resignation. We take note of the guidance provided in the case of Wright above, that there is requirement for the employee's resignation to be solely or primarily in response to the employer's breach of contract as long as it is part of the reason for the employee's resignation. Here we refer to our findings of fact at paragraph 29.101 and 29.102 above. The claimant in her resignation e mail makes it clear that she is resigning with immediate effect "*due to current events"* and that e mail included with it the claimant's grievance submitted two days earlier which set out the claimant's summary of those events (see paragraphs 29.97 to 29.99).

This foreshadowed what might happen next as the claimant details her suspension without pay, the failure to articulate why this took place and the failure to investigate as being a "*step towards constructive dismissal*". The claimant was already considering such matters to be sufficient to entitle her to resign and this is precisely what she did just two days later. All that happened in the intervening period was that the claimant was then sent a letter confirming her suspension (paragraphs 29.100) which did not really provide the claimant with much further clarity about why she had been suspended.

74. Clearly the claimant had already taken steps to look for and even secure alternative employment. We see from her text messages with ZH that this had been on her mind since at least 19 October 2021 when ZH indicates that she wanted to leave and the claimant said she might be right behind her (see paragraph 29.71). This had crystallised by 22 October 2021 when the claimant indicated that she would be off as soon as she could and we know she attended an interview on 23 October 2021 (see paragraph 29.81). She was hopeful that she would have a second interview on 25 October 2021 (see paragraph 29.85). However even if the claimant was planning her new employment and even if such a role had been offered, we were still satisfied that the claimant clearly resigned in response to the breaches we have identified above. The claimant cannot be blamed for trying to quickly look for alternative employment at the time she did but we did not conclude that this employment was the trigger for her resignation, but that rather the trigger was the conduct of the respondent set out in her resignation letter. The claimant clearly resigned in response to the breach.

<u>Did the claimant affirm the contract before resigning?</u>

75. This was not particularly argued by the respondent and given that there was such a short delay between the matters that we have found to have constituted a breach (which took place on 22 and 25 October 2021) and the claimant's resignation (on 28 October 2021) we were satisfied that there was no such affirmation of contract before resignation.

<u>Was the reason or principal reason for dismissal that the claimant made a protected disclosure ?</u>

76. As we have already concluded that no protected disclosures took place, this cannot have been the reason for the breach of contract (and consequently the constructive dismissal). The claimant's complaint that she was dismissed for the reason that she made a protected disclosure (contrary to section 103A) must fail and is accordingly dismissed.

Has the respondent shown that the reason or principal reason for dismissal i.e.the reason for the breach of contract was a potentially fair reason within section 98 (2) ERA and did it act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant as required by section 98 (4) ERA?

77. The respondent submits that applying the tests in Burchell above that the respondent clearly had a genuine belief that the claimant had committed misconduct which led it to take the action it did in suspending her on 25 October 2021. However we were not satisfied that even if such a belief was genuine (which in PC's case it may well have been) that the respondent has established that it had reasonable grounds to hold that belief and (in particular given our findings and conclusions at paragraphs 63 to 64 above) it formed that belief having carried out a reasonable investigation. For similar reasons, we do not conclude that the respondent acted reasonably in all the circumstances. The dismissal was fair as required by section 98 (4) ERA and we conclude that the claimant was therefore unfairly dismissed.

Relevant remedy issues at this stage

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

78. We have also considered whether the claimant would have been fairly dismissed in any event in the very near future such that no compensation should be awarded, alternatively that any compensation awarded should be reduced in accordance with Polkey (above). We were not able conclude that had the respondent carried out the procedure in a fair and reasonable manner and she had not resigned that the claimant would still have been dismissed. The respondent's failings in particular the flaws in the investigation were so significant that we were unable to conclude whether dismissal would have occurred. The respondent and in particular PC had reached a conclusion that the claimant was responsible for dishonestly appropriating funds from the respondent by overclaiming for food and withdrawing cash using its Equals card for her own use. PC simply failed to consider any possible other explanation (such as error or indeed to consider whether the very many other employees at Delves Court who had free access to the Equals card and B&Q card could have been responsible (see paragraphs 29.18 and 29.32). It failed to consider the role of ZH in managing the claimant. Had that been done, the respondent may well have reached the conclusion (as CH did after her meeting) that the administrative failings were due to a "*lackadaisical approach*" (see paragraph 29.77) and an issue of performance and perhaps training, rather than one of conduct. We were not able to speculate as to what would have happened had this not taken place as it may have led to an entirely different outcome. For these reasons, no reduction on the basis of Polkey is appropriate.

Did the ACAS Code apply and did the respondent or the claimant unreasonably fail to comply with it? If so was it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

79. The claimant was being investigated (and was suspended) in relation to her conduct under the respondent's disciplinary procedure so we are satisfied that the ACAS Code applied and that it has relevance to the claimant's complaint of unfair dismissal, unlawful deduction of wages and breach of contract. We conclude that the respondent failed to comply with the provisions set out at paragraphs 4 and 5 of the ACAS Code in that it:

79.1 Did not carry out any necessary investigations, to establish the facts of the case before deciding to take punitive action against the claimant in suspending her without pay (see our conclusions above).

79.2 It did not inform the claimant of the basis of the problem and give her an opportunity to put her case in response before the decision to suspend her without pay was made (again see conclusions above).

80. We conclude that such failings were clearly unreasonable and led to the matters that we have found to be an unfair dismissal and a breach of contract below. We also find that such matters were relevant to the decision not to pay the claimant in respect of wages for October 2021. Therefore we have deemed that it is just and equitable appropriate to increase the awards applicable to those complaints by the maximum amount of 25%. This was a wholesale failing to carry out sufficient investigations before imposing a punitive sanction of suspending the claimant without pay. The obligations to investigate and to inform the claimant of the allegations against her were effectively ignored when it was decided that the claimant would be suspended without pay. This was a deliberate decision of PC who had already concluded and satisfied himself as to the claimant's guilt in misappropriation of monies when he took the decision in question. This was a serious breach of the principle of the ACAS Code and as such we feel that a maximum uplift to the relevant awards is just and equitable in all the circumstances.

If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

81. As we have found the dismissal to be unfair, the next stage is to consider whether the claimant's actions caused or contributed to that dismissal (i.e the fundamental breach of contract entitling the claimant to resign) such that no compensation should be awarded, or alternatively that any compensation awarded should be reduced by his level of contributory fault. When considering a deduction to the basic or compensatory award on the basis of contribution, firstly, it is necessary to identify the conduct which is said to give rise to possible contributory fault. Secondly, we must

decide whether that conduct is blameworthy. Thirdly, under section 123(6) ERA, we should consider whether the blameworthy conduct caused or contributed to the dismissal to any extent and finally we must determine to what extent it is just and equitable for the award to be reduced.

82. The claimant's conduct said to give rise to contributory fault was not set out with any particularity by the respondent in its submissions, other than the reference to the "matters set out by PC at paragraph 27 of his witness statement". Those matters were firstly "*the multiple withdrawals of cash on the Equals Money card which she facilitated by making false purchase orders*" in particular in relation to Cannock Care and Mascot Homes. Our detailed findings of fact on such matters are set out in paragraphs 29.16 to 29.18 and paragraphs 29.33 to 29.43 above. He further relies upon false occupancy returns which we address at paragraphs 29.57, 29.47, 29.68, and 29.74. He lastly relies on the issue relating to failure to send receipts which we address at paragraphs 29.29, 29.44 to 29.46 and 29.50 For essentially the same reasons set out at paragraphs 83 to 84 below we do not consider the conduct of the claimant to be blameworthy in relation to such matters and so do not need to go on to consider whether it caused or contributed to her dismissal. No reductions to the basic or compensatory award in respect of contributory fault are appropriate.

Wrongful dismissal / Notice pay

83. It was not in dispute that the claimant's notice period under her contract of employment was 12 weeks (Issue 3.1) and she was not paid for that notice period (issue 3.2) so we have gone on to consider whether at the time of her dismissal the claimant was guilty of gross misconduct (issue 3.3). We have to ask ourselves whether what the claimant did which led to her constructive dismissal so undermined the trust and confidence inherent in the contract of employment that the respondent was entitled to dismiss her at that point. We have to conclude that there was some form of deliberate or wilful breach of the employee's duties. When asked what matters were said to be acts of gross misconduct, the respondent again referred us to the evidence of PC at paragraph 27 of his witness statement. We have referred to these above but address each matter of concern (upon which we also heard submissions from the claimant) in more detail below:

83.1 <u>Cash withdrawals using the corporate card</u>

Our detailed findings of fact about the use of the Equals Card at Delves Court are set out in paragraphs 29.16 to 29.18 above. The respondent in effect suggest that the claimant was placing POs which were fraudulent in order to obtain cash transfers on to the Equals Card which were then withdrawn (presumably it suggests) for her own use. There are a number of flaws in that arguments which mean we cannot conclude that the

respondent has shown that the claimant committed this misconduct as alleged. Firstly all POs were apparently approved by BB (see paragraphs 29.12 to 29.15). Secondly and perhaps importantly, contrary to what the respondent suggests the claimant did not have sole use of and access to the Equals card. Quite the contrary applied and at least 6 other employees were regularly using the card for purchases. KC also made cash withdrawals from the card. Thirdly, there was no evidence before us to support the fact that cash was used or retained by the claimant for her own use or as the claimant suggests in submissions, there was no evidence of unjust enrichment. We accept this submission and certainly before this Tribunal no such evidence was produced. On that basis we were unable to conclude that the respondent had shown a deliberate or wilful breach of contract on the claimant's part in relation to the use of the Equals Card.

83.2 Spending/withdrawing cash whilst on annual leave

Our findings of fact on this matter are at paragraphs 29.48 and 29.49 above. We were not satisfied that the respondent has shown that any of the sums spent on the Equals Card whilst the claimant was on annual leave were inappropriate or a breach of contract on her part.

83.3 Use of the B&Q Card

We refer to paragraph 29.32 above and again conclude that the respondent has not shown that any spending of the claimant in relation to the B&Q card amounted to a breach of contract on her part.

83.4 Mascot Homes

We refer to our detailed findings of fact at paragraphs 29.33 to 29.38 above. The allegation of the respondent here is that the claimant falsely placed POs on the system for such works and that no work was ever done by Mascot Homes with the claimant presumably 'pocketing' the cash that the respondent had allocated for such PO herself. We conclude that the respondent has not shown that the claimant behaved dishonestly in relation to Mascot Homes for the reasons we set out at paragraph 29.38 above. We have already recognised in our findings of fact that it was very unwise of the claimant to have acted as she did in relation to Mascot Homes and to have instructed a relative to carry out works and to have then dealt with such large cash payments to him was really far from ideal. It left the claimant wide open to allegations of impropriety and we absolutely acknowledge that PC was right to be suspicious of this and to start to investigate. However the fact that there does not appear to be any policy prohibiting such conduct at the respondent and also the fact that the claimant had the agreement of her line manager, leaves the respondent in some difficulty in showing that the claimant behaving in such a manner was a fundament breach of her contract of employment. We were not able to conclude that it had shown as such.

83.5 Cannock Care

We refer to our findings at paragraphs 29.39 to 29.43 above. Whatever the failings in terms of paperwork, we conclude that the respondent has not shown that any of the actions taken by the claimant in this matter relate to a fundamental breach of her employment contract.

83.6 Falsely claiming occupancy figures to claim additional food budget

We refer to our findings of fact at paragraphs 29.57, 29.47, 29.68, and 29.74. This was a complex matter and we entirely understood the concern raised that the figures for occupancy appeared to show more residents than were actually at Delves Court and that this triggered additional payments for food budget. However we were not satisfied that the respondent has shown that any actions of the claimant were fraudulent in respect of this matter (they may have been as anticipated by CH on 24 October 2021 "*an oversight*" (se paragraph 29.83)). The claimant's actions in relation to occupancy figures and the costed rota were done with the approval of ZH, her line manager. There is no evidence again of any benefit to the claimant in whatever was done in relation to occupancy figures. The respondent has not shown that the claimant acted in fundamental breach of contract in relation to the figures she provided in the costed rota in relation to occupancy.

83.7 Theft of money from the safe

Our only findings of fact in relation to this matter were at paragraph 29.103 above and that was that it was discovered on 29 October 2021 that a sum of money was missing. On the basis of this alone, the respondent clearly has not shown that the claimant was guilty of theft. The evidence is purely circumstantial and given that others who were still in the home had free access to the safe both before and after 25 October 2021, the evidence is flimsy.

84. We conclude that the respondent has not shown that any of the claimant's acts as set out in detail above amounted to repudiatory conduct which would entitle the respondent to dismiss lawfully without notice. The claimant was wrongfully dismissed and is entitled to damages in respect of that period of notice to be assessed at the forthcoming hearing for remedy.

Holiday Pay (Working Time Regulations 1998)

85. It is not in dispute that the respondent failed to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended and given our conclusions above in relation to breach of contract, those sums are now due to be paid to the claimant.

Unauthorised deductions

86. We have finally gone on to determine the issue at paragraph 8.1 of the Final List of Issues and that is whether the respondent made unauthorised deductions from the claimant's wages and if so how much was deducted. It is not in dispute that the respondent withheld from the claimant her pay from 1 October to 28 October 2021 (see findings of fact at paragraph 29.106). The respondent contends that it was entitled to withhold such pay under the provisions of the claimant's contract of employment (see paragraph 29.2) on the basis that it had sustained losses which were caused through the carelessness, negligence, recklessness or through the claimant's breach of its rules or her dishonesty. At the time this decision was made, the matters upon which the respondent was relying were around its suspicions on misuse of the Equals Card and the B&Q Card. In light of our conclusions above the respondent in our view did not at this time have sufficient evidence to conclude that firstly any losses had been sustained (and this we find was a fundamental flaw with much of this line of argument); nor that the these were caused by the claimant for the reasons we have already outlined. The respondent we conclude was not validly able to withhold the claimant's salary and therefore the deduction of this salary was unauthorised and falls due to the claimant.

Remedy

87. The remedy to which the claimant is entitled will be determined at a separate remedy hearing which will be listed to be heard by CVP(with a time estimate of 1 day) and the date notified to the parties. At that hearing, the Tribunal will determine the remaining issues relating to remedy from the Final List of Issues that have not yet been determined which are set out below:

87.1 What is the amount of Basic Award to which the claimant is entitled?

87.2 Is the Claimant entitled to a Compensatory Award, and if so how much, including considering?

(a) What financial losses has the dismissal caused the claimant?
(b) Has the claimant taken reasonable steps to replace their lost earnings for example by looking for another job?
(c) Does the statutory cap of fifty two weeks pay or [£86,444] apply?

87.3 How much notice pay is the claimant entitled to?

87.4 How much holiday pay is the claimant entitled to?

87.5 How much was unlawfully deducted from the claimant's wages between 1 and 28 October 2021?

88. In accordance with its powers under rule 3 of the Employment Tribunal Rules of Procedure the Tribunal encourages the parties to take steps to try to resolve as many of the remaining issues in dispute by agreement

as they are able to in advance of that remedy hearing so as to comply with their duties to assist the Tribunal in furtherance of the overriding objective.

Employment Judge Flood

Date: 15 July 2024