EMPLOYMENT TRIBUNALS

Claimant: Ms D McCrudden

Respondent: St Helens Borough Council

HELD AT: Manchester **ON:** 30 and 31 May 2017
1 and 2 June 2017

BEFORE: Employment Judge Feeney
Mr J L Pennie
Mr P Gates

REPRESENTATION:

Claimant: Mr J Heath, Solicitor
Respondent: Mr D Tinkler, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of

1. unfair dismissal,

2. automatic unfair dismissal by reason of having made a protected disclosure;

3. wrongful dismissal, and

4. detriment for making a protected disclosure

fail and are dismissed.

REASONS

1. The claimant brought claims of unfair dismissal, automatic unfair dismissal by reason of having made a protected disclosure, wrongful dismissal and detriment for making a protected disclosure following her dismissal by the respondent on 1 July 2016.

Witnesses

2. We heard from the claimant herself and for the respondent Debbie Jones, Registered Manager of the respondent's Supported Living Service in the People Services Department; Pauline McGrath, Assistant Director in the People Services Department; and Councillor Susan Murphy, who chaired the appeal committee.

3. The claimant was represented by Mr J Heath, solicitor, and the respondent by Mr D Tinkler, counsel.

The Issues

4. The issues for the Tribunal were as follows:

Unfair Dismissal Claim

(1) What was the reason for the dismissal? Was it a conduct reason and did the respondent have a genuine belief in the misconduct at the time?

(2) Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

(3) Was the decision to dismiss a fair sanction, that is was it within the range of reasonable responses of a reasonable employer?

(4) If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

(5) Does the respondent prove that if it adopted a fair procedure the claimant would have been fairly dismissed in any event?

Public Interest Disclosure Claim

(6) Did the claimant disclose information as follows:

(i) To Mr Perry on 21 January 2016 and to Miss Caterall and Miss Jones thereafter that her colleague, Mr Rowe, had smoked cannabis at work?

(ii) To Mr Perry on 21 January 2016 and to Miss Caterall and Miss Jones thereafter that her colleague, Mr Rowe, had stolen toilet rolls from the employer?

(iii) To Mr Perry on 21 January 2016 and to Miss Caterall and Miss Jones thereafter that her colleague, Mr Richardson, had been sleeping at work?

(iv) To Miss Caterall and Miss Jones on 3 February 2016 that her line manager, Mr Perry, had asked her to alter a record related to the care of JW?

(v) To Mr Perry on 10 February 2016 that her colleague, Mr Irwin, was demonstrating symptoms of schizophrenia and presented a risk to his colleagues and JR?

(7) In any or all of these was information disclosed which in the claimant's reasonable belief tended to show one of the following:

(i) A criminal offence had been committed (in respect of paragraphs 4.1.1 and 4.1.2 i.e. paragraphs 6(i) and 6(ii) above)?

(ii) A person had failed to comply with legal obligations (in respect of paragraphs 4.1.3, 4.1.4 and 4.1.5 i.e. 6(iii), 6(iv) and 5(v) above)?

(iii) The health of an individual (JW) in respect of paragraphs 4.1.3 and 4.1.5) and other workers (in respect of paragraph 4.1.5) had been put at risk?

(8) If so, did the claimant reasonably believe that the disclosure was made in the public interest?

(9) If so, the respondent accepts that any such disclosure would be protected because it is not disputed that the claimant gave or purported to give the information to the employer.

(10) For the avoidance of doubt Mr Tinkler confirmed the issue here was whether they were qualifying disclosures.

Detriment Complaint

(11) Was the claimant, on the ground of any protected disclosure as may be established, subjected to detriment by the employer or another worker in that:

(i) She was subjected to disciplinary proceedings;

(ii) By the manner in which those proceedings were conducted?

Dismissal Complaint

(12) Was the making of any proven protected disclosure the principal reason for the dismissal?

(13) Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?

(14) Has the respondent proven its reason for the dismissal, namely misconduct?

(15) If not, does the Tribunal accept the reason put forward by the claimant or does it decide there was a different reason for the dismissal?

Breach of Contract

(16) It is not disputed that the respondent dismissed the claimant without notice?

(17) Can the respondent establish that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct? This requires the respondent to prove on the balance of probabilities that the claimant actually committed the gross misconduct.

(18) How much notice was the claimant entitled to?

5. There was an agreed bundle of documents.

Findings of Fact

6. The claimant was employed by the respondent as a Supported Living Worker from 22 January 2014 until 21 July 2016. For the majority of her employment the claimant worked at a particular house caring for JW. JW had severe learning disabilities and epilepsy and required 24 hour care.

7. The claimant became concerned about some aspects of JW's care, in particular that he was allowed to sleep without a pyjama top on and that around 11 or 12 January 2016 when she was giving him a drink in the middle of the night she felt that he was very cold and she persuaded him to put his top back on and put a warm blanket over him. She recorded her concerns about JW being left with his top off on the contact record sheet ("CRS"). She felt she had voiced concerns about this numerous times and felt she was being ignored. It was later agreed at a team meeting on 10 February that staff should check the temperature of JW's bedroom, make sure it was warm enough and try to encourage him to wear his top at night in order to maintain a warm temperature.

8. The claimant was next in work on the night of 12/13 January 2016 with Andy Hughes and Stephen Fairbrother. She had a discussion with them about her comments in the CRS and communication book and said she could not believe staff had left JW with his top off when it was so cold. They said they had taken JW's top off that night at his request as it was his decision.

9. The claimant felt that although she understood JW's right to make his own decisions that he did not understand the repercussions and he would be very cold later on. Later on that night JW was awake and again the claimant went in to see him with a drink, put his top on with his agreement and he went to sleep. She recorded he concerns on CRS again.

10. On 21 January 2016 her manager, Nigel Perry, came to see her. He had the two CRSs with him and told her that his manager, Melanie Caterall, had said that he had to re-write the record because they did not want CQC to see it. We did not hear from Mr Perry or from Melanie Caterall so we accept the claimant's evidence that this was how he put the point. The claimant said she was not happy about JW's treatment and explained why she had written it. Mr Perry said she could only write facts and not expressions of her opinion. The claimant said Mr Perry said if she did not re-write the record she would be disciplined. He also said that Andy Hughes and

Stephen Fairbrother had made statements about the claimant in relation to their disagreement and that other members of staff were complaining about her as well.

11. The claimant felt aggrieved that she was being singled out for trying to do something which she felt was in JW's best interest and reminded Mr Perry she had complained in the past about other staff not doing their job properly and he had done nothing about it. She then raised with him a number of examples of misconduct by other members of staff, the most serious of which were:

(1) She said she had heard from her colleague, Stephen Fairbrother, that another colleague, Ian Rowe, had stolen toilet rolls from the duty office at a nearby house.

(2) That Andy Hughes had told her that another support worker, John Richardson, had been heard snoring through the wall when he was supposed to be working the night shift.

(3) That Ian Rowe had smoked cannabis with the claimant when she was on duty with him. She had challenged him about it when she smelt it on his clothes and saw him smoking it in the back garden. That he had admitted it and said it helped to calm him down. She had told him he should not be doing it at work and he said he would not do it again.

12. The claimant was asked why she had not mentioned it earlier and she explained that because she feared that Mr Perry would not deal with things confidentially, and she said she was afraid of retaliation if it was known she had raised these issues. She also liked Ian Rowe. He was the sole breadwinner and he had said he would not do it again. She was not sure she would be believed either.

13. The claimant said she asked for a meeting with more senior management to discuss the issues but Mr Perry was away for a week and therefore they eventually agreed that they would be raised after he had returned to the workplace.

14. On 22 January 2016 the claimant arrived at work and was told by Andy and Stephen that Nigel Perry had insisted they wrote statements but that they had not complained about her.

15. The claimant felt she could no longer trust Mr Perry as it felt like he was building a case against her and so she texted him to ask for a meeting with Melanie Caterall and Deborah Jones. She then did not receive a reply and she went off sick suffering from work related stress. She was rung by the respondent because her sick note said "work related stress". Melanie Caterall asked her how she could resolve the problem and the claimant explained the disagreement with Mr Perry about the contact recording forms. A meeting was arranged between the claimant and Deborah Jones for 3 February 2016.

16. In this meeting in respect of the issue of writing in the log the managers advised the claimant that Mr Perry's instruction was correct because she should write personal comments and information about the service user in the house communications log rather than putting it in the contact record sheet, and that she should only be writing facts in the contact record sheet and not her personal opinion. After some discussion the claimant agreed to do this.

17. There was some discussion about JW's private time as it was felt the claimant was intruding on that, and there was also discussion about the claimant imposing "brain rest" on JW from his gadgets as she thought he was being over stimulated, but it was explained that there was no requirement for this as it was not in his support plan and he had to use his personal belongings as long as it was safe.

18. Miss Jones gave evidence she felt the claimant had been making decisions about JW's care based on her own personal opinion and not adhering to the service user's support plan. Miss Jones advised the claimant she should seek advice from the Duty Manager based at Sorogold Close if she was unsure about anything. It was a long meeting and Miss Jones' perception was that there was a challenging discussion about the claimant's practice where she would say, "well if you think I'm bad" and then she would draw attention to how other people had behaved. In any event Deborah Jones and Melanie Caterall stated they were happy for the claimant to pass on any of her concerns.

19. The claimant said she was reluctant to pass on the details of poor practice by other staff members as she thought she might get the sack, and Deborah Jones advised the claimant to put her concerns in writing so that they could look at them, and she reminded the claimant that she had a duty to report safeguarding concerns to the duty team leader and that the respondent could not act on issues unless they knew about them.

20. Melanie Caterall then emailed Nigel Perry to give him an outline of the discussion they had had that day, which advised him that they told the claimant:

- Not to be writing personal comments in the communication book but to use the DACR, and that she only recorded facts in the case recording resource.
- If she thought JW was having a seizure she must physically go and check on his welfare.
- They reinforced that JW was entitled to "private time".
- That she should not take gadgets off JW to "let his brain rest" as that was bordering on restrictive practices.
- That if she had any issues with any support workers this must be raised with Mr Perry or the duty team leader if Mr Perry was not available, particularly safeguarding matters must be reported immediately.
- If she felt unsupported she should speak to Deborah Jones directly.
- She was informed that she needed to be mindful that staff had seen her approach or practice as her trying to line manage them when this was Nigel Perry's role, as what she is writing in the different logs is in effect instructing other staff how to behave.

21. Regarding the other concerns, they stated that these would be discussed later and Mr Perry was instructed not to have any discussions with Debbie about this matter.

22. The claimant's concerns that she had raised in the meeting were forwarded in a separate email to Jim Philbin, Service Manager. This stated that the issues that the claimant had were:

- She had no confidence in Nigel Perry to manage the staff team.
- She had told Nigel in supervision about Ian Rowe not doing the shopping. Ian walked in the room after they had just finished supervision and Nigel said to him in front of the claimant “Is this who you’re on about?”. She did not feel that was a confidential way of behaving.
- His back goes up when she suggests anything and he always opposes everything, for example she said JW should have decaffeinated coffee/tea but Nigel Perry disagreed. That she had given reasons why he should have decaffeinated but nothing had been addressed. Medication was not ordered on time and JW was left without medication leaving emergency medication to be sought. Paperwork was not being completed as staff are not pulled up for not doing things.
- She feels he is treating her differently from other members of staff. He pulls her up for things she has done wrong but he does not pull up other staff for things they do wrong.
- She said Ian Rowe plays on his phone. John Richardson never followed up sorting the car tax out so they were driving around with no car tax. She says (Nigel Perry) addresses things in a “jokey” manner rather than seriously.
- It sounds like the culture is not good in the team with male staff thinking they do not need to do the ironing and clean the fridges.

23. The claimant said there were things that she felt staff might get the sack for but would not elaborate, and that she was asked down the issues as they could not be dealt with off the record. They were meeting with Nigel; Perry on 10 February to discuss matters further.

24. The claimant had a return to work interview on 6 February and confirmed she was happy that Melanie Caterall and Deborah Jones were dealing with her work related issues which had caused the absence.

25. The claimant met again on 9 February with Melanie Caterall and Deborah Jones to discuss the 25 page bullet point document the claimant had provided, which were all matters to do with a service user and nothing to do with other members of staff. In the meeting on 9 February the claimant was advised that some of these issues should be discussed in the team meeting the following day and agreement reached on them in relation to the team.

26. The claimant was asked why she had not provided details of the allegations she was making against individual members of staff and was reminded that they could not take action unless they had sufficient information.

27. Deborah Jones agreed that the claimant had mentioned during the meetings that she had seen Ian Rowe smoking cannabis at work but she had concerns she had not seen him smoking cannabis later. She also said that she had been told by another colleague that Ian Rowe was stealing toilet rolls from a toilet at 22 Sorogold Close but she would not give them the name of the colleague who had told her about this, and also that another colleague had said John Richardson could be heard snoring through the wall, but again she refused to say which colleague had told her this or the date when it had occurred.

28. Deborah Jones gave evidence regarding the smoking cannabis allegation. She said she was already aware that Ian Rowe had been investigated for cannabis use in January 2015, having an interview with Jim Philbin and HR. He claimed that he was smoking herbal tobacco not cannabis and the investigating officers were satisfied with that explanation. There was no safeguarding issue and no further action was taken. The respondent confirmed this in a letter to Ian Rowe which was produced to the Tribunal.

29. On 10 February Melanie Caterall and Deborah Jones met with Nigel Perry before the team meeting and went through the claimant's List of Issues. He said she had not raised these matters with him before. Regarding the issues pertaining to Ian Rowe and John Richardson it was verbally agreed that Mr Perry would look into these matters.

30. At the team meeting the majority of the claimant's issues were discussed in the meeting and agreement reached. For example regarding the claimant's issue that service users should not have drinks in the bathroom, it was agreed that would not happen for hygienic reasons.

31. Following the meeting with Nigel Perry and the team meeting on 10 February Deborah Jones prepared a document detailing the actions taken in respect of the issues and this document was sent to Nigel Perry and Jim Philbin.

32. In relation to Nigel Perry’s investigation, he spoke to Ian Rowe who denied it. Jim Philbin also contacted the duty officer who confirmed there were no concerns regarding the stock or toilet rolls and the inventory appeared to be correct. Without the claimant advising them who had told her about this in order that they could find out the strength and the detail of the evidence they could not take this any further.

33. Nigel Perry also spoke to John Richardson who denied that he had been asleep on duty. It was said that the service user had a weight issue and was known to snore and so therefore it was likely that it was the service user that could be heard. Again the claimant did not provide any more details of this incident. Because of confidentiality of the claimant was not advised of the outcome of her complaints regarding Ian Rowe and John Richardson. Melanie Caterall and Deborah Jones felt the action taken was appropriate.

34. The issues the claimant raised against Sam Irwin they say were not raised in the meetings with them, but they pointed out that Sam Irwin’s managers were fully aware of his mental health issues, which included the fact that he spoke about his religious belief, but there was no evidence at the time that he was behaving inappropriately or was not fit for work.

35. The issues paper that Deborah Jones prepared in relation to how they had dealt with the matters raised by the claimant ran to two pages and had 26 points on it. They were all connected with practice in respect of service users. The respondent intended to take matters forward on the basis of this paper.

36. On 23 July 2016 the claimant reported an issue in the contact record sheet. She stated that:

> "JW was in the lounge watching a DVD at start of shift. JW has been mithering and trying to control staff the last few shifts (Debbie) so sat a couple of times on the couch and turned JW's chair to watch DVD. Settled down later. Played DVD and relaxed after tea. Ate well, drank plenty, had a nice evening."

37. This was signed by the claimant and by Gill Little although Gill Little would later deny she had signed it and the claimant would assert that it was normal for members of staff to sign for each other when they were on shift together.

38. Nigel Perry will have viewed this contact record sheet. He made no comment to the claimant about her entry. He was later disciplined for failing to raise with the claimant the issue about turning the chair.

39. On 3 March 2016 Nigel Perry was on a seconded post when he received a text from Nicky Jones, a supported living worker, at 3.49pm. Ms Jones raised a concern that while the claimant was on a shift with Sam Irwin the claimant had turned the service users chair to the wall so he was not looking at her when he had been mithering. The text message said:

> "When u back? Just heard a safeguarding issue. When Debbie has been on and John's been mithering she turned John's chair to face the door so he isn't looking at her. It was when she was on with Sam and Steve and Andy came on he was like that in his chair…it's disgraceful Nigel."

40. Nigel Perry reported it to Deborah Jones the same day and then contacted Sam Irwin and requested he wrote a statement in relation to what had happened, which statement Mr Perry received on 5 March 2016. This statement said:

> "On Tuesday 1 March I was working with staff member Debbie McCrudden at 24 Sorogold Road with service user JW. Both staff were working the afternoon/evening shift. Debbie McCrudden was on a 4-10 shift and I was on a 3-10 shift. At her evening meal at approximately 18:30 both staff took JW into the lounge and sat him in the chair. Debbie McCrudden then turned JW's chair to face the wall near the entrance door away from the TV and where Debbie was facing. I at this point challenged Debbie and said 'should J be really facing the wall?' Debbie replied 'he is obsessed with me and he is staring at me so its better he is facing the other way to stop his obsessive behaviour'. At this point in time J was sat watching his DVD player facing the wall. I believe JW felt reasonably happy as he was focussing on his DVD, although JW did try and turn his head occasionally to see what was going on behind him. I also believe knowing JW that he would be prefer to be facing the television i.e. facing forward as JW likes to be involved with what is going on

> around him. JW stayed sat in his chair until bedtime at approximately 21:30pm. JW stayed facing the wall for these three hours."

41. The respondent called a multi agency safeguarding strategy meeting on 4 March and it was agreed that an investigation should be carried out. When Deborah Jones reported the matter on a safeguard alert she stated that it had been alleged that:

> "Deborah McCrudden turned JW around in his wheelchair and faced him towards the wall. It is alleged the reason for his was that Mr JW was obsessing with her. It is advised Mr JW is unable to mobilise his own wheelchair."

42. Deborah Jones agreed in her evidence that she had mis-described this in referring to a wheelchair but stated it was true that JW could not move but would normally be in a chair.

43. Deborah Jones rang the claimant in order to advise her not to attend her next shift as a safeguarding alert was now in place regarding her practice. Ms Jones advised the claimant she could not tell her what the information was until the investigation had concluded. The claimant believed it was other members of staff getting back at her after making the complaints, but Deborah Jones emphasised that to protect the service user her contractual shifts would be reallocated from 6 March. Deborah Jones then contacted Sam Owen to request a written account of events from 1 March, and Deborah Jones also sent an email on 4 March 2016 to Jim Philbin detailing the events of the previous day.

44. The claimant then reported in sick from 6 March 2016.

45. Deborah Jones managed to speak to the claimant on 9 March 2016 and advised her that having taken advice from the Safeguarding Unit they were content if the matter was dealt with by way of an internal investigation and need not be escalated to any outside body. She was advised she would be placed in another property until the internal investigation was concluded. However she remained off sick.

46. The claimant was invited to attend an investigatory interview in relation to the allegation on 23 March 2016. Jim Philbin acting as investigating officer with Andrea Smith from HR.

47. The claimant was accompanied by Gill Middlehurst, a colleague.

48. The respondent's policy forbade the recording of meetings unless all parties agreed.

49. Mr Philbin explained that the allegation was that after JW had had his tea at approximately 6.30pm it was alleged that the claimant had turned JW's chair around to face the wall rather than facing the TV and what prompted her to do that. She said she would never turn JW's chair against the wall, she had never done that. They then explained exactly where it was, "It is alleged that the chair was turned to face this wall because he was obsessing with you". She then said, "No, it wasn't for that reason at all" and said, "No, I didn't turn J's chair all the way around to the wall cos I

wouldn't do that to J. The only thing was when J was sat facing like that and J was looking at me he was getting agitated and he was getting irritated so rather than just, you know, J escalate or anything like that, and I know Nicky has done this, she told me to do this in the past, she said 'just turn his chair slightly, tell him it's to see the TV better' so I just went to J 'would you mind if I turned your chair a little bit please so you can see the TV better?" and so his DVD reaches better because there is actually an extension on the left-hand side.

50. Mr Philbin said, "you've done this before?". "Nicky's done it before" she said, "I've been on duty when she has actually moved the chair a bit herself because he does become a bit like that" and she clarified "but not to face the wall" because he was getting agitated and obsessed and she did not want the situation to escalate.

51. Mr Philbin asked her was it not bad enough for her to have time out, which they allowed to do, and she said "no". She said, "Sam was in the room. I was keeping John company and I just turned the chair slightly a little bit just there she could see the DVD better, he could see the television, I could see him at all times and no way I didn't have my eye on J". It was JW's actual chair and not a wheelchair that was moved.

52. Mr Philbin then put to the claimant what Sam had said, which was "Should J really be facing the wall?". The claimant said, "That's an absolute lie. Sam had made that up cos I did not say that whatsoever. Sam never said that". She said, "Sam has never said a word to me. He said nothing. He sat in about 7 o'clock, 10 to 7 like I said to watch Emmerdale. Next thing I think J's mum rang or something and he was on the phone to her, and at no time was J facing the wall or Sam saying anything to me". Mr Philbin then said, "So you didn't respond to him [i.e. Sam] with 'he's obsessed with me and it's better him facing the other way to stop his obsessive behaviour'?" She said she did not say anything of the sort. Ms Smith said, "Well why do you think Sam would say that you did say that?". The claimant then replied:

> "Well to be quite honest with you this sounds really bad but I have expressed concerns about Sam to Nigel regarding the fact that when he was on duty he told me that God was speaking to him, that he could hear God and was talking, and I said to Nigel 'do you think Sam really should be working with a vulnerable adult?' and that he was quite hyper that night."

53. The claimant gave another example of when she felt Sam overreacted and got very worked up and she denied that he had said anything to her and that she did not see much of him that night. She said JW was not distressed.

54. Mr Philbin said there was nothing in JW's care plan about turning his chair slightly if he displayed obsessive behaviour, "Was this advice Nicky Jones had given her?" and the claimant said, "Well generally Nicky Jones has done it in the past. Maybe it was a wrong assumption but that was the best way of dealing with it".

55. Mr Philbin asked the claimant how should they deal with any obsessive behaviour in accordance with the care plan, but she said he had never really got that bad. She presumed it was ok because Nicky Jones had worked there for 15 years, and that J had been getting a bit obsessive in the two weeks working up to this date but it was not that bad. In the care plan she agreed he was supposed to take time out or report it to the duty office or try and calm him down and de-escalate. She

thought that was what she was trying to do. She did not speak to the duty manager about the situation as suggested in the care plan.

56. They pointed out to the claimant that she had not reported on the daily record sheet that JW had got obsessive with her, but she said that was because moving his chair slightly had resolved the problem. He could still see the television and he was not bothered.

57. Mr Philbin said nobody was accusing her of throwing the chair around or throwing JW against the wall as the claimant had just suggested, but it was an issue of issuing a sanction against a service user by turning him to face the wall, especially when it was not written in the care plan. The claimant said she had asked JW's permission. She had done it because he was getting obsessive. It was put to her that JW lacked the capacity to give proper permission for his chair being turned. They said they would speak to Nicky about it. The claimant denied again that Sam had said anything to her and she said, "why didn't he do something if he felt it was wrong?". Sam had spent a lot of time in the dining room by himself. The claimant then said that Nicky Jones might not even recollect that she had done it and said this to the claimant. The claimant said she had asked JW's permission to do something so she assumed that was the same for the chair. She did not think it was a safeguarding issue. She had just moved his chair a little bit because she had witnessed another member of staff doing it and it would save the situation escalating. They told the claimant that Sam had not reported her but they had gone to interview him after having it referred by somebody else. There was a discussion about whether the claimant was returning to work and if she did they would put her in a different house. It was significant that in cross examination at the Tribunal the claimant, after saying there was no conversation as described by Sam Irwin with Sam Irwin, she agreed that there had been. Accordingly that admission supported the voracity of Sam Irwin's statement taken on 5 March.

58. The claimant also said that she discussed with Sam Irwin how J was. She alluded to the fact that "Gill" had been moved house because he was getting a bit obsessed with Gill and she said he had started to become that way with herself. She said it did not bother her, "but he focuses on you and he gets quite agitated, repetitive and he sort of stares at you". He was watching his DVD and she was in the lounge with JW because Sam spent a lot of time in the dining room on his phone checking the football or rugby results, and then "he sat for an hour and a half doing a CRB for a holiday he is going on with the children which is nothing to do with this job". They then went through the layout and Sam was explaining that he had to do a CRB because he was taking children on holiday with the Christian Church he was involved in.

59. There was a break in proceedings because Ms Smith was concerned that the claimant was going to raise allegations versus other members of staff and wished to discuss this in private with Mr Philbin. The claimant was allowed to leave her possessions in the room during this break and it transpired later on that she had been covertly recording the whole of the meeting and accordingly also recorded the private section of the meeting. As the claimant left her recording device, probably her telephone, in the disciplinary interview while she left, she recorded the conversation between Mr Philbin and Andrea Smith while she was out of the room. In this Andrea Smith says that the claimant is "lying through her teeth though, isn't

she?" and Mr Philbin described the claimant's actions as "mustard therapy from the 80s" i.e. aversion therapy which was not approved. They were also concerned that she was dragging "Nicky" into it so that if she has done something wrong so has Nicky. Ms Smith then said "yes", but then she backtracked about whether Nicky had done it or not. They also said the claimant wanted to "drop Sam in it also" and again she backtracked on that because when they said they were going to check with IT whether he was on the internet for an hour and a half she said "well he used his own phone".

60. In addition the claimant based part of her case on an allegation that the respondent had said that she was not wanted in this arena. However, her own notes say that Andrea Smith "I don't think that's for this arena". This refers back to a conversation they were having about her trying to drop someone else in it and it was in respect of that that Ms Smith said, "I don't think that's for this arena" i.e. that should be dealt with separately.

61. Mr Philbin then agreed that the claimant was "lying through her back teeth". They also thought the claimant was keeping something back and that she was going to "drop someone else in it" and that if this involved a safeguarding issue they needed to tell her to raise it in writing as a grievance. They referred to these additional allegations as "not being for this arena". The claimant had misunderstood this as meaning she was not wanted "for this arena" but we are quite satisfied in the context of the discussion that Ms Smith and Mr Philbin simply meant that if she was going to raise allegations about other members of staff these should be dealt with separately as a grievance and they were not matters to be dealt with in the disciplinary interview. Whilst we accept that the claimant may genuinely have thought this was what it meant, there is no doubt in our minds that this was a complete misinterpretation. They were discussing what to do if she said she had additional information and they agreed they would ask her to put it in writing if it was an allegation against somebody else, but if it was linked to the allegation made against her they would listen to it now. They also discussed a safeguarding alert and whether the claimant would try and blame Gill Little. The claimant had been concerned as to who had raised the issue for which she was being investigated. It was not who she thought. Mr Philbin thought she would now try and come up with everything about Sam as she thought he was the one who had reported it until Mr Philbin had advised the claimant in the interview that it was not him and she said, "Oh, I've got an idea who it is now" so she is "trying to dob somebody else in".

62. They also discussed that they were not too bothered about what the claimant had said about Sam and Mr Philbin said, "the God bit is one of his strategies to keep him well" and they were both alright with that. JW's managers knew, including Ms Smith and Mr Philbin, the advice his psychiatrist had given him and the medication he was one, but the claimant did not know that. They decided to get her back in and then say that if she has got a complaint against somebody else to put it in writing. The claimant then came in.

63. Following this the claimant submitted a written complaint about Nigel Perry, that he never listened to her about staff not performing care duties and constantly pulled her up and did not keep things confidential. She was trying to improve the care in JW's house and she referred to speaking with Deborah Jones and Melanie Caterall about these things on 3 and 9 February.

64. Investigatory interviews also took place with Sam Irwin, Nicky Jones, Nigel Perry and Gill Little. They were all asked whether they had adopted a strategy of turning JW to face the wall. Gill Little said she did notice the chair turned at an angle on Tuesday 23 February and she thought this might be because somebody had had to get at the cupboard behind JW and it was moved back and then she carried on cooking. She went back in and the chair was moved again and that she asked the claimant why the chair was turned and the claimant said because JW had been mithering her. She thought this was awful and Ms Little recalls saying to her not to do that and offered to swap with the claimant. So the claimant went into the other room and had some time out. Ms Little was asked if that was the first she had noticed JW's chair had been moved and she said "yes" and that she swap with the claimant and did sit with JW and the claimant went to do some paperwork.

65. Nicky Jones was asked what she would do if the claimant became obsessive, that she would contact the duty office and/or have time out, so she was asked whether she would have turned JW's chair to face the wall. She said she was aware of the complaint about the claimant and "Steve Costello had told me what he had witnessed on Monday, that JW's chair was facing the door. He was unsure what to do and did not want to go straight to the office", so Nicky Jones had sent a text to Nigel Perry straightaway. She denied that she would ever have said to do this or practiced it herself. The only time the chair was moved was to get into the cupboard and she was confident in answering that she knew it was not in his care plans to move the chair in this way. She said what the claimant had said was a lie and she could not believe she would say that.

66. Steve Costello said that he had not reported it but he thought Sam Irwin had reported the claimant for turning JW's chair. Nigel Perry was also interviewed.

67. By 14 April 2016 it had been decided that a disciplinary hearing was warranted, that there was a case to answer and the claimant was informed of this.

68. On the same day the claimant's mother called Andrea Smith to tell her that the claimant had recorded the investigatory meeting and they would "have Andrea Smith and JP for being unprofessional and for calling the claimant a liar". The claimant disputed that her mother had said "liar" on the phone. However this was corroborated by a note taken by Andrea Smith so we accept the evidence regarding this.

69. Despite this contention by the claimant and the comments by Andrea Smith in the covert recording the claimant in evidence said that she did not think Andrea Smith was influenced at all by any whistle-blowing.

70. The disciplinary hearing was arranged for 11 May 2016. The allegations were:

(1) That you have placed a sanction on a service user which could constitute abuse on more than one occasion.

(2) That you failed to accurately record that there had been any challenging behaviour incidents on the contact record sheet.

(3) That you have demonstrated poor working practice and breached the agreed standards of care.

71. The claimant was advised that the above could constitute gross misconduct under the Council's disciplinary rules and procedures "and could result in a sanction being issued to you up to and including summary dismissal". It was set out that the disciplinary hearing would be heard by Pauline McGrath and the claimant had the right to be accompanied by a trade union representative or a Council employee of her choice. Management intended to call Nicky Jones and Gill Little as witnesses to support the management case. That letter was dated 27 April 2016.

72. On 4 May 2016 the claimant wrote to Ms Smith stating that she did not have time to prepare for the hearing on 11 May 2016 given her medical condition of work related stress. She also had a injury on the index finger of her right hand which limited movement and makes writing/typing a painful and slow process so she asked for a postponement.

73. An Occupational Health report of 6 May 2016 said she was not fit to return to work and she did not fit the criteria of being fit to attend a disciplinary meeting. The Occupational Health Physician said as far as he could ascertain "this is not about to avoid the meeting but rather ensuring she is fully prepared". She will need breaks in the meeting and hopes she will be able to have someone for moral support in the meeting and take notes as because of her finger injury she will not be able to do so. The meeting was then postponed until 16 May 2016. The claimant was told that Rachel Clear, Senior Assistant Director in Adult Social Care and Health, would be hearing the case and the claimant provided submissions for this on 11 May 2017 and disclosed the typed version of her covert recording.

74. The claimant also lodged a grievance on 11 May 2016. In this she raised the fact that:

- her protected disclosures had not been dealt with properly;
- that the interview was carried out in a biased and interrogatory way;
- that they had lied to the claimant saying they did not know who had made the safeguarding report;
- that they falsified the minutes and led witnesses to believe she had said things about them that were untrue;
- that they were recorded as saying that the claimant was lying;
- Mr Philbin should not have investigated her because he was aware of the whistle-blowing allegations she had made.
- She also stated that they had not told her she could not record the meeting as is set out in the minutes.

75. The claimant requested to be accompanied by a family friend, Richard Hughes, as she did not have a representative and was unable to take notes herself.

76. Because of this it was decided that the meeting on 16 May would proceed as an investigatory interview in respect of the matters the claimant had now raised. She asked to attend that meeting with Richard Hughes again.

77. On 13 May 2016 the claimant was advised that she could not have someone attend who was not a work colleague. It could only be a trade union representative or workplace colleague. If she needed assistance in facilitating a colleague's attention Mr Philbin could be contacted.

78. By 16 May 2016 the claimant had refused to attend without Mr Hughes and therefore the meeting did not take place.

79. The disciplinary hearing was then arranged for 4 July 2016 and the claimant was informed of this on 17 June 2016.

80. On 5 June 2016 Pauline McGrath, who was to undertake the disciplinary hearing, wrote to the claimant and reiterated the Council's rules on attendees. On 28 June 2016 she offered that her own personal assistant could take notes of the hearing. However the claimant said this was not the same as having somebody there for moral support. Also no-one had advised her what was happening about her grievances.

81. On 4 July 2016 the claimant attended again with Mr Hughes but would not enter the room. The respondent rearranged the disciplinary hearing for 21 July 2016 and urged the claimant to seek representation or for a colleague to attend with her. In a letter of 6 July 2016 the claimant was adamant that she wanted to attend with Mr Hughes and that she would be at a disadvantage if she did not have a companion. She was willing to attend the hearing and had provided the recording and a long statement of her position. She stated she would answer questions by email if there was no other alternative. Gill Middlehurst had said she did not want to go to the claimant's disciplinary hearing with her as she had found it all very upsetting.

82. The claimant in her letter of 7 July 2016 made some points regarding the disciplinary hearing:

(1) That the allegations were unclear as to whether it was a wheelchair or the lounge chair;

(2) whether it was facing the wall or the door;

(3) whether it was the Monday or Tuesday shift;

(4) Nicky Jones mixed up three shifts in her initial text;

(5) She stated Steve Costello told her about it but he denied that;

(6) In respect of signing the CRS it was common practice for one person to sign two people in – Gill Little and Stephen Fairbrother had both done this;

(7) Gill Little had not written in CRS about the claimant turning the chair and yet she said that this had happened on her shift as well and that the claimant had taken time out – this should have been recorded;

(8) Sam Irwin's statement said that JW was facing the wall opposite the claimant on the couch, so how could he have seen the television? She

> said she did not blame Sam Irwin as she understood he had had a severe mental breakdown approximately a month after the allegation and she believed Sam had been used as a pawn to get rid of the claimant. They had had a very positive relationship otherwise.

83. On 21 July 2016 the disciplinary hearing was held in the claimant's absence. At the hearing Pauline McGrath was present, Tracey Barker as advisory HR officer, Jim Philbin and Andrea Smith. Sam Irwin was ill and unable to attend but they said they could call witnesses Gill Little, Nicky Jones and Steve Costello. Mr Philbin read through the investigatory report. He stated:

> "JW is challenging but he trusts the staff that support him. He likes to see what is going on around him. Refer to the mental capacity assessment for JW. He does repeat things. When DM says she asked JW if it was ok to move his chair the assessment makes clear he has no capacity to give permission to do this. There is a positive behaviour support plan. JW likes young women and he doesn't like being ignored. This is relevant to when DM moved the chair as it meant that JW couldn't see DM in the room. Being ignored has been identified as a trigger for JW. JW can be restrained but staff use distraction techniques with him."

He also made the following points – that it was accepted it was not a wheelchair that was moved as initially reported but a chair, and that as the statement with Sam Irwin was done very quickly on 5 March and undertaken when he was well it should be accepted.

84. Gill Little was then called as a witness and cross examined. Nicky Jones was called as a witness also. She denied that she had ever advised DM to move the chair. Steve Costello confirmed that he had not told Nicky Jones that the chair was facing the wall, it was in its normal position when he came on duty. Gill Middlehurst was called as a witness for the claimant.

85. There was a summary of the case which stated that the claimant had accepted she had moved his chair, she had said it was because he was mithering or obsessing about her, that was not part of his care plan and the recommendation was to have time off or go to the duty officer. Nicky Jones denied ever having used this method in the presence of the claimant or telling her to do it. Gill Little said she told the claimant her actions were wrong on 23 February when she moved his chair and she swapped duties with the claimant as a distraction technique. Sam Irwin's statement says he told the claimant not to turn JW's chair around and it was wrong.

86. In Nigel Perry's statement he regretted not noting that on 23 February the claimant referenced that she had turned JW's chair. He should have dealt with it. He knew the practice was wrong.

87. The summary also recorded that the claimant had also failed to reference on the CRS of 1 March any concerns with JW's behaviour during her shift and failed to mention anything on handover. It should be noted that JW is profoundly disabled. He does not like being ignored. He likes to be communicated with at all times but the chair was moved so he was not facing the claimant and he would have to keep moving his head. He must have felt he had been deserted and was being punished and this has the potential to constitute abuse.

88. The disciplinary panel concluded that the claimant had covertly recorded the investigatory interview and in management's view she has admitted to placing a sanction on JW on more than one occasion. She had failed to record on 1 March that he had displayed challenging behaviour and that she had placed her own sanction on him. Whilst she recorded it on 23 February and the evidence was that Gill Little had told her it was awful and not to do it. By recording the interview she has contravened the Council's disciplinary rules. Further, she has stated on more than one occasion she cannot type or write normally because of her finger injury, but the transcript has been typed and stored by a third party, they believed, as the claimant was unable to type. This would be a contravention of the Code of Conduct and breaches a number of points within data Protection Act.

89. They said there was no excuse for the claimant's actions against JW, 'a vulnerable and elderly service user'.

90. The claimant actually appealed before she received the outcome of the disciplinary hearing. The outcome letter was sent out on 1 August 2016. In this letter Pauline McGrath explained that she decided to go ahead as it was clear that the claimant, however well or unwell she was, was unwilling to attend a hearing without Dr Hughes and the respondent's position in respect of that was clear.

91. The following allegations which were upheld were that:

(1) She had placed a sanction on a service user which could constitute abuse on more than one occasion.

(2) She failed to accurately record that there had been any challenging behaviour incidents on the contact record sheet.

(3) She had demonstrated poor working practice and breached the agreed standard of care.

(4) That she covertly recorded the investigatory interview on 23 March which is a contravention of the Council's disciplinary procedure and in doing so you have disclosed confidential information about an employee.

(5) Her actions have breached the Code of Conduct and the Data Protection Code of Conduct.

92. Mrs McGrath described the condition of the service user, JW. She then said that:

> "Sam stated that you turned the chair to face the wall. That he challenged you about this and you said that JW was obsessing with you so it's better he is facing the other way to stop his obsessive behaviour, and that JW kept trying to turn his head to see what was going on and that he was in that position for approximately three hours. Sam said he did not report it because he was fearful of you."

93. She then recounted Gill Little's evidence regarding 23 February "and your description of JW as mithering". Nicky Jones had stated that Steve Costello had

advised her of what had happened and that she had never advised the claimant to do this in the past. Steve Costello recalled Sam Irwin had told him that "he had reported you for turning JW's chair" but he did not recall himself telling Nicky Jones about it.

94. Regarding the covert recording, the claimant had not asked permission to make this recording and that given the claimant's injury to her finger they believed that the notes must have been typed by a third party and that would constitute a breach of the Council's Code of Conduct and Data Protection Code of Conduct as confidential information about an employee would have then been known to a third party: "Jim Philbin believed that you were guarded in your answers because you knew the matters were being recorded and that you avoided answering questions". It was not possible to ask any further questions regarding this issue because the claimant did not attend the hearing.

Allegation 1

95. In respect of allegation 1, Mrs McGrath's findings were that the claimant had admitted that she had turned JW's chair around because he had become obsessed with her:

> "You said it was ok because you had asked JW if it was ok and because Nicky Jones had done this previously. Nicky Jones denied it and it was clear from the mental capacity assessment that JW did not had the mental capacity to understand what was being asked of him."

96. There were clear strategies to use if JW had displayed challenging behaviour of becomes obsessive – distraction, time out or contacting the duty officer. The claimant did none of those things.

> "You also stated you had never turned JW's chair before but there was a reference on the CRS sheet that you had done this on 23 February which Gill Little confirmed."

97. She could find no reason why Sam Irwin or Gill Little would make these things up as they had nothing to gain therefore she found that she did place a sanction on the service user which was not in his care plan which could constitute abuse.

Allegation 2 – Failing to record accurately challenging behaviours on the Contact Record Sheet

98. This was the sheet of 1 March. Previously this had been recorded and it should be recorded. No explanation would be given as to why it had not been recorded on 1 March and Mrs McGrath believed the claimant was seeking to hide what had happened by not recording it on the CRS.

Allegation 3 – Demonstrating poor working practices and breaching standards of care

99. This was in relation to imposing the sanction on JW outside of the parameters of JW's care plan.

Allegation 4 – Regarding covertly recording the investigatory interview on 23 March in contravention of the Council's disciplinary policies

100. There was no explanation for this that Mrs McGrath found convincing. The claimant said she felt she was being discriminated against but Gill Middlehurst was there and could have taken notes and she found that allegation proven as well.

Allegation 5 – "That by doing so you have disclosed confidential information about an employee"

101. In the light of the fact that Occupational Health and the claimant said that she found it difficult to type or write due to her finger, and the fact that the transcript submitted was in a different font size (and she would say also in evidence that the name of a road had been corrected in handwriting and that it was unlikely that if the claimant had typed this, as she was later to assert, that road would have been incorrectly typed in the first place). It was therefore Mrs McGrath's belief that a third party had typed the transcript and confidential information about an employee will have been disclosed.

Allegation 6 – "That by your actions you have also breached the Code of Conduct and Data Protection Code of Conduct"

102. Mrs McGrath found this proven, although there was no detail given of what provisions were breached. She also said she had considered the grievances in respect of the claimant suggesting that she had been placed in a vulnerable position by raising concerns to managers who had also been involved in the investigation, but she did not uphold those grievances although she considered their content as part of the process. There was no further elaboration on this.

103. Mrs McGrath decided that summary dismissal was the appropriate sanction in the light of the proven allegations, the range of sanctions available and the credibility of the claimant's account, her actions and approach.

104. She advised in tribunal that she had in the past dismissed on the basis of failures in relation to recordkeeping.

105. The claimant's appeal letter of 26 July 2016 stated that the reason she felt the decision was unfair was because:

(1) She felt that the allegations related to her raising concerns and whistle-blowing about care in 24 Sorogold Close. She had stated at the time she was concerned about repercussions and four weeks later a confused and conflicting allegation was made against her.

(2) She believed that whistle-blowing was the reason the allegation was made.

(3) She had an excellent working record and not so much as a verbal warning in two years. Four weeks after the whistle-blowing an accusation is made.

(4) Similar issue. The serious allegations she made in the whistle-blowing were not investigated or reported to safeguarding by management.

(5) Her team leader approached staff members involved instead of using the correct protocol leaving the claimant in a vulnerable position.

(6) The Council is in breach of contract as she was entitled to a fair, objective, unbiased fact finding investigation. None of the ACAS guidelines were followed.

(7) There was a duty of care by the Council to observe mutual trust and confidence that is implied into any contract.

(8) She raised two grievances which were ignored for six weeks then linked to the disciplinary even though two of the management team were not present.

(9) She had been unfairly treated all along by management from the first allegations she raised with Nigel Perry, Deborah Jones and to Rachel Cleal who ignored the grievances. Pauline McGrath sent a decision by email not a hand delivered approximately two hours after the hearing stating:

"As I am on leave from tomorrow until 1 August 2016 full written reasons for my decision will be forwarded to you in due course along with your right to appeal."

This was an unnecessary delay and the claimant was advised to appeal immediately as she only had three months in which to apply to a Tribunal.

(10) That the claimant had requested she be accompanied by a friend other than the companions stated in the Council rules but this was denied and she was expected to attend alone. She did not think this was fair.

(11) The ACAS Guidelines state:

"An employer might even consider allowing a personal friend or family member to accompany an interviewee if this is reasonable in the circumstances."

(12) I was not sent a letter clearly outlining what the allegations were against me so I could be prepared beforehand.

(13) It clearly the allegation against me in the safeguarding report was that I turned a wheelchair to face a wall and that the service user cannot mobilise. This allegation does not match the investigation and was false. This was withheld in the investigation.

(14) There is no reasonable evidence or proof of the first allegation.

(15) The brief period in between me whistle-blowing and the accusation made against me led to me recording the investigation and being

accused of further allegations. I would have had no need to record anything if I had been fairly treated in the beginning.

(16) The recording proves discrimination against me as it was clearly stated I was not wanted in this arena proving a decision was made half way through the investigation to dismiss me without talking to all the witnesses and gathering fact. I was called names.

(17) The evidence sent to me by the investigators is full of conflicting statements. They told witnesses I said things I did not. They withheld evidence, they lied to me. The recording proves this.

(18) Ms Jones states that Mr Costello approached her and said the chair was turned on Monday. He denies he approached her and states that when he came on duty the chair was in its normal position. Mr Irwin states “when I was on my next shift the chair had been turned. I was off after 1 March, so what is Mr Irwin on about?”

(19) I have not withheld the recording or full transcript. Both have been given to the Council.

(20) I was willing to attend the second investigation but my companion was refused entry.

(21) Why was the second investigation held by the same two investigators who I had a grievance about? My witness can testify their eagerness to try to get me to go into the room either alone or with someone they wanted to facilitate themselves for me. It should be my choice according to ACAS.

(22) My friend is a doctor of high standing and reputation and he spoke to an employer lawyer on the day who stated when all other avenues have been exhausted I have the right of accompaniment. This led to me not being able to defend myself at the disciplinary hearing.

(23) I typed the transcript and all the correspondence myself. This is why I asked for an extension. It took me three days as I can type but I cannot grip a pen. I can prove this is on the laptop. No third party was involved. No-one has heard the recording or read anything to do with the disciplinary.

(24) Where is the CCTV evidence or proof a third party was involved?

(25) I have not breached any data protection laws or breached any confidential information about any fellow employee. Only myself and the Council have a copy of the recording.

(26) I rang the Information Commissioner’s office for advice afterwards and was told that I believed I was going to be victimised or discriminated against and a lot of data protection laws do not apply as it is on a personal device and I do not go public with sensitive material, which I have not.

(27) I did not impose a sanction on JW. I asked his permission which he can clearly understand and make decisions for myself. I used a diversion distraction technique to take the focus off myself before it led to JW being restrained. I was working in his best interest.

(28) There were no actual examples of diversion of distraction techniques in the care plan. It does not state anywhere you cannot turn a piece of furniture if it helps to calm the situation with the service user's permission. It does state that restraint must be the last resort when all others have failed. The situation did not escalate and JW was happy.

(29) How is creating a better outcome in a potentially volatile situation using poor working practices? Was it better that JW violently scratched his head, bites his arms, scream, kick staff, hurt himself and be restrained which angers and upsets him, compared to turning a chair slightly and taking his focus off myself. He was not harmed or disturbed in any way. There was no evidence or proof that JW suffered any psychological damage.

(30) Why did Sam Irwin not write in the CRS or contact the duty officer if he was so disturbed by my behaviour? I had a work related injury to my finger and found writing difficult. Even though I wrote the report I had forgotten about the earlier incident as it did not escalate. It was an oversight not a deliberate action to cover anything up. I had not covered anything up on the 23 February CRS report.

(31) How could Mr JW not see a 50" screen if he was pointing at the wall opposite the sofa I was sitting on? The wall with the fireplace on it not the wall behind him as first stated. Has anyone been to JW's home and done a reconstruction?

(32) Why was I ignored when I reported to my team leader that Mr Irwin was hearing voices on shift and acting strangely? I thought it might be his medication as he has been open about his schizophrenia. I was told it was not my concern even though he was looking after a vulnerable adult. Mr Irwin suffered a severe mental breakdown not long after and was hospitalised.

(33) Mr Irwin shouted at another member of staff angrily because he believed the other member of staff had reported me not him. Why was he so confused? I was proved to be correct when Mr Irwin suffered a severe mental breakdown and was hospitalised. How can he be a credible witness?

(34) I clearly reported that I turned JW's chair a bit to watch his DVD on 23 February in the CRS. This was signed off by team leader Nigel Perry before indicating this was an acceptable technique. I was unaware I had done anything wrong. This is validated by the fact I had witnesses a long serving member of staff do the same thing on several occasions. If Mr Perry had pointed out this was wrong I would have apologised and not done it again. He was generally very quick to pull me up about other things I had written in the wrong file, for example.

(35) Had I not turned JW's chair after tea on 23 February there is no proof or evidence as she did not record anything on CRS. Contact the duty office or speak to myself. The evening was without further incident. Why is it that she should be believed above myself when I did record the incident?

(36) The CRS concerning 23 February clearly shows another staff member on the same day signed himself and his co-worker in as I did, but I committed fraud for putting Gill Little was on shift? This was common practice amongst staff and can be seen many times in the files.

106. The claimant ended up by saying, "I apologise if I have written too many bullet points. There is much more evidence to prove I had an unfair investigation but I cannot list them all".

107. On 9 August 2016 the claimant was advised that her appeal had been referred to the Personnel Appeal Panel and they were currently trying to identify potential dates. The writer also addressed the matter of being accompanied by a friend and said that this would not be allowed: it would be an employee of the respondent or a union official or official employed by a trade union.

108. On 25 August 2016 the claimant as invited to an appeal hearing listed for 28 October 2016. On 22 September 2016 the claimant asked if her friend, Mr Hughes, could accompany her to the appeal hearing. It comes as no surprise that this was refused. The reply from a solicitor at the Council stated that the Council could arrange for an independent member of Council staff to accompany her who would be independent of HR and People Services and would take notes on her behalf, and she should let them know by Friday 14 October if she wished the Council to arrange this. The claimant submitted a lengthy reply.

109. The claimant's appeal was heard by a panel chaired by Councillor Susan Murphy with two other colleagues, Lynn Glover and Linda Maloney. The claimant had been advised the hearing would go ahead in her absence and she had also been invited to submit questions for Pauline McGrath which could be put to her at the appeal hearing and the claimant did provide those questions. There were 15 questions.

110. The panel agreed that all reasonable steps had been taken to encourage the claimant to attend and that it was reasonable to proceed in her absence. Jim Philbin and Andrea Smith attended the hearing. Notes were taken of the hearing but they were not verbatim. The dismissing officer also attended the hearing i.e. Pauline McGrath. The claimant's questions were put to Pauline McGrath by the respondent's solicitor. The claimant did provide 15 questions.

111. The questions were as follows:

(1) What had happened with the whistle-blowing? Why were the concerns not dealt with correctly? Why was she not protected? Why were staff not investigated? Why were safeguarding issues not raised? Ms McGrath was unable to answer those questions.

(2) This concerned Nigel Perry breaching confidentiality, and also that he had signed off the CRS report on 23 February and not said there was anything wrong in what the claimant had written. Ms McGrath said she was aware this had been taken up with Nigel Perry and a sanction taken.

(3) The third question was why was she not informed before the first investigation meeting what the allegations were? Ms McGrath answered that from the Council's policy a broad indication only is given and that was complied with.

(4) Why was it not made clear what was written in the safeguarding report and who had made the complaint? Why was the safeguarding report different from what the claimant was investigated for? Why was the CRS report of 23 February not shown to the claimant? Why did the dismissing officer not listen to the recording which she supplied which proved she was not treated fairly and that the investigating officers were subjective, that they lied, withheld evidence, slandered her and proves that she did not say the things that they then said to the witness she had said and that they stated I was not wanted in this arena? Ms McGrath said it was an early stage strategy meeting on the day the incident was disclosed and the safeguarding report was made, but also a request to undertake an investigation (which would get to the bottom of things). She said she had already answered why she did not listen to the covert recording . Andrea Smith stated she could answer the other parts of the questions: that they did not tell the claimant what was in the safeguarding report because they did not know; they did not withhold evidence or try and trap the claimant; they did not know she had turned a chair before, only after the investigatory interview did they look at the records and find the record from 23 February.

(5) Why was she given an unfair investigation? The evidence conflicted but it was allowed to stand. Why was it believed she had used a third party to type the notes without any proof? Ms McGrath said she believed the investigation was carried out in a professional manner following Council procedures. The claimant did not provide any more detail on what she says by "unfair". In respect of the report, as the Occupational Health report had said that she could not type or write, it was a reasonable suggestion that a third party was involved in typing it up.

(6) Has the disciplinary officer read through all the evidence as I am misquoted, the investigated minutes are manipulated and the witnesses conflict with one another? Ms McGrath said that she had.

(7) Regarding staff signing each other in on duty, was evidence produced to prove that? Ms McGrath stated, "I had sight of the records. My issue was by signing for GL it was implicating her that she was complicit in agreeing with the treatment (i.e. the treated meted out to JW)".

(8) Why were her grievances not dealt with? Ms McGrath said "I have already dealt with that".

(9) Able to comment on the allegation that she was misquoted; this was a misquote saying "I did not trust my colleagues or the Council. I clearly stated in a letter that my colleagues would not accompany me for fear of reprisal and revenge and that I did not have any faith or trust in the Council after the way I had been treated, not that I did not trust my colleagues". Yes, the claimant had said that her colleagues would not accompany her for fear of reprisal and revenge, but there was no evidence to support this. Gill Middlehurst attended the disciplinary hearing as a witness for the claimant.

(10) Why was Nicky Jones a witness when she clearly stated she witnessed nothing, was not on shift, mixes up three shifts, states Steve Costello approached her (yet he denies this), states the chair was turned towards the door? She was also told that I had said on shift that she turns JW to face the wall. I do not say this and the recording proves it. Why was this allowed? Ms McGrath replied, "I think this demonstrates the claimant's lack of understanding of the disciplinary process. NJ was called as a witness by management. DM had stated NJ had also turned the service user's chair.

(11) Why was Gill Little statement about me taking time out and turning JW's chair after tea allowed? She did not report the matter. She did not write in the CRS and she never reported anything to the duty office. It did not happen but yet you allowed it, why? The same answer. She was interviewed and called as a witness by management.

(12) Why does Jim Philbin state to you that JW doesn't understand the question? I asked about if it was ok to turn his chair a bit to see his DVD better when it clearly states in his care plan he can understand very clearly. I have worked with JW for two years and know exactly the extent of his understanding as he makes many personal choices over the day. Ms McGrath replied that a mental capacity assessment carried out by a qualified social worker clearly states what a service user is/is not able to understand. It states he has basic communication skills and repeats without understanding the meaning.

(13) I have worked with JW for two years without any warning and on many occasions have reported issues with him in order to assist and in his best interests. In 23 years of being a care assistant I have never received even a verbal warning. Why was none of this taken into account? Ms McGrath said "to act in JW's best interests you would need to do a BI assessment but it would then be recorded in his care plan. This is a normal document. You cannot just make BI decisions in the way the claimant is suggesting. The claimant is not qualified to make a judgment about what the psychological effects may be on him".

(14) Where is the proof I imposed a sanction? I did not impose anything. I asked his permission as I do with everything else. Sam Irwin was not present in the room therefore did not witness anything. He is now unwell to be asked questions so how can he be a credible witness?

Sam Irwin was in work when he gave a statement and was interviewed. There is no reason to doubt that that interview was correct.

(15) Why have the investigators been allowed to conduct such a personal, subjective, conflicting, unfair investigation and the Council covered up their indiscretions? Ms McGrath replied that "Council procedures are in accordance with the ACAS guidelines. The wording of the question is inflammatory and judgment of a situation the claimant chose not to be involved in. I have chaired several disciplinary hearings and I have shown sympathy and understanding that it can be an anxious/stressful process and I always make clear employees can ask for an adjournment. If I thought any element of the investigation had been inappropriate I would have had a duty to act accordingly. If I had any concerns I would have consulted with HR. I am a qualified nurse. I have a lot of experience as a senior manager so I can take these things and deal with them appropriately. I did not have any concerns".

112. In respect of any other questions of Pauline McGrath, she was asked questions about why she did not proceed with the earlier meetings. She said because she wanted to try and see if she could get the claimant to attend and had offered her PA. It was only when it was clear she would not attend that she went forward with it. She considered the two reports, asked for the mental health capacity assessment, considered the documents the claimant had submitted, and regarding allegation 1 she considered that:

> "It concerned an extremely vulnerable service user who was immobile, who did not like being ignored, who could be distressed. He repeated things; it doesn't necessarily mean he understood things. No evidence JW was obsessing over the claimant. She believed it was ok to turn the chair because she asked him. He wouldn't understand the consequences. She said NJ had done it previously. NJ denied this. Adamant would not do that. All staff stated they would not do that. It is not a matter referred to in the care plan as a strategy. There were other strategies. Gill Little stated she had said it was awful. The claimant admitted she had turned the chair so she did place a sanction on him. She said it was in his best interests but no evidence of best interest assessment had been carried out and it did constitute abuse."

113. Regarding allegation 2, the incident should have been recorded on May 1 and it had not been. The claimant stated only that she forgot. Sam did not witness any obsessive behaviour so he could not have noted that. In the absence of the claimant attending to answer questions she could only make the decision on what was available.

114. Regarding allegation 3 about poor working practice, the claimant had not acted in accordance with the care plan.

115. Allegation 4 related to the covert recording. This contained confidential information regarding another member of staff and Ms McGrath believed that the claimant had recorded it deliberately. There was no evidence the claimant was being discriminated against. Gill Middlehurst confirmed at the disciplinary hearing she was not asked by the claimant to take notes. It is clear that recording is not permitted so that was true.

116. With regards to allegation 5, as the claimant had stated she had an injured finger and Dr King referenced difficulties with writing and typing, and that it had been made a big issue of at times, and further that because the font was different to the other documents the claimant had typed Ms McGrath came to the conclusion that the claimant had not typed it herself. She also believed that the fact that it was typed Brent Road meant this must have been typed by a third person as the claimant knew Brent Road did not exist, it was Whint Road, and by getting somebody else to type it this information had been conveyed to an outside person.

117. Relating to allegation 6, this was a complete breach of the Code of Practice. Ms McGrath did not believe that the claimant typed the document; she had already breached Code of Conduct by covertly recording. Ms McGrath said she had read the claimant's transcript and did not see any abusive language or anything to suggest the claimant was distressed. If she had read something untoward she would have taken HR advice. She said she also considered that the claimant had never apologised or recognised she had made a mistake or done anything wrong. He was a vulnerable, immobile service user. The claimant had not said she had had a bad day, nothing. She says she was discriminated against but no evidence of that. She was asked if she had considered any mitigation. She said “yes”, she had considered everything the claimant had submitted. Two witnesses were consistent. There was no reason to disbelieve them and the claimant was unwilling to engage with the process and she had to make a decision on the basis of the evidence she had. She was asked whether she considered alternative sanctions. She said the allegations were serious. The claimant take not take responsibility, ownership or make an apology. There was nothing like that. She was bringing the Council into disrepute by her behaviour.

118. In respect of the holiday and the claimant having to wait for an outcome, Ms McGrath said the holiday was unplanned. Her mum was unexpectedly taken into hospital and she had to go to Ireland. She was given the outcome immediately and it was the full grounds to follow. She stated that Sam Irwin’s and Gill Little’s statements, there was no reason not to believe them, stated that the claimant had done this on two occasions.

119. Ms McGrath also mentioned that the claimant's mother must have had access to the information as she phoned the office and mentioned things that were in the transcript. Pauline McGrath also agreed that the fact that Sam Irwin had not reported anything would be taken up with him when he returned from sick leave, and she mentioned that she had also asked the signing of the note to be changed so that both people must sign and the time be recorded.

120. In respect of the whistle-blowing complaint Mr Philbin explained that the cannabis allegation against Ian Rowe had been investigated before and that it was accepted that it was herbal cigarette. Mr Philbin confirmed that the claimant had reported Sam Irwin regarding the “talking to God” issues in her whistle-blowing complaint but they could not tell her it was one of his “coping mechanisms”, that he was not hallucinating but expressing his religion, had been told by Mr King (his psychiatrist) that he should do that to assist and that Mr Philbin was aware of it.

121. The appeal panel agreed that Ms McGrath had reached a reasonable conclusion relating to the six allegations with the evidence she had before her, that

they constituted gross misconduct and that the sanction of summary dismissal fell within the band of reasonable responses. They considered other disciplinary action as an alternative to dismissal but unanimously agreed there had been a loss of trust and confidence in the claimant and the allegations were serious. They were particularly concerned the claimant still did not appear to believe she had done anything wrong in turning JW's chair away from her and that this had been done in his best interests. They also took into consideration the patient's mental capacity assessment, that he did not like being ignored, and that it was not a strategy for dealing with his challenging obsessive behaviour. They took into consideration the claimant's colleagues in interviews stating they would never do this and would use distraction techniques or time out. The claimant was not entitled to make a decision that something was in the service user's best interest in the way she was suggesting. She had used the word "mithering" to describe JW's obsessive behaviour. They were in no doubt that the claimant's actions did impose a sanction on a vulnerable service user and given the claimant's failure to recognise this there had been a loss of trust and confidence in her as an employee. They were concerned about the claimant's actions in covertly recording the investigatory interview and there was no evidence that the claimant was being unfairly treated. They felt this also constituted to a loss of trust and confidence in the claimant to comply with the respondent's procedures in future.

122. The committee were aware that the claimant maintained a belief that the allegation was made against her because it related to her raising concerns about whistle-blowing, but there was no evidence to support this and in particular the claimant had agreed she had turned the service user's chair away from her on more than one occasion due to his "mithering", and that Ms McGrath in making her decision had no other motivation than considering the evidence properly.

123. The outcome letter was sent to the claimant on 3 November 2016. It explained why the hearing went ahead in the claimant's absence and stated that the committee unanimously agreed with the decision of the dismissing officer, that all of the allegations were proven and constituted gross misconduct, and that the sanction of summary dismissal fell within the band of reasonable responses.

The Law

124. Meaning of Protected Disclosure

43A of the Employment Rights Act 1996 states that "in this act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H, 43B

(i) in this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure (is made in the public interest) and tends to show one or more of the following:

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

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligations which 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 the information tends 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 a disclosure -

(a) to his employer or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer or

(ii) any other matter for which the person other than his employer has legal responsibility, to that other person.

(2) a worker who in accordance with the procedure whose use by him is authorised by his employer makes a qualifying disclosure to a person other than his employer is to be treated for the purposes of this part as making the qualifying disclosure to his employer.

125. It has to be established that the claimant has provided information to the respondent, whilst the information may contain allegations within it it must be sufficiently particularised to constitute information. A harsh dividing line between information and mere allegations is no longer required, in **Kilraine -v- London Borough of Wandsworth EAT 2015** Langstaff J said "I will caution some care in the application of the principle arising out of Cavendish Munroe that the difference between information and allegation is not one that is made by the statute itself, it would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggests that very often information allegation are intertwined, the decision is not decided by whether a given phrase or paragraph is one or rather than the other but is to be determined in the light of the statute itself, the question is simply whether it is a disclosure of information, if it is also an allegation that is nothing to the point".

126. Separate disclosures can be aggregated to establish information, in **Norbrook Laboratories -v- Shaw 2014 EAT** quite trivial matters were involved in a series of emails which taken together constitute a disclosure about Sales Representatives driving in snow. In **Babula -v- Waltham Forest 2007** Court of Appeal it was established that the information must tend to show a breach not that it

is accurate. A claimant does have to establish a reasonable belief even if their belief is wrong. In **Babula** it was said that the word belief in Section 43B(1) is plainly subjective, "it is the particular belief held by the particular worker, equally however it must be reasonable which is an objective test. Furthermore like in **Darnton** I find it difficult to see how a worker can reasonably believe that an allegation tends to show there has been a relevant failure if he knows or believes that the factual basis for the belief is false".

127. A claimant also has to establish public interest following the Enterprise and Regulatory Reform Act 2013 although the requirement of good faith has been removed. In **Chesterton Global -v- Nurmohamed 2015 EAT** it was made clear the test of the Tribunal is not an objective one for public interest but rather whether the claimant had a reasonable belief that the disclosure was in the public interest. In this case no issue arose in respect of this if proven the disclosures were in the public interest. Public interest was not challenged in this case. Clearly the proper conduct of the provision of residential care for vulnerable adults is a matter of public interest.

128. **Black Bay Ventures Limited -v- Gaheer 2014 EAT** which set out the steps the Tribunal should take in its reasoning in a whistle blowing case. It should:-

(1) separately identify each alleged disclosure by reference to date and contact;

(2) identify each alleged failure to comply with a legal obligation or health and safety matter;

(3) identify the basis on which it is alleged each disclosure is qualifying and protected and

(4) identify the source of the legal obligation relied upon by reference to the statute or regulation.

129. The Tribunal should then go on to consider whether the claimant held a reasonable belief as required by Section 43B(1) of the 1996 Act then the enquiry should move onto whether the disclosure was made in the public interest, following which these obstacles are surmounted a Tribunal must identify the alleged detriment, the date thereof as part of its findings and then ultimately decide whether the detriments arose because of the protected disclosures.

130. The burden of proof is on the claimant to establish a protected disclosure has been made (**Goulding -v- Lands Securities Trillion Limited UKEAT 2006**

<u>Automatically unfair dismissal – section 103 Employment Rights Act 1996</u>

131. Section 103A of the Employment Rights Act 1996 provides that:

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

132. A "principal reason" is the reason that operated in the employer's mind at the time of dismissal as set out in **Abernethy v Mott, Hay and Anderson [1974]** Court

of Appeal. The burden of proof in a section 103A claim is the same as that which applies in other automatically unfair reasons for dismissal. Technically the burden is on the employer to show the reason for the dismissal. Generally the employer seeks to discharge this by showing that where dismissal is admitted the reason for it was one of the potentially fair reasons under section 98(1) and (2) of the Employment Rights Act 1996. It is said that the employee thereby acquires an evidential burden to show, without having to prove that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason advanced. However once the employee has satisfied the Tribunal that there is such an issue the burden reverts to the employer, which must prove on the balance of probabilities which of the competing reasons was the principal reason for dismissal.

133. In **Kuzel v Roche Products Ltd [2008]** where the reason for the dismissal was not accepted to be a fair reason under section 98 of the 1996 Act, that did not mean that the Tribunal found that it was the protected disclosures that led to dismissal. At the Court of Appeal Lord Justice Mummery rejected a contention that the burden of proof was on K to prove that that her making of the protected disclosures was the reason for her dismissal, but he agreed with the EAT that once a Tribunal has rejected the reason for dismissal advanced by the employer it is not bound to accept the reason put forward by the claimant. The Tribunal could conclude the true reason for dismissal is one which has not been advanced by either party.

Detriment

134. Section 47B of the 1996 Act states that:

(i) 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;

(ii) this section does not apply where:

(a) the worker is an employee and

(b) the detriment in question amounts to dismissal.

135. In **Shamoon -v- Chief Constable of Royal Ulster Constabulary (Northern Ireland) 2003** House of Lords it was said that "a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment. In order to establish detriment is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of and the detriment can arise after the end of the employment relationship.

Causation (detriment)

136. In respect of the test for whether the protected disclosure was the reason for the treatment in a detriment claim,. the Tribunal must be satisfied that the claimant was subjected to a detriment on the ground of the protected disclosure. In this regard the Tribunal must be satisfied the disclosure was a material factor behind the alleged detriment. This is set out in **Feckitt -v- NHS Manchester 2012** Court of Appeal where Elias LJ held "I agree with the submissions that liability arises if the protected

disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act, the reason which has informed the European union analysis is that unlawful discriminatory consideration should not be tolerated and ought not to have any influence on the employers decision, in my judgment that principle is equally applicable where the objective is to perfect whistle blowers particularly given the public interest in ensuring they are not discouraged from coming forward to highlight potential wrongdoing. In my judgment the better view is that Sections 47B will be infringed if the protected disclosure materially influences (in any sense of being more than a trivial influence) the employer's treatment of the whistle blower. If Parliament had wanted the test for standard of proof in Section 47B to be the same as for unfair dismissal it could have used precisely the same language but it did not do so".

137. This raised the issue of whether the individual was responsible for the detriment but was innocent of the whistle blowing disclosures could be responsible for a whistle blowing detriment. In the **Royal Mail -v- Jhuti [2006] EAT** this situation was addressed where Mitton J states, "I am satisfied that as a matter of law a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee who is in possession of the true facts can be attributed to the employer or both of them".

138. There is also provision for vicarious liability set out by the Enterprise and Regulatory format 2013 where a worker has been subjected to a detriment by another worker of their employer stating that that should be treated as also down by the worker's employer, whether it was done with the employee's knowledge or approval.

Causation Generally

139. In respect of establishing causation more generally this would be decided in many cases by inferences as in a discrimination claim and it is unlikely to be positively acknowledged that whistle blowing caused the detriment or dismissal.

140. For inferences a claimant can rely on natural justice in respect of the notice of the charge i.e. that the claimant did not know he was under scrutiny, natural justice in respect of a defective investigation and bias, breach of protocol or procedure or policies, inferences can be drawn from totality of the primary facts and the context of the case.

Unfair Dismissal

141. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> "A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

142. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "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 sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

143. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

> (1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
>
> (2) were there reasonable grounds on which to base that belief?
>
> (3) was a reasonable investigation carried out?

144. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

145. The Tribunal must not substitute its own view for the range of reasonable responses test.

146. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure.

147. In **Sainsbury's PLC v Hitt [2003]** Court of Appeal the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

148. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

149. In addition, if it is found that the claimant's dismissal was unfair, in relation to remedy the following issues must be considered (**Polkey v A E Dayton Services [1988]**). If the Tribunal finds there was a failure to adopt a fair procedure and the consequence was that dismissal was unfair then the Tribunal can consider whether, had a fair procedure been followed the claimant would still have been dismissed? If the procedure failings were so severe that no reasonable employer acting reasonably would have dismissed the claimant then **Polkey** does not act to reduce any compensation.

Wrongful Dismissal

150. Any dismissal by the employer in breach of contract can give rise to an action for wrongful dismissal at common law and it usually arises where the employee has been dismissed without notice in a situation where summary dismissal is not justifiable i.e. the employee is not guilty of gross misconduct. A successful claim for wrongful dismissal will result in notice pay being paid.

151. In order to decide a wrongful dismissal claim, therefore, the Tribunal has to decide whether in fact the claimant was guilty of the conduct alleged and if so whether it was gross misconduct.

152. In order to establish that summary dismissal was justified by gross misconduct it is necessary to establish that the employee has engaged in repudiatory conduct which justified summary dismissal. In order to amount to a repudiatory breach the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract (**Laws v London Chronicle (Indicator Newspapers) Limited [1959 Court of Appeal**). The employer must be able to prove there was a repudiatory breach in order to justify dismissing summarily an employee without incurring liability for wrongful dismissal. It is not enough for an employer to prove that it had a reasonable belief the employee was guilty of gross misconduct. That is the test for statutory unfair dismissal. The Tribunal must be satisfied both that the employee committed the misconduct and that it was sufficiently serious to amount to a repudiation.

153. The degree of misconduct necessary in order for the employee's behaviour to amount to repudiatory breach is a question of fact for the court or Tribunal to decide. The case of **Neary & another v The Dean of Westminster [1999]** ECJ (Special Commissioner) established a test 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".

Submissions

Claimant's Submissions

154. The protected disclosures the claimant relied on were those made on 21 January to Nigel Perry:

(1) That Ian Rowe had smoked cannabis while at work;

(2) That he had stolen toilet rolls; and

(3) That John Richardson had been sleeping while at work.

155. There were then protected disclosures to Melanie Caterall and Deborah Jones on 9 February which replicated the three to Nigel Perry.

156. On 3 February the claimant raised the issue of Nigel Perry asking the claimant to alter a record.

157. On 10 February the claimant raised with Nigel Perry that Sam Irwin was presenting symptoms of schizophrenia whilst at work.

158. In relation to the cannabis and the toilet rolls the claimant relied on section 43B(1)(a), that a criminal offence had been committed.

159. In relation to sleeping on duty the claimant relied on section 43B(1)(b), failure to comply with a legal obligation i.e. breach of his contractual duties to the respondent, and the respondent's duty to JW to meet his needs for care and support, or that the health and safety of JW had been endangered (section 43B(1)(d).

160. In relation to being asked to re-write a record she relied on failing to comply with a legal obligation which is a requirement of the Health and Social Care Act 2008 (Regulated Activities Regulations 2014).

161. The claimant relied on the detriments of the instigation of the disciplinary proceedings and the manner they were conducted. The claimant accepted that the decision to instigate the proceedings was not materially influenced by the claimant making protected disclosures. However, in respect of the investigation she relied on the rush to judgment from the investigation officer; the incuriosity about the circumstances in which the allegation against the claimant was made; the false allegation that the claimant was told in the investigatory interview that she could not record it; and the failure to investigate properly the issue of JW's capacity.

162. In respect of automatically unfair dismissal the claimant submits that the whistle-blowing was the principal reason for her dismissal. The claimant relies on Mr Philbin presenting a misleading picture to Pauline McGrath i.e. a **Jhuti** scenario.

163. In respect of unfair dismissal the claimant stated that it was unfair and procedurally unsound not to admit Dr Hughes; just because it is not required by statute does not mean it is reasonable to exclude him; that it was reasonable of the respondent to relax the procedure where the claimant could not obtain union representation and none of her colleagues wanted to assist her. She believed the issue of capacity would have been challenged had Dr Hughes been there; that allegations 2 and 4 were not sufficiently serious to justify dismissal; that the recording showed that the investigators were biased; that Jim Philbin should not have been involved because he was involved in the whistle-blowing allegations.

Respondent's Submissions

164. The respondent agrees that the claimant made three allegations to Nigel Perry and that these were repeated to Melanie Caterall and Deborah Jones on 9 February re the cannabis, toilet rolls and sleeping on duty. Regarding the other two protected disclosures, the respondent disputed them.

165. The respondent stated that there was no connection between the claimant's dismissal and the protected disclosures. If there was any doubt this could be demonstrated by the fact that the claimant's protected disclosures were treated seriously by Melanie Caterall and Deborah Jones and that they were followed up and the claimant was given every encouragement to raise matters. Other matters were also dealt with in a team meeting without identifying the claimant. Further, nothing happened between the time she made the allegations until 3 March. The claimant could not point to any signs of any retaliation from any colleague or manager at all.

166. Whilst there was a discrepancy between how Nicky Jones knew of the allegation as Steve Costello had denied it, the claimant had in any event agreed that she had moved the chair. Given that the claimant had accused Nicky Jones of doing it at a time when she did not know Nicky Jones had raised a complaint, it seems highly unlikely that Nicky Jones would have relayed a complaint about the claimant doing the same thing as it was likely to implicate her if she had been doing the same.

167. The allegations that the investigation was corrupted in order to ensure the claimant's dismissal could not be sustained. There was nothing to connect Nicky Jones to the whistle-blowing complaint such as to suggest that Nicky Jones raised the complaint deliberately. Again this is unlikely because the claimant agreed she had done something that night. The claimant had been unreliable in evidence as she, after saying that there was no discussion with Sam Irwin, agreed that there had been. The claimant now agrees the investigation was instigated without reference to the whistle-blowing allegation. The claimant agreed that Andrea Smith was not influenced by her disclosures.

168. In the covert recording nothing was said by Jim Philbin or Andrea Smith which indicated the conduct in the investigation was motivated by the fact the claimant had made protected disclosures. Part of the reason the claimant believed that she was set up for dismissal was because she misunderstood the transcript where a reference was made to "not wanted in this arena", but it is clear that it was her allegations about other members of staff were "not for this arena".

169. The fact that Andrea Smith and Jim Philbin expressed doubts about the claimant's credibility does not in any way prove that the decision was influenced by the claimant's whistle-blowing. In fact quite the opposite, as Andrea Smith was the first person to mention this. Andrea Smith interviewed Gill Little, Nicky Jones and Steve Costello and the claimant accepted she was uninfluenced by whistle-blowing, therefore if incorrect matters were put to those witnesses that could not have been motivated by the whistle-blowing. Neither were the disclosures of such significance that three members of staff, Nigel Perry, Deborah Jones and Jim Philbin, would seek to engineer the claimant's dismissal. The evidence did not need to be manipulated because the claimant admitted what she had done and the dismissal was because of the matter admitted.

170. In addition it was the safeguarding team who recommended the investigation take place. Regarding the CRS reporting being a failure to comply with a legal obligation, the respondent disputed that this could be the case as the claimant was only being asked to remove personal opinion which was legitimate.

171. The claimant accepted that she had "guilty of a number of the matters she was charged with – turning the chair, failing to record, covertly recording".

172. Regarding the unfair dismissal, it was perfectly reasonable to refuse Dr Hughes' attendance. Breaches of confidentiality could arise and the respondent would not be able to refuse this in future. There was no disability suggested that required a specialised representative. Alternatives were suggested.

173. Further, if there were any procedural defects the claimant could have been dismissed in any event (**Polkey**).

Conclusions

Unfair Dismissal

174. In respect of the allegations against the claimant we find firstly that the respondent did not have enough evidence to establish (5) and (6) as Mrs McGrath was unable in evidence to articulate what the breaches were that she was referring to. (1) and (3) were really the same allegation and we were satisfied that the respondent had sufficient information to form a reasonable belief in the claimant's misconduct in respect of the allegation regarding the chair turning. In respect of (2) and (4) the respondent had enough information to conclude that the claimant had undertaken these matters.

Allegation 1

175. We find in relation to allegation 1 the **BHS v Burchell** test is satisfied. There was a sufficient investigation and information gathered for the respondent to form a reasonable and genuine belief that the claimant was guilty of the allegation of turning the service user's chair and that it had a detrimental effect on the service user to the extent that this was a sanction rather than any positive measure. The evidence they had was Sam Irwin's statement taken a few days after the allegation; the fact that in cross examination the claimant admitted she had spoken to him on the day which confirms the veracity of his statement (and hence supports the respondents view at the time that the statement was reliable); the fact that in interview Gill Little regarded it as wrong and confirmed the claimant had done it before; the fact that the care plan showed there were alternative actions the claimant could have taken; there was no evidence anyone else considered using this strategy as a sanction; the fact that the claimant had clearly stated in a previous record that she had done this before and she admitted she had done it on the day.

Allegation 2

176. In relation to allegation 2, that Mrs McGrath's finding was inconsistent as she found JW did not behave obsessively towards the claimant on 1 March but also that the claimant had failed to record it. Clearly the claimant had failed to record obsessive behaviour. This was particularly strange as the claimant had recorded it on 23 February and given that Nigel Perry had not raised it as a problem with her it is surprising she did not record it again. This was not a real inconsistency. Mrs McGrath did not accept JW was behaving obsessively, but if that was what the claimant thought she should have recorded it nevertheless.

Allegation 3

177. Allegation 3 was the same in effect as allegation 1.

Allegation 4

178. Was that it was clear the claimant had covertly recorded the meeting? In submissions she relied on not being told she could not record it. However, it is plain that meetings are not to be recorded unless all parties agreed, therefore this allegation is made out . The claimant relied on the covert recording showing the unfairness of the investigation. While we have found that the investigation officers were forming a view, they put all the claimant's points to the witnesses that they subsequently interviewed and so this did not influence how they undertook the other interviews.

Allegation 5

179. The fact that Pauline McGrath found that the claimant had disclosed information about an employee, particularly because she had had the recording typed by a third party. However the claimant in her appeal stated she had typed this herself and maintained this in cross examination and was convincing on this point. However, the fact she did not attend the appeal did not give the respondent the opportunity to assess her credibility and therefore it was reasonable for Ms Murphy to find that allegation upheld.

180. Of course Pauline McGrath did not have this explanation for the transcript and therefore could not take it into account, and therefore again she had sufficient evidence to find allegation 5 upheld. It was reasonable of her to rely on the claimant's medical evidence and the mistyping of the address

181. Further the conversation between the claimant's mother and Andrea smith shows she was privy to the recording which contained other,private information. The claimant did agree that she had told her mother about SI's mental illness. She relied on the fact that his father had posted this on Facebook to say that this was not private information. However, the facebook posting was after this incident.

182. Accordingly there was sufficient information at the time to support the respondent's conclusions.

Allegation 6 – Actions breach the Code of Conduct and Data Protection

183. Given that the respondent could not explain how these Codes of Conduct had been breached we find that their conclusions in this respect did not meet the **BHS v**

Burchell test as they could not have a genuine belief and they had certainly not undertaken sufficient investigation. This was a potentially unfair finding and not very well argued in the dismissal letter.

Investigation

184. In respect of whether the investigation was inadequate (considering the claimant's submissions):

(1) The fact that the investigating officer in the recess started to form a view that the claimant was lying is surprising and is not in the spirit of the investigation, which should be not to judge until all the interviews have been concluded. However, by itself we do not think this makes the investigation unfair as the respondent's interviewing officers did continue to interview and put matters from the claimant's interview to the other witnesses.

(2) As regards the lack of curiosity on the part of the respondent about the circumstances in which the allegation against the claimant was made (i.e. the discrepancy between Nicky Jones and Steve Costello), we do not think this is a compelling issue. The claimant admitted turning the service user JW because he was mithering or obsessing or staring at her and this was the allegation which went forward.

185. Regarding the record in the minutes that the claimant was told in the investigatory interview she could not record it, it is clear the claimant was not told this. All the investigatory interviews had this at the beginning of the interview. As the minutes were drawn up when the respondent was not aware that the claimant had recorded it so there was no particular reason for including it. We find on the balance of probabilities it is likely that this was just a matter that was automatically included when minutes were drawn up and that on this occasion at least the interviewers forgot to remind the claimant of this matter. It does not alter the fact that the claimant knew she should not be recording the meeting this was clearly set out in the respondent's policies and is in any event a matter of commonsense.

186. With regard to the failure to investigate properly the issue of JW's capacity, we were satisfied that the respondent was fully aware of the service user's capacity and did not exaggerate his incapacity. The purpose of his treatment plan was to convert his limited capacity into practical advice which the workers were required to follow and they were advised to take advice from a senior member of staff if they had any doubts about how to treat JW and/or take time out. They were not entitled to use their own judgment in respect of such things as distraction techniques.

Respondent's refusal of the claimant's request that Dr Hughes attend

187. Legally a respondent is only required to allow a work colleague or a trade union officer to attend a disciplinary hearing with an employee. However in disability cases this will often be relaxes, particularly if the requested representative has some relevant specialist skill. The claimant here stated that none of her colleagues would

attend; certainly Gill Middlehurst would not do. However there was no evidence the claimant had made any other enquiries regarding any other colleague.

188. The respondent made some suggestions for compromise:

(1) That a note taker would be provided; and

(2) That Dr Hughes could stay in a separate room and the claimant could have breaks to consult with him, which whilst cumbersome was not unreasonable.

189. The claimant also stated that Dr Hughes would have been useful in challenging the respondent's perception of the capacity of JW. We find this inappropriate and worrying. We know nothing about Dr Hughes. It seems fanciful to suggest that he would have been in a position to better assess JW's capacity above the view of the respondent and their expert who had drawn up the care plan based on direct communication and observation of JW. This is also a misapprehension of the role of a companion to such a meeting and was seeking to suggest that Dr Hughes would have been a witness.

190. In any event we find that the respondent's attempts to compromise on this issue were reasonable and that it was not unfair for them to ultimately not allow Dr Hughes to attend.

191. Taking all these matters together we find they did not make the investigation unfair.

Dismissal within the range of reasonable responses

192. We find that allegation 6 was not satisfactorily proven and that allegation 3 was simply a repetition of allegation 1. We agree with the claimant's submission that allegation 4 were not sufficiently serious to justify dismissal. Regarding allegation 5, this was made out on the facts available to the respondent at the time. Allegation 2 was also established. By itself it may not have been sufficiently serious to dismiss the claimant. We also bear in mind Mrs McGrath's evidence that she had dismissed for recordkeeping alone in the past.

193. However, regarding allegation 1 in our view there was sufficient evidence for the respondent to find proven that the claimant had moved JW's chair in effect in retaliation for him mithering or obsessing over her, and that that by itself was sufficient to dismiss the claimant. It was towards the harsh end of the range of reasonable responses as the respondent may have chosen to give the claimant a final written warning. However, given the importance of safeguarding individuals who cannot speak for themselves and given the responsibility of the respondent to ensure that these vulnerable individuals were protected, we find it was within the range of reasonable responses of an employer in this area.

194. We did consider whether it was unfair to dismiss when Nigel Perry had failed to remonstrate with the claimant after the first occasion of moving the chair which was recorded by the claimant. It could be said this lulled the claimant into a false sense of security and that a final written warning would have been more appropriate.. However the other actions found proven would in any event have

tipped a final written warning for allegation 1 over into a dismissal as it would have been legitimate for the respondent to find they had lost trust and confidence in the claimant as an employee for covertly recording the meeting,for failing to record and for passing on information to a third party, which as we found was a reasonable assumption for them to have made at the time.

Protected disclosure claim

195. In respect of the claimant's protected disclosures, as Nigel Perry was not called there was no evidence to dispute the contested disclosures. The only issue which really arises in respect of those is whether the claimant had a reasonable belief that there was a breach of a legal obligation in respect of asking her to alter the contact record sheet. This was in light of the fact that in the discussion between the claimant, Melanie Caterall and Deborah Jones it was explained that the reason Nigel Perry had remonstrated with her was because she was expressing an opinion, so at that stage she could not have a reasonable belief that there was a breach of a legal obligation as she was not being told not to report things but just not to express an opinion, which would not have breached any legislation.

196. In respect of the Sam Irwin disclosure, we accept the claimant had a reasonable belief that Mr Irwin was not well and this could place the service users and colleagues in health and safety danger.

197. Accordingly we accept the claimant's protected disclosures apart from the one relating to the CRS.

Detriment

198. In respect of the detriment, the claimant relied on an inadequate investigation and her dismissal.

Inadequate Investigation

199. We make our finding in respect of whether there was an inadequate investigation above under “unfair dismissal” and therefore rely on those findings. Accordingly we find the investigation was not inadequate and therefore no detriment is established.

200. If we are wrong on that we rely on our findings below that there was no causal connection between the dismissal and the claimant's whistle-blowing allegations as the same considerations apply.

Dismissal Causation – unfair dismissal as a result of making a protected disclosure

201. In respect of whether the dismissal was caused by the claimant's whistle-blowing we have considered the following inferences:

(1) That Nicky Jones’ complaint was made relatively soon after the claimant raised her issues;

(2) That Nigel Perry had lacked confidentiality in the past and so it was possible he may have told other people that she had made these disclosures (otherwise there is no causal connection).

(3) That there was a discrepancy in the investigation in that Nicky Jones said Stephen Costello had told her about the chair being moved, whereas Stephen Costello denied this.

(4) Further, the respondent did not bring Jim Philbin or Nigel Perry to give evidence.

202. However, we have borne in mind the fact that the claimant agreed in evidence that she had discussed the moving of the chair with Sam Irwin when previously she had said he was lying when he had said this. This severely affects the claimant's credibility. This would not be fatal to the causation issue, however it does establish that Sam Irwin's statement on 5 March was substantially true. As he did not report it this does not immediately appear as a situation where the claimant was being set up; indeed she could not have been "set up" as she admitted she had actually done something, turning the chair slightly, and she had done it relatively close in time to when Nicky Jones reported it.

203. Further, Gill Little and Nigel Perry knew on 23 February 2016 that the claimant had moved the chair. This was after the claimant had made whistle-blowing disclosures and therefore if there was any staff interest in retaliating against the claimant then there was an opportunity there to do it, particularly for Nigel Perry. Instead, of course, he later faced disciplinary action for not raising the turning of the chair with the claimant after her note on 23 February. There was no explanation as to why Nicky Jones would be more likely to make an exaggerated complaint against the claimant rather than Gill Little or Nigel Perry. In fact there was no explanation as to why Nicky Jones should be concerned about the matters the claimant had reported. As nothing turned on the matters the claimant reported as none applied or impinged on her (Nicky Jones), and there was no evidence that she had a particular motive to report these matters or any reason for feeling aggrieved that Ian Rowe or John Richardson had been criticised.

204. Ultimately there was no evidence that any of the claimant's co-workers knew about her whistle-blowing allegations. While some of her concerns about the service user were discussed in a team meeting, these were not the matters which were the subject of the whistle-blowing.

205. Further, the decision to undertake an internal investigation (which ultimately led to the dismissal) was instigated by the Safeguarding Unit who felt that this would be sufficient and it would not be necessary to report the matter outside.

206. However, the most compelling evidence to us was the claimant's own evidence of the covert recording that in order for there to be a chain of causation for Nicky Jones to report matters and then for the investigators to do a "hatchet job", Jim Philbin was the linchpin and it is very clear from the covert recording that Andrea Smith led the criticisms of the claimant and that Mr Philbin was concerned with professional issues such as whether it was being used as a sanction. Significantly there was no mention whatsoever in that covert recording of the claimant's whistle-

blowing. We would have expected there to be some mention if this was on Jim Philbin's mind at all while the investigation was being considered.

207. In respect of the dismissal, the claimant relies on a Jhuti point re defective investigation being deliberate in order that Pauline McGrath would dismiss the claimant. However, first of all we do not find the investigation was defective as set out in our section on unfair dismissal. Secondly, any problems with the information Mrs McGrath had was because the claimant did not attend the hearing. She considered the points the claimant made in writing. The claimant clearly had admitted the matters she was charged with and as Mrs McGrath gave evidence that she had dismissed somebody for faulty record keeping in the past, there was nothing to suggest her decision to dismiss for the various allegations against the claimant which she found proven was influenced by any extraneous factors. The most one could say is that it was difficult to explain what the breaches of the Code of Conduct were, but however this does not alter the fact that the reason the claimant was in a disciplinary hearing was legitimate and the reason she was dismissed was genuinely because of the reasons given.

208. In addition of course we have found that there was no evidence in conducting the investigation Mr Philbin or Andrea Smith were motivated by the claimant's allegations, (whether they saw them as whistleblowing or not) quite the opposite. The fact that Andrea Smith (who the claimant did not believe was tainted by the whistleblowing in any event) said she believed the claimant was lying shows that she was focussed on the allegation of misconduct before her as was MrPhilbin, who was slightly reluctant to agree to the lying at first in any event and was genuinely concerned as to whether the action was a sanction.

209. Therefore weighing up all the relevant factors we find there is no evidence that either the investigation or the dismissal were influenced at all by the claimant's allegations/whistle-blowing.

Wrongful Dismissal

210. We accepted that in relation to the proven allegation number 1 that this was gross misconduct and would therefore justify a summary dismissal. Clearly where an organisation is set up to care for vulnerable adults the fact that an employee has imposed a sanction on one of those vulnerable adults because they were discomforted by their behaviour is clearly a matter which goes to the heart of the contract and is a repudiatory breach justifying summary dismissal.

211. The claimant's claims therefore fail and are dismissed.

Employment Judge Feeney

Date: 19/9/2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 September 2017

FOR THE TRIBUNAL OFFICE