Case Number: 3200124/2016

RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr B Spencer**
Respondent:	**Thera East**
Heard at:	**East London Hearing Centre**
On:	**24 – 28 October 2016 (In Chambers) 5 & 6 December 2016**
Before:	**Employment Judge M Warren**
Members:	**Mr P Quinn** **Mr C Wheeler**

Representation:

Claimant:	Mr T Oxton (Counsel)
Respondent:	Ms R White (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim that he was automatically unfairly dismissed and subjected to detriment for having made a Protected Disclosure fails and is dismissed.

2. The Claimant's claim that he was unfairly dismissed contrary to section 98(4) of the Employment Rights Act 1996, fails and is dismissed.

3. The Claimant's claim in breach of contract, (for notice pay) fails and is dismissed.

REASONS

Background

1 Mr Spencer brings claims arising out of his dismissal from the Respondent's employment on 13 October 2015. In addition to claiming ordinary unfair dismissal, he

claims that he was automatically unfairly dismissed for having made protected disclosures and that he was subjected to detriment for making those disclosures. He also claims notice pay.

The Issues

2 The issues in this case were identified by agreement between the parties at a Preliminary Hearing before Employment Judge Goodrich on 31 March 2016 as follows:

Unfair dismissal

3 The Respondent accepts that the Claimant's unfair dismissal complaint is in time and that no jurisdictional issues arise, so that he is entitled to bring an unfair dismissal claim.

4 The Respondent contends that the reason or principal reason for his dismissal was conduct.

5 The Claimant disputes that conduct was the reason or principal reason for his dismissal and contends that he was dismissed for making protected disclosures; and that his dismissal was unfair pursuant to Section 103A Employment Rights Act 1996 ("ERA").

6 Further or alternatively the Claimant contends that the dismissal was procedurally and substantively unfair pursuant to section 98(4) ERA. Further details will be provided by the Claimant to the Respondent. By way of example he says that he was prevented from having the companion of his choice during the disciplinary process against him.

7 If successful in his unfair dismissal claim the Claimant seeks compensation, not reinstatement or re-engagement with the Respondent.

8 If successful in his unfair dismissal claim the Respondent will contend that the Claimant would or might have been dismissed if fair procedures had been followed; and that the Claimant caused or contributed to his dismissal by his conduct; so that no, or reduced, compensation should be paid. The Claimant would dispute that any such reductions should be made.

9 In relation to the basic award the parties dispute whether the Claimant's employment started on or about 28 December 1998 and his employment transferred to the Respondent on 1 March 2003 by virtue of the "TUPE" Regulations; or whether it started on 1 March 2003.

10 The Claimant contends that the Respondent has failed to comply with the ACAS code of practice on disciplinary and grievance procedures so that his compensation should be increased. He says that the Respondent unreasonably delayed dealing with his grievance and the disciplinary process. The Respondent disputes that any such increase should be made.

Public interest disclosure claims

11 The Claimant says that he made the following protected disclosures as defined by Sections 43A – 43L ERA. He says that he:

11.1 Made disclosures to Mr Jon Cheyette (Managing Director of the Respondent) on 1 and 4 February 2014; and 6 May 2014 regarding service user 'DS'.

11.2 Made disclosure to the CQC (Care Quality Commission), and Essex Police on 24 April 2014 regarding 'DS'.

11.3 Made disclosures to Bernard Jenkin (MP) during meetings which took place at dates unknown except for a meeting on 9 May 2014 at which Samantha Eaton was also present.

11.4 Made a disclosure on 11 September 2014 with Samantha Eaton to the CQC.

11.5 Made a disclosure by providing copies of documents/a forensic report concerning allegedly fraudulent documents issued to him by the Respondent, that disclosure being made under cover of letter dated 18 May 2015 to Mr Simon Conway (Non Executive Chairman of the Respondent).

11.6 Made a disclosure on 26 or 28 May 2015 when he reported alleged offences committed by persons unknown working for the Respondent to Essex Police, and in connection with the matters stated at paragraph [11.2] above.

12 The Respondent disputes that any of the disclosures made to it amounted to protected disclosures. It contends that the disclosures made by the Claimant were allegations rather than the provision of information; that the Claimant did not have a reasonable belief that any of the matters listed in Section 43B(1) ERA tended to show any of the matters listed in Section 43B(1) ERA as occurring or being likely to occur; or that he had a reasonable belief that any such disclosure was made in the public interest.

13 In relation to disclosures made other than to the Respondent the Respondent says that it was not aware of some of the disclosures concerned or subject matter of the disclosures; and does not admit that they were protected.

14 The Claimant says that he was subjected to the following detriments because of the protected disclosure or disclosures he made namely:

14.1 Being moved from his post in Harwich and sent to work in Clacton. He says that this caused a significant increase in his working hours and additional expenses in fuel and vehicle running costs.

14.2 Suspension from work which he claims is as a result of having made a protected disclosure.

14.3 Being subjected to disciplinary hearing that he says were brought about in bad faith as a result of having made a protected disclosure.

14.4 Losing an average of 25 hours a month in overtime, amounting to 12 separate occasions when this occurred.

14.5 A suspension period of 12 months, exacerbated due to the considerable delay by the Respondent in investigating what he says were fraudulent documents presented by them to him. It was, he says, further exacerbated by the length of time in notifying him of the outcome of his appeal against dismissal.

14.6 Dismissal.

15 The Respondent does not accept that all of the detriment claims are in time. Further, it disputes that any detriment to which the Claimant was subjected was done on the grounds of any protected disclosures they may have made.

16 In relation to compensation the Respondent contends that the Claimant's disclosures were made in bad faith for personal gain; and that any compensation to which he might otherwise be entitled should be reduced. The Claimant disputes that any of his disclosures were made in bad faith.

17 In relation to costs the Claimant may refer to what he says is a false allegation of bad faith and may make an application for costs against the Respondent. The Respondent reserves its position on making a costs application.

Evidence

18 We had before us for the Claimant, witness statements from:

18.1 Mr Spencer himself;

18.2 Mr Peter Scotchbrook, former work colleague with the Respondent;

18.3 Mr Andrew Hepburn, work colleague in the Metropolitan Police, and

18.4 Ms Denise Froud, former work colleague with the Respondent

19 For the Respondent, we had witness statements from:

19.1 Mr Robert Mead, former Human Resources Adviser;

19.2 Ms Benita Bull, Operations Manager;

19.3 Ms Edith Aganoke, Operations Manager;

19.4 Ms Helen Merry, Operations Manager, and

19.5 Mr John Cheyette, Managing Director.

20 We did not hear oral evidence from Mr Scotchbrook or Mr Hepburn. Mr

Scotchbrook was not called. Mr Spencer sought a witness order in respect of Mr Hepburn, but having read his witness statement, we refused to make such an order as it did not appear to us that his evidence would assist us in deciding the issues.

21 We heard evidence from each of the Respondent's five witnesses, from Mr Spencer and from his other witness, Ms Froud.

22 During a reading break on the first day of the hearing, we read the witness statements and read or looked at in our discretion, the documents referred to by page number in the witness statements.

23 We had before us three lever arch files of copy documents paginated to 1256, with some additional documents added during the course of the hearing at page 1300 – 1312.

24 At the start of day two, we warned the parties to keep in mind that we will not have read all the documents and the representatives must make sure that they take us to what they regard as the important documents and passages in those documents, during the course of the evidence.

25 Upon the Claimant producing a signed witness statement from Mr Hepburn, the Respondent confirmed it had no objection to our taking the content of that statement into account and attributing to it such weight as we considered appropriate, given that the witness was not here to be cross-examined.

26 With regard to the additional document added to the bundle 1300 – 1312, this is an un-redacted version of a set of minutes dated 4 June 2015, (there had been a redacted set of minutes in the bundle at 1239). Mr Oxton wished me to review the redaction and determine whether or not it was appropriate. I did so during an adjournment and then discussed those redactions with the representatives, as a result of which, amendments to the redactions were agreed. The document added to the bundle at 1300 – 1312 reflected those agreed amendments to the redaction.

The Law

The Whistle-Blowing Claims

27 Mr Spencer says that he was subjected to detriment for having made protected disclosures, (whistleblowing) and that he was dismissed because of those disclosures. The relevant law is derived from the Employment Rights Act 1996, (the "ERA").

What is a Protected Disclosure?

28 What amounts to a protected disclosure is defined in the ERA at Section 43A as a qualifying disclosure. That in turn is defined at Section 43B as:

> *"… Any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and tends to show one or more of the following – …*

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

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

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

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

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

29 The disclosures need not be factually correct, nor amount to a breach of the law, provided that the claimant reasonably believed them to be so, see Babula v Waltham Forrest College [2007] IRLR 346.

30 The expression, "reasonable belief" must be considered having regard to the personal circumstances of the discloser, in particular their "inside knowledge", what they know about the field in which they work, about their employer, about the subject matter to which the disclosure relates. In other words, the test is subjective, see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

31 The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. There is a need for care however; information can be disclosed within an allegation and tribunals are warned not to be seduced by a false dichotomy between an allegation and information, we should focus on the wording of the statute at section 43B, "the disclosure of information tending to show…" (Kilraine v London Borough of Wandsworth UKEAT 0260/15/JOJ).

32 The claimant must also reasonably believe that the disclosure is in the public interest. In Chesterton Global ltd (T/A Chestertons) v Nurmohamed [2015] IRLR 614, the EAT held that the purpose of this provision is to exclude the possibility that a claimant may seek to rely solely on a breach of his own contract as a breach of a legal obligation, where the breach is of a personal nature and there are no wider public interest implications. A relatively small group may be sufficient to satisfy the public interest disclosure test and what is sufficient, will be fact sensitive.

33 If the question arises as to whether one of the situations listed in section 43B(1) is, "likely" to arise, the test is whether it is, "more likely than not" to arise, see Kraus v Penna Plc [2004] IRLR 260.

34 A protected disclosure must, (per section 43A) be made to one of a number of specified persons set out at sections 43C to 43H.

35 Section 43C provides for disclosure to the claimant's employer.

36 Section 43F provides for disclosure to a person who has been prescribed by Order of the Secretary of State. For such a disclosure to be protected, the claimant must believe that the relevant failure falls within the scope of that prescribed person and must reasonably believe that what is disclosed is substantially true. Prescribed person under such Order include the CQC and Members of Parliament, (not the police).

37 Disclosures can be made to external bodies that are not prescribed, but only if stringent conditions apply, as provided for by Section 43G:

37.1 The claimant must reasonably believe the information and any allegation within it, to be true;

37.2 The disclosure must not be for personal gain;

37.3 One of the 3 conditions at Section 43G(2) must be met, namely:

37.3.1 The claimant at the time, believes that he will be subject to detriment for raising the concerns under the preceding provisions;

37.3.2 Where there is no prescribed person, the claimant reasonably believes that it is likely that evidence will be concealed or destroyed, or

37.3.3 The claimant has previously made the disclosure either to the employer or to a prescribed person.

37.4 In all the circumstances, it must have been reasonable to make the disclosure.

38 In circumstances where the disclosure has already been made to the employer, the subsequent response of the employer is relevant to the test of whether it is reasonable in the circumstances to subsequently make the disclosure to an external body, (see below).

39 In deciding whether it is reasonable in all the circumstances to make the external disclosure, the tribunal using its objective judgement, must take into account, (s43G(3)):

39.1 The identity of the person to whom the disclosure is made;

39.2 The seriousness of the relevant failure;

39.3 Whether it is likely to continue or recur;

39.4 Whether the disclosure is made in breach of a duty of confidentiality;

39.5 The response of the employer or prescribed person, if a previous disclosure were made, and

39.6 Whether the claimant followed the employers whistleblowing policy in any previous disclosure to the employer.

Detriment for Whistle-Blowing

40 Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment because he has made a protected disclosure. That does not apply where the detriment in question is dismissal of an employee, (because dismissal is covered by Section 103A, see Melia v Magna Kansei Ltd [2006] IRLR 117).

41 A detriment may be inflicted by any act, or failure to act, (Section 47B(1)).

42 The term, "detriment" is not defined in the ERA. We look to the meaning attributed to that phrase in the discrimination case law, in particular as defined in the seminal case of Shamoon v the Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: a detriment is where by reason of the act or acts complained of, a reasonable worker would or might take the view that he has been disadvantaged in the circumstances in which he had thereafter to work. Detriment is not limited to some physical or economic consequence.

Burden of Proof

43 Where it is established that there has been a protected disclosure, in considering whether a worker has been subject to a detriment as a result, an Employment Tribunal must ask itself:

43.1 Whether the worker has been subject to detriment; if so,

43.2 Whether that detriment has arisen from an act or deliberate failure to act by the employer, and if so

43.3 Whether that act or omission was done on the ground that the worker has made a protected disclosure.

See Harrow London Borough v Knight [2003] IRLR 140).

44 The burden of proof on the question of whether there was a legal obligation and that information provided tends to show that there may be a breach, lies with the claimant, see Boulding v Land Securities Trillium (Media Services) Ltd UEKAT/0023/06, (paragraph 24).

45 As to the link between the disclosure and the detriment, ("on the ground that") one has to analyse the mental process, (conscious or unconscious) which caused the employer to act. We should not adopt the, "but for" test sometimes utilised in discrimination cases. The Court of Appeal considered this in Fecitt & others v NHS Manchester [2012] IRLR 64 where it was held that there is a causal link if the protected disclosure materially influences, (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. It is not the same test as that for a causal link in respect of dismissal; in considering whether there has been an unfair dismissal by

reason of a protected disclosure, the disclosure must be the sole or principal reason before it is deemed to be automatically unfair.

46 It is the mental processes of the decision maker that are relevant, (CLFIS (UK) Limited v Reynolds [2015]IRLR 562, an age discrimination case).

47 The respondent then, must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the claimant had done the protected act i.e. that the protected act did not materially influence, (was not more than a trivial influence on) the respondent's treatment of the claimant, see Fecitt, in particular at paragraph 41.

48 It is of course right, (indeed trite) to say that the alleged victimiser must know of the protected disclosure, (Scott v London Borough of Hilingdon [2001] EWCA Civ 2005). That said, we keep in mind Royal Mail Group Ltd v Ms K Jhuti UKEAT 0020/16, where the dismissing officer did not know about disclosure, but senior management did and deliberately subjected the claimant to detriment and manipulated facts so that the disciplinary officer and investigator believed the claimant was a poor performer. That was automatically unfair dismissal.

49 There is no longer a requirement for disclosures to be made in good faith so as to qualify for protection. However, section 49(6A) of the ERA now provides tribunals with a discretion to reduce compensation by up to 25%, if the disclosure is not made in good faith. We have not been referred to and are not aware of, any authorities on what is meant by, "good faith" in this context. However, the words were previously used as a requirement for a disclosure to acquire protected status and there is no reason to suppose that the any different interpretation of the words is intended in the new context. Under the old law, the leading authority was Street v Derbyshire Unemployed Workeers Centre [2004] IRLR 687 which held that, "good faith" required more than simply that the person making the disclosure honestly believed or reasonably believed in the truth of the information disclosed, it also required that there was no ulterior motive that was the dominant or predominant purpose behind making the disclosure. In that case, it was held that the motive behind allegations in which the Claimant honestly believed, was antagonism toward her manager and was not therefore made in good faith. A lack of good faith has also been found to exist, in a case where a disclosure was made to strengthen one's hand in negotiations, (Backnak v Emerging Markets Partnership (Europe) Ltd UKEAT/0288/05).

Unfair Dismissal for Whistle-Blowing

50 Section 94 of the ERA contains the right not to be unfairly dismissed.

51 Section 103A of the ERA provides that

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

52 In an ordinary case of unfair dismissal, the burden of proof as to showing a potentially fair reason for dismissal lies with the employer. If the employer is able to show that potentially fair reason, then the burden of proof as to the test of fairness is neutral.

The situation is slightly different where the reason for dismissal asserted by the employee is one which is automatically unfair. The authority on this is Kuzel v Roche Products Limited [2008] IRLR 530, Mummery LJ put it thus:

> *"When an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason."*

53 So, we look to the Claimant for some evidence that the real reason for dismissal is not that asserted by the Respondent. If he does that, we look to the Respondent to discharge the burden of proof and show that the reason for dismissal was the potentially fair reason contended for.

54 It does not automatically follow that if the reason for dismissal was not that given by the employer, it must have been the disclosure. That often will be the case, but it is possible the Tribunal could find that it was not.

55 It will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure. A tribunal may therefore draw inferences from findings of primary fact as to the real reason for the dismissal, (see Kuzel above).

Time Limits and Whistle-Blowing

56 Section 48(3) of the ERA requires that any complaint of detriment for having made a protected disclosure must be brought within 3 months of the detriment complained of, or if there was a series of similar acts or failure to act, the last of them. If it was not reasonably practicable to bring the claim within that time frame, it may be allowed, if brought within such further period as the Tribunal considers reasonable.

Ordinary Unfair Dismissal

57 Mr Spencer claims in the alternative, that he was unfairly dismissed in the ordinary sense, contrary to the test of fairness set out at s98 of the ERA.

58 Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

59 We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

60 If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

61 The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

62 Controversial in this case, is that the dismissing officers of the Respondent relied upon anonymous statements as evidence of Mr Spencer's misconduct. We were referred to 3 authorities.

63 The first is the EAT's decision in Linfood Cash & Carry v Thomson & Others [1989] ICR 518. In that case the claimant was dismissed for theft on the basis of a statement taken from a fellow employee, the identity of whom was undisclosed at that individual's request. The Tribunal's finding of unfair dismissal was upheld, because it had applied the correct test, asking itself whether the employer had acted reasonably on the facts. However, the EAT set out some guidance for dealing with anonymous informants, (522 at G0):

63.1 The information given should be in writing in a statement, (the statement may be subsequently redacted to preserve anonymity).

63.2 In taking statements, the following are important: (a) the date, time and place of each incident; (b) the opportunity to observe clearly and with

accuracy; (c) circumstantial evidence such as knowledge, reason for presence or why details are memorable; (d) whether the informant has reason to fabricate, such as personal grudge.

63.3 Further investigation should take place to confirm or undermine the allegation, corroboration is obviously desirable.

63.4 There should be tactful enquiries into the character and background of the informant.

63.5 If the informant will not attend a hearing and their fear is thought to be genuine, consideration should be given as to whether to proceed at all.

63.6 If the employer proceeds, then at each stage, the member of management involved should interview the individual and be satisfied as to the weight to be attributed to the evidence.

63.7 The written statement, with necessary redaction to preserve anonymity, should be provided to the accused.

63.8 If the accused employee raises matters that should be put to the informant, there should be an adjournment so that may be done.

63.9 It is all the more important in such cases, that full and careful notes are taken during the disciplinary proceedings.

63.10 Similarly, it is all the more important for the evidence of the investigating officer to be in writing.

64 This is not a hard and fast checklist. We are concerned with the reasonableness of the employer's actions on the evidence. As the EAT said in Linford, "*Every case must depend on its own facts*".

65 In Hussain v Elonex [1999] IRLR 420**,** the claimant was dismissed for head butting another employee on the basis of the evidence 4 witnesses, whose statements were not disclosed in advance, although they did attend the hearing and evidence was heard from them. This is not a case about anonymised statements. The reason we have been referred to it is because the Court of Appeal held that there is no universal requirement of natural justice that in all cases, witness statements must be disclosed in advance, it is a matter of what is fair and reasonable in each case.

66 The third case to which we have been referred on the question of anonymised statements was, Asda Stores Ltd v Thompson [2004] IRLR 598. The claimant was dismissed for the supply and use of illegal drugs on the basis of a number of anonymous statements that were never shown to him. During the proceedings before the employment tribunal, the claimant made and was granted an application for disclosure of those statements. The EAT allowed the respondent's appeal, holding that the tribunal should have ordered the statements be redacted to preserve the identity of the witnesses, but then disclosed in redacted form. It is not clear why we have been referred to this case,

other than that the observations in Linfood Cash & Carry are discussed with approval.

67 In this case, the Respondents say that Mr Spencer was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

68 More serious allegations, which might have more serious consequences if upheld, call for a more thorough an investigation. The ACAS 2014 Guide to Discipline and Grievances at Work, (not the code of practice) advises as such and the EAT confirmed as such in A v B [2003] IRLR 405.

Facts

69 The Respondent provides to support to people with learning disabilities.

70 Mr Spencer, aged 67**,** used to be a police officer, latterly with the Metropolitan Police. He retired in 1987 on medical grounds and after one or two other jobs, he commenced employment with the Respondent's predecessor as a Support Worker on 28 December 1998. He was transferred to the Respondent under TUPE on 1 March 2003.

71 In 2012, Mr Spencer began working in a property known as 6 Earlham Mews, (sometimes referred to as The Anchorage) located at Harwich in Essex, where the Respondent provided support to residential service users.

72 Mr Spencer was promoted to the position of Team Coordinator on 25 March 2013. The job description, (page 52) describes the role as including:

72.1 Supporting people and getting to know them and their requirements;

72.2 Matching appropriate staff to those people and planning work rotas to ensure delivery of support;

72.3 Essential planning and administrative tasks associated with policy and procedures;

72.4 Regulatory compliance, safe working practices and quality assurance.

It is described as a supervisory level post.

73 We are not sure of the precise date, but at some point in late February or during March 2014, a service user with whose care Mr Spencer was involved, known as DS, died. In brief, DS had been injured and had been in hospital as a consequence. He returned from hospital to the Anchorage but was unhappy, because he had recently been

moved there and wanted to go back to his previous home. He exhibited behavioural difficulties. Mr Spencer and other members of his team felt that DS needed more people involved in his care, or that more time be given over to his care, because the medical advice was that he needed to be kept mobile to avoid fluid building up in his lungs. Mr Spencer and his colleagues felt that their manager Ms Bickmore, had not done enough to provide more staff for the care of DS. DS had been readmitted to hospital and subsequently died of pneumonia.

74 On 1 February 2014, (before DS died) Mr Spencer wrote an email to Mr Cheyette and Mr Mead. That email included at the foot of it, the names of four of Mr Spencer's colleagues who wished to add their names to the concerns being raised. The relevant passage of the email reads as follows:

> *"We believe Jane Bickmore has acted in an unlawful, possibly illegal way, and to have displayed moral bankruptcy amounting to a "lack of duty of care" toward both ourselves and the person we support, DS.*
>
> *Despite clear communication of difficulties around the support these communications have been treated at best flippantly and that worst ignored and there has been a fundamental lack of both capability and willingness to help the situation.*
>
> *We believe her actions, and inactions, have been detrimental not only to our well being but more importantly to that of DS."*

75 On the same day, Mr Spencer copied that email to social services. That is not relied upon as a protected disclosure in the list of issues.

76 On receipt of this, Ms Bickmore queried of Mr Mead, (HR Advisor) and Mr Cheyette, (Managing Director) whether she was to be suspended. Mr Cheyette replied saying that further investigation would be required in the form of an informal fact find. She was told to email him a statement of her point of view, that it would not be fair to expect her to continue to manage this particular team, but in the meantime, she was not suspended.

77 Mr Mead provided advice to Mr Cheyette that there was no need to suspend Ms Bickmore, noting that there were no details about what it was she was alleged to have done and that there would need to be further investigation. Mr Cheyette replied, (page 87) making reference to the inappropriate and unprofessional email which Mr Spencer sent to social services and observed that it was not clear what the substance of the grievance was. He proposed a number of points of action, which included instruction to the authors and signatories to the email not to send any further emails externally until matters had been properly and reasonably investigated through due process. In response to that, Mr Mead advised that in instructing the staff not to send emails externally, it should be emphasised that does not undermine their right to take action with regard to valid whistleblowing issues where appropriate, but that such concerns should be raised internally first. Although Mr Cheyette had suggested making reference to bringing the Respondent into disrepute, Mr Mead advised against doing so because that might be taken as suggesting the Respondent was more concerned about its image than solving the problem.

78 The requirement to raise concerns internally is in accordance with the Respondent's whistleblowing policy, (page 1141) which provides that external disclosures to a prescribed person should only take place once internal procedures have been exhausted. There is no such requirement in section 43F and 43FA.

79 On 4 February 2014, Mr Spencer sent by email to Mr Cheyette a, "statement of grievance" which includes the following:

> *"From his return, DS would not get out of bed or try to walk. Staff repeatedly encouraged him and on occasion he did stand and use his walking frame for a few steps but would then lower himself to the floor. He would then lay on the floor for very prolonged periods …*
>
> *As a result the one member of staff on shift had the virtually impossible – and certainly unsafe – task of trying to give personal care either on his bed, unsuitable because of his height being an ordinary bed, or on the floor, wherever he had decided to deposit himself.*
>
> *The situation was rapidly becoming untenable. Jane Bickmore was kept fully informed of events. Sam Eaton and I tried to give additional support whenever we could …*
>
> *On Friday 24th Ruth Davey, the Community Nurse, who had worked with DS for many years visited him. He was on the floor, by the bathroom door, and had been incontinent of faeces…*
>
> *Intensive support nurse, Diane Henley, visited on Sunday 26th and stated she was pleased with the strategies we had been following… Jane Bickmore, a qualified learning disabilities nurse, had made no contribution to our strategies …*
>
> *…Ruth is based in Colchester. Jane Bickmore lives in Harwich, probably less than two miles away, … At no time prior to DS's readmission to hospital on 29th January did Jane Bickmore make any attempt to visit the support to see the situation at first hand, and at no time did she make any significant contribution to ease the difficulties or make any attempt to become better acquainted with DS and his actions …*
>
> *The only contribution she made in respect of direct support or strategy was to forward some suggestions at 18.07 on the 28th from Ruth Davey… Furthermore, at no time did Jane Bickmore make any attempt to offer moral support to any of the team...*
>
> *Ruth Davey emphasised the importance of mobility to DS as he is prone to frequent chest infections, a fact we were well aware of and which Jane Bickmore was, or by then, should have been, equally aware. Certainly these and the problems of frequent urine infections have been discussed in general meetings … this potential danger was either ignored or unrecognised…*
>
> *Jane's contribution was to say we could double up for one hour twice a day, to get*

him walking and for personal care. There was also a provision for 2 x 1.5 hours a week for shopping, bills and, if any time left, for personal care. This could continue for three weeks provided no awake nights were needed. She also said that on Monday 27th she would request a Social Services review and that we should put an emergency plan in place, should he be on the floor and be faecal incontinent outside of the double up times. The only thing she could think of was to telephone the on call… the importance of trying to keep DS as mobile as possible seems to have eluded her and there is no reconfiguration of hours…

Clearly it either did not cross her mind, or she was resolutely against, any flexibility of usage of hours available."

80 In a summary at paragraph 34, Mr Spencer said:

"Jane Bickmore has completely abdicated her responsibilities, both professionally and morally. She has shown total disregard for the safety of DS in that, having been told by Ruth Davey and us, the importance of giving as much encouragement and support as possible to DS to get mobile, she saw no need to review arrangements to be able to provide that support. She has totally disregarded any help she may have been able to give to ensure as safe working condition as possible in the circumstances… she is making demands on lower management that are totally unrealistic and potentially injurious to heath by expecting to take on lot of extra responsibility without providing them with either the time or support to effectively carry out those responsibilities."

81 For a three week period during the rest of February 2014 thereafter, another individual called Simon Pott line managed Mr Spencer and his team. However, at the end of that three week period, Ms Clare Upson was put in charge of line managing the team. She reported directly to Jane Bickmore. Mr Spencer was concerned about this and on 26 February wrote an email to Mr Cheyette and Mr Mead expressing concern in that regard.

82 Mr Mead was assigned to consider the grievances. Meetings with the signatories to the email of 1 February were set up. On 27 February Mr Mead emailed Mr Spencer to state that the grievers would not be able to accompany each other in the investigation meetings that were to follow, (page 126).

83 On the same date, Mr Spencer emailed Mr Cheyette and Mr Mead to reiterate his concerns about Ms Bickmore causing difficulties for him and his colleagues, "by proxy". (Page 129).

84 On 4 March 2014, Ms Bickmore emailed Mr Cheyette to state that she was over staffed at Harwich and suggested moving Mr Spencer to a vacancy at Clacton. One should bear in mind that Mr Spencer lived in Harwich and moving to a post in Clacton would be an inconvenience to him. Relevant passages from this email read as follows:-

"It has been apparent for some time that Earlhams has a high management level … I have a TC post vacant in Clacton which I wished to put out to advert however, in theory we could move Barry from Earlhams to Clacton… do we look at Barry moving or are we separating management from support staff and do I also not put

this forward because of the situation?"

In her email she set out the structure of support workers and team co-ordinators and where there are vacancies, but in doing so, she singled out Mr Spencer and Ms Eaton, (co-signatory to the grievance) stating: *"this leaves Barry TC and Sam Eaton SSW".*

85 On 5 March 2014, each of the grievers were interviewed.

86 On 7 March 2014, Ms Bickmore emailed the four team co-ordinators at Harwich, Ruth Ring, Lisa Woods, Linda Scutcher and Mr Spencer. She explained that the contracted hours at Earlhams were decreasing, which meant they were overstaffed. She asked whether any of them would be interested in a transfer to Clacton, where there was a vacant TC post.

87 Ms Ring replied immediately, *"to be completely honest and blunt Jane, I would rather not! I have my reasons should you want them but a bit drawn out for an email"* to which Ms Bickmore replies. *"no that's fine – I have been asked to ask – know responses I think".* She received no response, apparently, from the other two TCs.

88 On 20 March 2014, Ms Bickmore asked by email whether she could inform Mr Spencer that there was a need for him to move to Clacton due to contract hour reduction. Mr Cheyette replied to say yes, but that Clare Upson should have the conversation with him. The plan made was that she would see what his response was and if he did not agree, she would ask him for his grounds. She was to make the point that his contract allowed the Respondent to make such a change and she was to point out to him that as he had previously in the past, volunteered to work in Hertfordshire, it was reasonable to assume that he would agree to work, "up the road". The Tribunal knows from its own knowledge that, "up the road" is to understate what is not a particularly pleasant journey between Harwich and Clacton, particularly in the winter time.

89 Subsequently, Ms Upson spoke to Mr Spencer on the telephone and she reported back on 21 March 2014 that he, *"seemed ok with this".* Mr Spencer told us in evidence, and we accept, that actually he said to Ms Upson that he did not think that it was fair that he be the one who is moved again but that he accepted that his contract does say that he can be moved.

90 It should be noted that Mr Spencer accepts that there was less work to do at Harwich, that there was, in effect, a redundancy situation. It also seemed to be accepted by both sides that redundancy is unheard of in the Respondent's organisation; vacancies are always found elsewhere when these situations arise.

91 Mr Spencer moved his work place from Harwich to Clacton on 1 April 2014.

92 On 16 April 2016, Mr Spencer wrote to Mr Mead expressing surprise that he was investigating the grievance, considering that he had always made it clear that operational matters were outside his field of knowledge. He also remarked upon the sparse interest he perceived Mr Cheyette has taken in the matter which he thought, "speaks volumes". He expressed the view that Mr Cheyette was predisposed to dismiss the affair, despite the seriousness of the matter and he commented that there was clearly an agenda in

progress.

93 On 17 April 2014, Mr Mead provided what he describes as a summary decision on the grievance. His conclusions include:

> *"It is clear from the information in the email trail that Jane Bickmore was fully involved in keeping up to date with events concerning DS.*
>
> *Also the relevant external professional services were involved.*
>
> *As I see it DS's situation was self imposed by his own behaviour of non cooperation and was not the result of any incapability, injury or negligence.*
>
> *…everyone providing care for DS were in fact doing their utmost to help him…*
>
> *Jane Bickmore introduced extra hours for support, and along with yourself requested a review of Social Care of the hours available plus additional equipment and the assistance of the Occupational Therapist and the Continence Adviser*
>
> *She maintained communication throughout with the external support services and with yourself as the senior manager on site.*
>
> *… I cannot see the complaints you have raised against her are supported by the facts…*
>
> *One of the issues raised was that she did not visit The Anchorage… she did not see the need as there were two experienced managers on site, yourself and Sam Eaton plus the involvement of all the external professional support services.*
>
> *In her role as Operational Manager she has a wider remit and was satisfied to leave it in the hands of the local managers…*
>
> *… the reasons she judged not to do this are operationally valid so I cannot conclude that this was a failure on her part to decide a visit was not necessary."*

94 Mr Spencer wrote on 22 April 2014 to say that there were in his view, many contradictions and anomalies in what Ms Bickmore had said and that they do not accept Mr Mead's decision. He made the following bullet points:

- *"The team express serious concerns about support delivered to [DS] …*
- *[DS] subsequently dies*
- *Thera decided to appoint someone who is honest enough to admit on a number of occasions he is not qualified in operational matters*
- *Enquiry takes 2 ½ months … because of other priorities … it is difficult to*

think what could take priority over looking into the death of a supported person …

- *Thera make no effort to progress the enquiry into a disputed death but are happy to leave it to someone who, as you have said, had a considerable workload."*

95 Mr Spencer relies upon an alleged protected disclosure made to the Care Quality Commission, (CQC) on 24 April 2014. We have no evidence as to what was said to the CQC by Mr Spencer, other than an email dated 24 April 2014 from Beverly Spencer of the CQC to a Nikki Springett of the Respondent, stating that information had been received that day concerning DS from an unnamed source and the concerns listed were:

95.1 That DS had slid out of a taxi on the day of his discharge and staff were unable to move him for an hour and a half, an ambulance was called to take him back to hospital with hypothermia and a safeguarding incident was not raised.

95.2 Concerns were raised with the operational manager about staffing levels when DS returned as they felt they did not have sufficient numbers to support him. No action was taken.

95.3 A lack of overall support for staff during this period despite concerns being raised and no action was taken to ensure DS's needs were met.

96 The same disclosures are alleged to have been made to Essex Police. We have no evidence as to what that disclosure consisted of save for Mr Spencer's evidence in his witness statement at paragraph 110, where he says he reported what he thought would amount to corporate manslaughter. He gave us no information on what precisely he said to the police.

97 Mr Cheyette wrote to Mr Spencer on 28 April 2014, in response to Mr Spencer's emails of 16 and 22 April referred to above. He commented that whilst Mr Spencer was perfectly entitled to raise matters of concern, he should follow proper protocols and procedures. He stated that it is inappropriate to make such serious allegations in email correspondence and reminded Mr Spencer that he had warned him about that before. He proposed to meet with Mr Spencer to discuss matters raised in the bullet points set out above, stressing that this is separate from the grievance process and that depending upon what he is told, he will take the appropriate next step.

98 On 28 April 2014, Mr Spencer and 3 of his co-signatories, confirmed they wished to proceed to Stage 2, (an appeal) in the grievance process.

99 Mr Mead provided a more detailed grievance outcome on 30 April 2014. In this he provided more detailed reasoning for the conclusions previously advised.

100 On 1 May 2014, Mr Mead emailed Ms Bickmore to inform her that the outcome of the grievance was going out that day, that the case file was now being passed to Mr Cheyette, who was going to ask someone from outside of Thera East to deal with the

appeal. Ms Bickmore replied expressing disappointment that Mr Cheyette was passing the matter on.

101 Mr Cheyette replied to the CQC on 1 May 2014. He essentially relied upon the outcome of the grievance investigation by Mr Mead and attached documents from it.

102 An operational manager from a different part of Thera, Midland South, Mr Kevin Parker, was appointed to hear Mr Spencer's grievance appeal.

103 Mr Cheyette met with Mr Spencer to discuss his emails of 16 and 22 April, on 6 May 2014. Mr Spencer relies upon statements made in this meeting as protected disclosures. In his further and better particulars at 29B paragraph 1(c), he itemises the disclosures as:

103.1 Stating that DS's flat was unsuitable, he would put himself on the ground;

103.2 That a two to one staff ratio was required;

103.3 There were not sufficient hours of support;

103.4 That he had dangers of chest infections;

103.5 No support of any sort was offered or suggested, and

103.6 He made reference to "financial abuse" in the use of support people's vehicles – something about which we heard nothing during the hearing. It was apparently a reference to another case.

All of these matters are recorded as having been mentioned during the meeting on 6 May. The unsuitability of DS's flat seems to be new, Mr Spencer commented to Mr Cheyette that DS's flat was suitable for someone that was mobile but in circumstances where they were trying to get people to move about, (presumably a reference to DS lying on the floor) it was unsuitable.

104 Mr Spencer relies upon an alleged protected disclosure made to Bernard Jenkin, MP on 9 May 2014. In his further and better particulars at page 29C paragraph 3, he gives no details of what he said to Mr Jenkin and we had no evidence placed before us in this regard.

105 On 13 May 2014, Ms Beverley Spencer of the CQC informed Mr Cheyette that the concerns raised with regards to DS were concluded; they were satisfied that the appropriate action had been taken to maintain his safety and welfare. They had seen evidence that the Respondent's formal grievance procedure had been followed and that the concerns and grievances had not been upheld.

106 The grievance appeal hearing took place on 8 July 2014 and the outcome was provided by a letter dated 21 July 2014. The conclusions of Mr Parker, in not upholding the appeal, were in summary:

106.1 There was significant communication between Mr Spencer and Ms Bickmore.

106.2 Everyone, including Ms Bickmore, were committed to providing the best possible support to DS, in what he described as difficult circumstances. He said there was clear documentary evidence that Ms Bickmore kept herself fully up to date and additional hours were allocated, additional temporary equipment was sought and relevant external agencies were involved.

106.3 At no time had the team at the Anchorage made any concerted attempt to convey their dissatisfaction directly to Ms Bickmore and demand from her greater involvement or additional action. He said that there was a break down in effective communication, noting that when he asked of Mr Spencer why he had not brought his concerns to the attention of his manager at the time he had replied, *"little point in pursing my furiousness with her"*. He referred to Mr Spencer commenting that he did not see the need to remind Ms Bickmore that the additional level of support was not added and that his previous experience of Ms Bickmore's management style had influenced his actions.

106.4 There was no evidence that the concerns now being expressed had been escalated to another level of management.

106.5 He accepted there could be some criticism of Ms Bickmore for not attending the site in person. However, he said that she had what he described as a strong management presence on the ground upon whom she took the decision to rely.

107 Mr Spencer appealed the outcome, taking his grievance to Stage 3 of the Respondent's grievance procedure, by a letter dated 24 July 2014. He said that he found the outcome letter incomprehensible. His point was that the specific nature and reason for the concerns he raised were mentioned, but their rejection was not explained. He submitted an 8 page document on behalf of himself and Ms Eaton, setting out an analysis of the matters raised and his dissatisfaction with the responses received thus far.

108 We are told that on 30 July 2014, (four days after the third stage appeal) Mr Cheyette, Mr Mead, Ms Bickmore and Ms Sadie Farrow met to discuss concerns regarding Mr Spencer's conduct and working practices. There are no notes of this important meeting. At paragraph 50 of his witness statement, Mr Mead tells us that Ms Farrow had said that Mr Spencer was not working well in his team co-ordinator role, not correctly completing important paperwork and that other members of staff were raising concerns about Mr Spencer generally, his approach to them and to work. She said that she personally was concerned about the Claimant's overall approach and behaviours at work.

109 Mr Cheyette told us at paragraphs 42 – 47 of his witness statement about this meeting. His record of what Ms Farrow said is similar. He also tells us that he asked Ms Bickmore whether Mr Spencer had made similar mistakes in the past and she said that he had made mistakes in the past but was not aware of the details. He then explains how

those in the meeting divided up amongst themselves separate tasks by way of investigating Mr Spencer:

109.1 Ms Bickmore was to commission an audit of the paperwork at Earlham Mews from 31 March 2013 to 1 April 2014.

109.2 Mr Mead was to speak to Earlham Mews staff about their working relationship with Mr Spencer.

109.3 Ms Farrow was to provide paperwork illustrating the areas to which she was referring.

109.4 The Claimant's one-to-one reviews were to be checked.

110 We note that Mr Cheyette explained that this meeting had come about as a result of Ms Bickmore approaching Mr Cheyette.

111 In the course of his investigation, Mr Mead spoke to four employees at Earlham Mews who were prepared to talk about their working relationship with the Claimant on condition only that they were to be granted anonymity. They required a guarantee of anonymity from Mr Mead. Mr Mead provided a written summary of these conversations in a document dated 27 October 2014, which is at page 510 – 511 in the bundle. Exert quotations from what is recorded as having been said by each of the four employees in turn is set out below.

112 Employee One:

"I couldn't work with Barry, he would go out for example to get money for those supported, it shouldn't have taken as long as he would be gone…

Overtime used to be very high, then a change of manager meant things were being managed more closely and it dropped dramatically but you could not see why …

I have heard others comment about Barry and drugs but I have never seen him under the influence of anything."

113 Employee Two:

"It is about time someone took up this mantle … has anyone every suggested doing random drug test…

I have never seen him do anything wrong with the people supported, but he does not seem to like hands on…

A new manager went into number 7 and things improved, it was obvious Barry had a lackadaisical approach …

He was working a lot of overtime and then it stopped…

He would go out for money or stationery, he would be gone for hours. He would take a colleague with him but he was very careful who he took with him…

Things had been happening even after he left, with medications for example, he could get someone to do this, nothing would surprise me about Barry…

People have seen him get away with so much over the years they think why go through the hassle speaking out when nothing is done…

Barry is capable of doing that, of planting something to cause you trouble."

114 Employee Three:

"Barry and Sam Eaton would disappear for lengthy periods … staff would say they have gone for money but the person they were getting the money for would not go with them. Barry was forever swanning in and out …

There was a problem with staff cars being vandalised in the car park, it was never the people supported cars always the staff cars. This stopped after Barry left but that may just be a coincidence."

115 Employee Four:

"I cannot understand how Barry is still here and then when he became a TC I simply could not understand that…

Barry would take regular cigarette breaks and be gone a long time. He was often late, sometimes he would not know he was on shift and someone would have to call him and he would come in.

He would often go to the bank, he would take Clare Wallace or Sophie Hammond with him and he would be gone for long time.

He covered up medication issues…

He would have a lot of hours he should not have had and staff would question it …

I am glad at last this is being looked at."

116 At the time, Mr Spencer was not aware that this was going on, but on 10 August 2014 he commenced a period of illness due to stress, he was absent from work until seeking to return on 13 October 2014.

117 Mr Spencer relies upon a further disclosure he says was made to CQC on or

about 9 and 11 September 2014. We cannot find any document that we were referred to that deals with this in the bundle. In his further and better particulars at page 29C paragraph 4, he states he had relayed a colleague's concern regarding financial abuse of a service user and that on 24 April 2014, he had contacted Ms Beverly Spencer at the CQC and that he had contacted Essex Police at the same time regarding corporate manslaughter. We do know that Mr Spencer did make a second referral the CQC, Mr Mead acknowledged that as such at paragraph 40 of his witness statement and we were referred to an email in the bundle at page 446 from Mr Spencer to the CQC dated 12 August 2014, in which he expresses dissatisfaction with the way that the CQC had handled the earlier referral.

118 The Stage 3 grievance appeal hearing had been referred to Mr Steve Raw, Managing Director of the Respondent's holding company. He had met with Mr Spencer on 22 September 2014. The outcome was that the decision at the previous two stages in the grievance process were upheld and his appeal dismissed on the basis that no new information or evidence was presented to suggest that the earlier decisions should be overturned. Mr Raw did state that he would be raising with Mr Cheyette whether lessons could be learned and measures put in place to avoid similar events or feelings of lack of support occurring again and whether there were any development or training needs arising. He said he would also be recommending to Mr Cheyette there should be no further line management connection between Mr Spencer and Ms Bickmore and that Mr Spencer may gain greater insight into his role if he shadows an Operational Manager.

119 Early in October 2014, Mr Mead advised Mr Cheyette that it would be appropriate to suspend Mr Spencer. Again, there are no minutes or notes of this important conversation. Mr Mead tells us at paragraph 57 of his witness statement that he felt suspension may be necessary in light of all the information gathered. This included that:

119.1 The outcome of the paperwork audit suggested there were concerns about the quality of Mr Spencer's paperwork;

119.2 There were concerns that Mr Spencer's personal folder had been removed from his place of work;

119.3 There was a suggestion that he had failed to pay for beverages at Earlham Mews and finally of course, and

119.4 The comments made by the four anonymous employees.

120 On the day that Mr Spencer was due to return to work after his period of illness, 13 October 2014, he was informed by Mr Mead by telephone that he was suspended.

121 Suspension was confirmed by a letter dated 15 October at page 502. The letter informed Mr Spencer that the purpose of the suspension was to enable initial investigation into:

- *Significant failings in completion of paper work procedures at Kings Avenue and Tudor Lodge*

- *Failure to properly complete paperwork procedures while you were at Earlham Mews, which had been discovered through a recent audit.*

- *Removal of your personal folder from your place of work*

- *Failure to pay for your beverages at Earlham Mews and when asked about this the page listing the money you owed was torn from the beverage record book shortly afterwards.*

122 As is usual, the letter of suspension informed Mr Spencer that he was not to attempt to contact or influence any member of staff whether on or off duty and that he must not discuss these matters with any person either inside or outside of the Respondent organisation.

123 Ms Benita Bull was appointed to investigate the allegations. Her terms of reference state that the investigation should have regard to matters which may go to the heart of the relationship that is meant to exist between management and support teams. Included within the aims of the investigation at item 5, was to ascertain Mr Spencer's application and commitment to work and at item 7, to examine whether he had undue influence over some members of staff, giving rise to a situation where the ability to talk and operate openly and honestly without feeling intimidated, is compromised.

124 A written report on the information provided anonymously was prepared by Mr Mead on 27 October 2014.

125 On 31 October 2014, as Mr Mead was leaving the Respondent's employment, he prepared a written handover for Ms Bull, which appears at page 516. He summarised the information he had gathered so far, which in summary was:

125.1 That people said that Mr Spencer did little work;

125.2 There were repeated errors with paperwork;

125.3 Money was going missing from service users and that was not being dealt with properly;

125.4 Mr Spencer owed money for beverages and shortly after he had been asked about that, the relevant page from the beverage book record had gone missing;

125.5 There is a suggestion that he was involved in drugs in the local area;

125.6 There had been comments that he mixed with unsavoury anti-social elements outside of work;

125.7 People were reluctant to comment for fear or repercussion, not necessarily from him but from his acquaintances outside of work. Mr Mead believed this fear was genuine, and

125.8 His personal file, which should have gone to Clacton, had gone missing from Earlhams.

Mr Mead explained that he has given four members of staff a guarantee of anonymity. He referred to Ms Farrow as very efficient. He commented in conclusion:

> *"Barry will be convinced that his suspension is because of the grievances but the issues of concern here are totally separate from the grievance matters."*

126 No action appears to be taken on investigating these matters until Ms Bull meets the first person who she interviews, Ann Karlsen, on 9 December 2014.

127 Statements from the various people interviewed by Ms Bull appear at pages 594 through to 600, which we summarise as follows:-

127.1 Liz Buxley-Saxon, interviewed on 12 January 2015, referred to hearsay and rumours about Mr Spencer. She said that she never had any problems with him. She said that Claire Upson had spoken to her during her maternity leave about lack of paperwork. She said when there were issues with a particular supported person, *"Barry was excellent and always made himself available to support the team*"

127.2 Mr David Num was interviewed on 12 January 2015. He had very little to say, commenting that he did not personally have any issues with Mr Spencer.

127.3 Christine Taylor was interviewed on 12 January 2015. She too had little to say; she never had any issues with Mr Spencer, she referred to there being a strong team at Kings where everyone worked together and pulled their weight. She said that she was very happy working with Mr Spencer.

127.4 Yvonne Corneleous was interviewed on 12 January 2015. She said that Mr Spencer did not keep up with paperwork, nor did the team leader, Claire Edmunds.

127.5 Michelle Levett was interviewed on 12 January 2015. She said that from her observations, Mr Spencer did not seem to have much to do with the supported person.

127.6 Bridget Cortes was interviewed, there is no date on the note of her interview. She referred to Mr Spencer going out a lot to get people's money and having a lot of cigarette breaks. She referred to the bungalow they worked in as being very unorganised; things never getting done, there being issues around medication, although she could not remember the details. She commented that Mr Spencer did not like medication issues coming to light and she did not understand how Mr Spencer had got promoted, she felt he did not represent the Respondent well and

described him as a bad role model, who had favourites and that he had made her feel intimidated.

127.7 Ann Karlsen was interviewed on 9 December 2014. As mentioned above, she relayed an incident when a supported person's money was found to be £5 short. The person responsible had put £5 into the tin in which the money was kept and subsequently, Mr Spencer was said to have told him not to put the money in the tin. He did not advise the person concerned to complete what is described as an incident report and he did not report the incident to the manager, Sadie Farrow. She commented that Mr Spencer did not like working at Tudor Lodge, he did not get on with the team, he always put himself down on the rota to work at Kings Avenue instead and for Sadie to work at Tudor Lodge. She commented that timesheets and rotas did not match up and that the relief shifts did not match. She claimed to have found on two occasions that Mr Spencer had claimed for two extra hours worked. She said that Mr Spencer used to calculate annualised hours incorrectly. She alleged that he did not interact with the people supported and would disappear. She gave an example of an occasion when a particular supported person was screaming and throwing things, Mr Spencer left the support worker to deal with it without coming to assist. Asked how Mr Spencer had behaved with her, she said that he had been fine, always polite, never rude but during the last few weeks she had noticed, *"what Barry was like".* The last few weeks would of course had been during August, in the period immediately leading up to his taking time off work through ill health.

127.8 Ms Froud was interviewed on 16 January 2015. She worked at Kings Avenue and said there was a good team there that worked very well, everyone mucks in and pulls their weight.

128 There were four other people who Ms Bull interviewed who requested that they remain anonymous. Three of these four people were based at Clacton, one of them was based at Harwich. We know that the four people who Mr Mead interviewed were based at Harwich and so at least three of these were new individuals. They are identified by Ms Bull in her note as employees five, six, seven and eight. We summarise each as follows:-

128.1 Employee 5 said that Mr Spencer did not do a lot of hands on support, that he mostly did paperwork. When Ms Eaton was working, they would keep going outside for cigarettes. He was lazy and would leave things lying around. There was a bad atmosphere, because they had to clear up after him. He seemed to take smoking breaks every 20 or 30 minutes. He was not supportive and there was not a good atmosphere when he was working. This person said, *"you could not trust Barry, he was not a good manager. Barry does drugs; I am not saying that he does them on shift. I want to remain anonymous; I wouldn't want Barry to know, as you never know what might happen in this small town"*.

128.2 Employee 6 described Mr Spencer as devious, trying to get people on his side, as bone idle, as always taking cigarettes breaks. He was said to be friendly with Ms Froud, getting her to do his paperwork. He is described

as a big troublemaker and, *"you have to be wary of him*". He is said to be fine with the people supported.

128.3 Employee 7 described Mr Spencer as being very negative about the Respondent and part of a, *"bring Thera down group".* He is said to be dubious and one who cannot be trusted. He is said to know, *"many people in Harwich"* and to have, *"got away with things in the past because people are scared of him".* He is said to rota people to work with him who he likes, which causes divisiveness within the team. He is said to have the nickname of, "paperwork Barry".

128.4 Employee 8 must be the one based at Harwich, because this person says that Mr Spencer did a lot of overtime at 7 Earlham Mews and that in January 2012 it suddenly dropped. This person also referred to Mr Spencer as owing possibly up to £90 in staff beverages and the relevant page in staff meal contribution book having been torn out.

129 At this point it is convenient to note the evidence that we heard from Mr Froud, which we accept. She told us that not long after Mr Spencer had started work in Clacton, Ms Farrow asked her what she thought of Mr Spencer. Ms Froud says that she replied to the effect that she had not really got to know him, but he seemed polite and humorous, to which Ms Farrow is quoted as having said, *"of course you know he has been sent here for a reason?".* Ms Froud's interpretation of what was meant by that, was that he had crossed the company and management wanted to sort him out. In her statement, Ms Froud describes Mr Spencer's work in praisworthy terms. She tells us at paragraph 21 that one member of staff had nicknamed him, "paperwork Barry" but she speculates this was to undermine Mr Spencer and that the individual concerned, "seemed to have a position of influence with Sadie Farrow".

130 Ms Froud also quotes Ms Farrow, at her paragraph 23, as saying to her on one occasion, *"Barry's dealer got raided at the weekend and his car was outside. I hope he got arrested*". This was said to have been at some point close to Christmas 2014. Ms Froud expressed shock at hearing this, because she had never heard or seen anything to suggest that Mr Spencer had anything to do with drugs and also because she thought it was an extraordinary remark for a manager to make about a member of staff.

131 On 19 January 2015, Mr Spencer attended an investigation meeting with Ms Bull. Mr Spencer recorded the meeting and both parties had intended to rely upon that recording. Unfortunately, his equipment failed. An HR person present prepared some notes, but they were so poor that everybody agreed the meeting ought to be conducted a second time.

132 On 20 January 2015, the Respondent wrote to Mr Spencer to add a fifth charge:

"That by your conduct/behaviour and practice in your role as team co-ordinator you have encouraged and engendered a workplace environment and culture and a team dynamic which:

- *Gives rise to you exercising undue, unwarranted and negative influence*

over some other members of Thera East staff giving rise to a situation where some believed their ability to talk and operate openly and honestly and without feeling intimidated, is seriously compromised

- *Is not conducive to, and undermines, the ability of the company to effectively manage and deliver the essential support to tenants of Thera East in specific location;*

- *Potentially constitutes a risk to people supported."*

133 Mr Spencer met with Ms Bull for the second time on 10 February 2015. They discussed the torn out page from the beverages book. Mr Spencer said he had his suspicions but he could not prove them. He made the point that this related to two years previously and suggested that the allegation was ludicrous. He suggested that the reason that this had happened was because of the allegations which he had made.

134 With regard to his missing personal folder, Mr Spencer made the point he had nothing to gain by removing it. It was suggested to him that he might have removed it to hide supervisions. He responded that most supervisions were done on a laptop and could be located anyway.

135 With regard to completion of appropriate paperwork, Mr Spencer explained that shortcomings had never previously been brought to his attention. He denied having anymore cigarette breaks that anybody else.

136 Mr Spencer protested that he ought to have a right to confront his accusers.

137 Mr Spencer described as rubbish, the allegation that he would not help out with service users. He acknowledged that of late he had been under stress and not working to his full capability and said that he had consulted a doctor. He said he was not denying that there were errors and that if there were errors, it was because he had not recently been well. He said that he had not felt that Ms Farrow was a person he could approach, because he felt that he was unpopular and that was because of the disclosures which he had made.

138 In a letter dated 6 March 2015, HR Partner Mr Jones wrote to Mr Spencer to tell him that the investigation report would be available soon. In this letter, he suggested that Mr Spencer had been contacting work colleagues in breach of the terms of his suspension and that this might result in further disciplinary action.

139 Mr Spencer replied on 9 March 2015, to protest about the delay in the process and he asked for clarification as to what precisely the alleged breach of his terms of suspension were. Not receiving a reply, he chased on 12 March and then received a reply in which Mr Jones confirmed that Mr Spencer would not be in breach of the terms of his suspension merely by attending a social gathering at which colleagues were present. He explained that his letter had merely been intended as a reminder to him of the importance of his not discussing related matters, particularly in connection with matters under investigation, with work colleagues.

140 On 24 March 2015, Ms Claire Upson wrote to Ms Bull by email. She said that during her time at 6 Earlham Mews, she did not have direct concerns with Mr Spencer, but said that it had been frequently brought to her attention by the support team that they had issues with the way he was managing them, including the fairness of rota management, the amount of time he used to disappear to collect money for the supported people, that he did not do direct support but would sit at the dining room table doing paperwork or would be outside smoking. She explained that when she had asked to see the annualised hours for the end of the financial year, Mr Spencer had been unable to provide the information and it had gone missing. When she looked to the timesheets rota and monthly payroll, she found paperwork missing or incomplete. She said she had completed one supervision with him in March, which was handwritten and put on his file.

141 On 17 April 2015, Mr Jones informed Mr Spencer that the disciplinary hearing would be on 5 May and that he would receive the investigation report, "early next week".

142 On 20 April 2015, Mr Spencer received a formal invitation to a disciplinary hearing. That enclosed the investigation report but did not include the all important appendices. The charges he had to answer were set out in that letter were as in the suspension letter, with the 5th charge added on 20 January 2015, as quoted above. He was informed of his right to be accompanied by a colleague or accredited trade union official, but that did not include individuals who were otherwise involved in the investigation or for whom there may be a conflict of interest.

143 On 22 April 2015, Mr Spencer wrote to ask for documents, including the appendices to the report which had been omitted. These documents were sent to him by recorded delivery on 22 April and he did subsequently received them.

144 In the investigatory report, (page 573) Ms Bull began by setting out the evidence which she had gathered from various people interviewed. She explained that in addition, she had interviewed four people who had asked to remain anonymous, stating that they feared threats and intimidation if they became known to Mr Spencer. In respect of each charge, she set out the evidence which she had gathered and Mr Spencer's response, followed by her conclusion:-

144.1 In respect of the allegation regarding failings in paperwork at Kings Avenue and Tudor Lodge, she concluded that it was clear that whilst he had been working at those locations, there had been serious failings in his paperwork.

144.2 In respect of the allegation of work failings whilst at Earlham Mews, she concluded that Mr Spencer's monthly and weekly paperwork was poor, indicating a lack of dedication to detail and approach and a failure to recognise the responsibility of the role of team coordinator. She said there was no indication of lack of capability.

144.3 In respect of the allegation of removing his personal folder from his place of work, she concluded there was no reason for his folder to have gone missing and that he should have taken personal responsibility for its safe keeping.

144.4 In respect of the allegation that he had failed to pay for beverages at Earlham Mews and that the page in the beverage record had been removed, she concluded that on the balance of probability, it was difficult to arrive at a conclusion other than that it seemed too much of a coincidence that this was the only page torn out of the beverages book.

144.5 With regard to the allegation relating to his behaviour, the work place environment and the culture which he encouraged, she referred to eight statements from members of staff who wished to remain anonymous (that is those that she had interviewed and those that Mr Mead had interviewed) and concluded that staff were intimidated, feared reprisal and that their fears were genuine. She concluded that there was a clear absence of trust and confidence in Mr Spencer, she referred to consistency and similarity in those statements, giving them some credibility and substance. She stated that Mr Spencer's attempt to link these allegations to matters he had disclosed, were not substantiated.

145 On 27 April 2015, Mr Spencer emailed Mr Jones and Ms Aganoke, referring to the anonymous documents as being clearly an attempt to discredit him as a result of his whistleblowing. He asked for time to examine the documents in detail. He attached a list of 41 documents or category of documents, copies of which he requested be disclosed to him. He listed 30 witnesses whom he proposed to call at the disciplinary hearing.

146 Mr Jones replied to agree that Mr Spencer could have more time to review the documents. He said that he was considering Mr Spencer's request with regard to copy documentation.

147 On 29 April 2015, Ms Aganoke wrote at length to Mr Spencer with regard to his requests for documentation, enclosing such copy documentation as she felt able to and commenting in respect of some of the documents that he had requested. With regard to witnesses, she remarked that she would only accept witnesses attending who have a pertinent comment to make with regard to the issues.

148 On 4 May 2015, Mr Spencer replied to Ms Aganoke arguing that the anonymous statements should be withdrawn, as there can be not the slightest justification for their being anonymous. He made the point that he had not been provided with full anonymised copies of full statements from these individuals. He went on to explain why he wished to have specific employees attend the disciplinary hearing as witnesses.

149 On 8 May 2015, Mr Spencer obtained an expert's report on the signatures appearing on two supervision records which had appeared in the investigation report. The expert is a Paul Craddock of Paul Craddock Consultancy Limited, forensic handwriting expert. This report referred to two sets of signatures appearing on two supervision documents, one dated 3 August 2014 and the other dated 30 June 2014. He described them as being absolutely identical. In other words, they were photocopies of the same signatures. One signature is or purports to be that of Mr Spencer, the other is or purports to be that of the supervisor, Ms Sadie Farrow. As the image on the second later supervision record is poorer than that on the first, it is likely that the second is a photocopy of the first, although one cannot be sure of that and indeed, it might be that both are a photocopy of even earlier versions of the signatures. The report states clearly that it is not

possible to sign exactly the same on two separate occasions and that therefore, the signatures on the 2 documents cannot both be true representations or the original and that either one or both are the result of mechanical or software manipulation.

150 On 11 May 2015, Mr Jones wrote to Mr Spencer to agree to his request for a rearrangement of the disciplinary hearing as Mr Spencer's union representative was not available. We note that in this letter, Mr Jones told Mr Spencer that he could not interview witnesses. He indicates that Ms Aganoke will consider Mr Spencer's representations at the disciplinary hearing and if she considers it appropriate, arrange for other people to be interviewed.

151 On 15 May 2015, Mr Spencer wrote to a non executive director of the Respondent, Mr Conway, copied to Mr Jones, enclosing a copy of Mr Craddock's report, pointing out that it is unequivocal in its findings. Mr Spencer relies upon this letter as a protected disclosure.

152 On 20 May 2015, Mr Spencer wrote to say that in view of what he called "serious issues" (in other words a reference to Mr Craddock's report) he did not propose to call any witnesses at the forthcoming disciplinary hearing.

153 Also on 20 May, Mr Spencer wrote a letter to Ms Aganoke enclosing a copy of Mr Craddock's report, stating that he had no other documents he wished to rely on at that stage, with regard to the pending disciplinary hearing.

154 On 21 May 2015, Mr Spencer raised a grievance alleging that Ms Farrow and Ms Bickmore colluded in the creation of fraudulent documents. He complained about anonymous employees making false and malicious statements against him. He alleged that a Jill Steed failed to secure the staff beverage's book, that Ms Upson had failed to protect confidentiality in the form of his personal folder and that Ms Bull had not investigated allegations against him with due diligence.

155 On 26 and 28 May 2015, it seems that Mr Spencer reported the fraudulent documents to the police. This appears in the list of issues as a protected disclosure, but we know nothing of what precisely was said to the police, all that we do know about this is what is mentioned in emails on 4 and 5 June 2015, discussed below.

156 The disciplinary hearing commenced on 28 May 2015. The disciplinary panel consisted of Ms Aganoke and Ms Helen Merry, both operational managers. Mr Spencer was accompanied by a union representative, Mr Barter. The meeting commenced at 10.00am and was adjourned at 17.05. At the outset of the hearing, Mr Spencer had asked people present to sign a document acknowledging that the supervision records had been certified by a qualified forensic document examiner as having been manipulated and are therefore fraudulent, to acknowledge the matter has been referred to the police and that therefore by proceeding with the hearing, the signatures may be a party to a conspiracy to pervert the course of justice, which is a criminal offence. Ms Aganoke and Ms Merry refused to sign the document, but confirmed that the allegations were being taken seriously.

157 Mr Spencer and his representative had challenged Ms Bull's competence. This

was dealt with by Mr Jones subsequently sending an email to Mr Cheyette on 31 May, asking him for his views on Ms Bull's competence to further investigate the matters which Mr Spencer had raised. Mr Cheyette replied on 8 June saying, not surprisingly, he had no hesitation in confirming his endorsement of Ms Bull's skills. Ms Bull was then appointed to investigate the matters which Mr Spencer had raised.

158 On 4 June 2015, Ms Bickmore wrote to Mr Cheyette, copied to Mr Jones, following contact from the police:

> *"I just wanted you all to know how I'm feeling…*
>
> *BS has reported Sadie and myself to the police – who have made contact with myself and wish to meet with me.*
>
> *… I do feel that as a company you are not protecting us in any shape or form…"*

159 Mr Cheyette replied:

> *"I feel we have supported you Jane by ensuring the following:*
>
> *(1) Clear "message" given to all concerned that we have every trust and confidence in you. You were never suspended throughout all of this nor subject to any investigation …*
>
> *I think it is fair to say that the attendant frustrations all must be feeling throughout this period of time are a reflection of the disproportionate amount of time we are all having to spend on these matters but there is no other option but to follow the procedures correctly."*

160 Ms Bickmore wrote again on 5 June 2015 to say that she had just spoken to the police, who confirmed that Mr Spencer had been to them with the two supervision records and they had asked for the original documents.

161 On 4 June 2015, there was a meeting of members of the Respondent's management. It is described as a, "Core Communication Meeting regarding potential negative PR". Two matters were discussed in this meeting, the first (notes about which have been redacted) has nothing to do with this case. The redacted version of this document, as amended during the hearing, appears at page 1300 in the bundle. Mr Cheyette gave an explanation of Mr Spencer's case to those present, which included three Non-Executive Directors, the Service Quality Director and a PR Consultant. He explained that Mr Spencer had made an allegation that documents had been falsified and he had taken that allegation to the police. He referred to Mr Spencer as being very influential and manipulative, to staff having stated that they are fearful for their safety and their families safety if they go up against him. He said that there was also a suggestion that Mr Spencer was involved with drug dealers and that staff seemed to be genuinely scared of him, although he does comment there is no evidence to back this up. The concern was that Mr Spencer might approach the local press with the allegation of the fraudulent documents. Mr Cheyette said that from the investigation report, there was sufficient evidence to seriously question Mr Spencer's conduct and performance at work.

He said the overall conclusion from an HR perspective at that stage was that they had lost all trust and confidence in Mr Spencer as an employee. He said that ultimately, Mr Spencer had been suspended for not doing his job properly.

162 On 1 July 2015, Mr Spencer was called to a meeting with Ms Aganoke and Ms Merry, accompanied by his trade union representative, the purpose of which was to discuss Ms Bull. Mr Spencer protested he had not been given any notice as to the purpose of the meeting and that he and his representative had not had time to prepare. The meeting was therefore adjourned. Subsequently, on 13 July 2015, Mr Spencer prepared a detailed written submission on Ms Bull's report, 27 pages long.

163 On 20 July 2015, Ms Aganoke wrote a letter to Mr Spencer setting out her conclusions on an investigation into concerns expressed by Mr Spencer as to the alleged competency of Ms Bull. They jointly, (Ms Aganoke and Ms Murray) agree that there is no reason to doubt the competency or impartiality of Ms Bull, they had every confidence in her skills, capability and impartiality.

164 Ms Bull met with Mr Spencer again on 28 July 2015. No notes were taken of this meeting.

165 On 2 September 2015, Ms Bull produced a further investigation report. She set out how she had investigated Mr Spencer's allegation that the supervision records were falsified. After speaking to Mr Spencer, she had spoken to Ms Farrow, who denied forging the signatures and is quoted by Ms Bull as saying, *"the examiner could not prove conclusively that the signature was a copy".* Ms Farrow felt that the views of the handwriting examiner were based on opinion and there was no solid evidence that they were forged, (all incorrect).

166 Ms Bull satisfied herself that the supervision on 3 August 2014 had taken place, by reference to an email exchange between Mr Spencer and Ms Farrow; in an email of 7 August 2014, Mr Spencer had referred to his supervision on the previous Sunday. She noted that Mr Spencer was unable to demonstrate or articulate how the fraudulent document supported the allegations against him in the disciplinary process. She said that if Mr Spencer was attempting to undermine the credibility of Ms Farrow by raising this as a matter of concern, *"in the absence of any substantiating evidence the assertion is not supported in this investigation"*. Her ultimate conclusion was that she left it to the disciplinary panel to arrive at a conclusion as to the matters raised. She went on to consider the other matters raised by Mr Spencer in his grievance of 21 May 2015.

167 On 15 September 2015, Ms Merry and Ms Aganoke met with some of the anonymous witnesses from the Clacton property at a hotel in Marks Tey. It is very surprising and remarkably poor practice that no minutes had been taken of that meeting, but we accept the evidence of Ms Aganoke and Ms Merry that the meeting did take place. Ms Aganoke and Ms Merry were satisfied that these people were genuine in their fears, that they feared repercussion outside of work should their identity be revealed. Ms Aganoke and Ms Merry were unable to interview the anonymous witnesses who had been interviewed by Mr Mead, because he would not disclose their names. However, they could be fairly certain that they interviewed different individuals from Mr Mead, because he interviewed people at Harwich whereas Mr Merry and Ms Aganoke interviewed people based at Clacton. They decided that the evidence of those interviewed by Mr Mead was

also likely to be genuine, based upon their own conversations with the individuals they met.

168 The disciplinary hearing reconvened on 23 September 2015. Mr Spencer made his point that these matters arose in his view, because of the disclosures he had made in relation to Ms Bickmore. As to the forged supervision records, he acknowledged that a form of supervision did take place but as he says, with regard to the signatures, "this stinks to high heaven". With regard to the page missing from the beverages book, he made the point, by way of suggesting that he has been set up, that an anonymous person stated that he owed £90 and then the relevant page of the book goes missing, in relation to a period of two years earlier. He pointed out the remarkable coincidence of timing, between the allegations which he makes against Ms Bickmore and the allegations which were suddenly made against him.

169 Mr Merry and Ms Aganoke decide that Mr Spencer should be dismissed. They each set out their reasoning in deliberation notes appearing in the bundle, Ms Merry's starting at 1030A and Ms Aganoke's at 1030L. They set out their conclusions in a detailed letter to Mr Spencer dated 13 October 2015:

169.1 Allegation 1: They found that there was significant evidence to indicate that Mr Spencer's approach, commitment and attitude to his role, as team coordinator, was less than adequate. They referred to inaccurate record keeping, weekly and monthly paperwork shortcomings, annualised hours not being managed accurately, inaccuracies in employee salary payments etc., poor and inaccurate completion of rota paperwork, that it was difficult to evidence that the Respondent was compliant and fulfilling its contractual obligations and that this would make the Respondent vulnerable to adverse criticism from the CQC. They said that Mr Spencer was an experienced Team Coordinator who had previously demonstrated competence and he had not asked for assistance. They concluded that his conduct therefore demonstrated a lack of commitment, focus and dedication to the duties and responsibilities of his role. The allegation was therefore upheld.

169.2 Allegation 2: They referred to the audit of paperwork carried out by Ms Sue Winter as significant and damning. After reviewing the faults in the paperwork, they concluded again that Mr Spencer's failings gave rise to potential adverse impact on the Respondent in terms of its contractual obligations with regard to the CQC. They concluded that he had demonstrated a failure to recognise and implement his responsibilities and the allegation was upheld.

169.3 Allegation 3: The allegation relates to a short timeframe in March and April 2014 during which Mr Spencer's personal folder went missing from a locked cupboard to which only he, Claire Upson and Sam Eaton had access. They considered as possible motives on the part of Mr Spencer: to remove less than positive comments from supervisions, trying to cause difficulty for his line managers when trying to manage poor performance, a wider strategy of undermining confidence in managers, to make it look as if there was no control over security for

information, attempting to undermine the credibility of Claire Upson, attempting to discredit employees. They noted that there was some potential benefit to the file going missing, in that it was said to contain a recent supervision by Ms Upson that was critical. Ms Aganoke and Ms Merry conclude that this allegation should be upheld on the basis that Mr Spencer was one of three key holders, he had motive, and there had been inconsistencies in his response.

169.4 Allegation 4: Ms Merry and Ms Aganoke note a consistency with other allegations in this case, about things going missing. They also note that Mr Spencer was not working at Earlham Mews at the time that the page from the beverages book was said to have been torn out. They conclude that whilst they suspect that as the apparent main beneficiary, he did somehow remove the page from the beverages book, such suspicion was circumstantial, given the time delay of over two years. They decided not to uphold the allegation.

169.5 Allegation 5: Ms Aganoke and Ms Merry referred to the significant number of employees who were only prepared to be interviewed if they remained anonymous. Mr Mead had said that those he interviewed were obviously genuine in their concerns and also that those interviewed by Ms Bull had been genuine in their fear. Mr Spencer's defence is summarised as seeking to discredit and undermine the views of those employees, suggesting that there was a hidden agenda against him, in particular that stemmed from his disclosures. Ms Merry and Ms Aganoke saw the allegations by the anonymous employees as entirely separate from the disclosures. In conclusion they found:

169.5.1 Staff members felt intimidated by him as a team coordinator

169.5.2 They, (Ms Agonoke and Ms Merry) had satisfied themselves that such fear or concern does exist.

169.5.3 It was difficult to see how an organisation can function properly when there are such fears.

169.5.4 A number of significant members of the team had lost trust and confidence in Mr Spencer's management.

169.5.5 His management style had engendered a workplace environment that was negative, divisive and compromised.

169.5.6 There were, *"numerous practices and operating approaches"* that were unacceptable.

169.5.7 Working practices prevalent were divisive.

169.5.8 Mr Spencer failed to set a good example and was not a role model.

169.5.9 The working relationship between Mr Spencer and members of his team had irretrievably broken down.

169.5.10 Mr Spencer himself had said he had no trust and confidence in key members of the Respondent's management team.

In light of the foregoing, Ms Merry and Ms Aganoke concluded that allegation 5 be upheld.

170 Under the heading, "mitigation", Ms Aganoke and Ms Merry referred to the allegation that the supervision sheets were forged. That of course is not mitigation, it was evidence Mr Spencer produced to undermine the cogency of the evidence being presented against him.

171 Ms Aganoke and Ms Merry also referred to Mr Spencer's allegation that all of this stemmed from his disclosures, as mitigation. Of course it is not mitigation, it is an explanation offered by Mr Spencer as to why these allegations were raised against him and is therefore a substantive part of his defence.

172 What would have been mitigation and appropriate to take into account in deciding upon the appropriate sanction, would have been to consider Mr Spencer's length of service and hitherto unblemished service. No mention is made of that in the dismissal letter.

173 In terms of sanction, Ms Aganoke and Ms Merry set out that they considered each allegation warranted the following:-

173.1 Allegation 1: upheld, warranted final written warning.

173.2 Allegation 2: upheld, warranted final written warning.

173.3 Allegation 3: upheld, amounting to gross misconduct in the illicit removal or theft of records and warranted summary dismissal without notice.

173.4 Allegation 4: not upheld

173.5 Allegation 5: allegation upheld and to constitute gross misconduct; a serious breach of trust and confidence, warranting summary dismissal without notice.

174 As a consequence, Mr Spencer was dismissed with immediate effect.

175 Mr Spencer appealed against his dismissal by email dated 20 October 2015 and set out his grounds of appeal in the document attached, in which he stated that in essence, all of this has been to blacken his name and to procure his dismissal because of his whistleblowing.

176 The appeal was heard on 26 November 2015, chaired by Mr Cheyette. Mr Spencer was accompanied again by his trade union representative, Mr Barter. Mr Cheyette reviewed each of the allegations with Mr Spencer and his representative.

177 Mr Cheyette provided an outcome to the appeal by a letter dated 4 January 2016. During the intervening period he examined the evidence before reaching his conclusions. The decision to dismiss was upheld. He concluded that the allegations were not brought against Mr Spencer because of his whistleblowing, there was no conspiracy against him and the decision to dismiss was therefore upheld.

178 This claim was issued on 26 January 2016.

Conclusions

Protected Disclosures

179 We consider first of all, whether the disclosures relied upon by Mr Spencer are protected disclosures.

180 The first relied on is Mr Spencer's email to Mr Cheyette and Mr Mead dated 1 February 2014. This email appears to do nothing more than make an allegation to the effect that Ms Bickmore has been behaving unlawfully. No more specific information is provided in this email. It does not therefore amount to a protected disclosure.

181 The second relied upon is the statement of grievance document emailed to Mr Cheyette on 4 February 2014. This very plainly does contain statements of information, such as what had happened to the service user DS, that Ms Bickmore was kept informed, that Ms Bickmore had made no contribution to strategies, that Ms Bickmore had not made any attempt to visit to provide support, that the only, (in Mr Spencer's view) contribution she had made was to allow staff to double-up twice a day. Whilst it is an email that contains allegations, we have to be careful as we have recently been reminded, not to overlook the fact that within allegations, maybe the provision of information and that is what we have here. The Respondent has a legal duty of care to its service users and the information provided suggests that it may be in breach of that. Mr Spencer reasonably believed that to be so. Such information is plainly in the public interest. The emailed attached document of 4 February 2014 was a protected disclosure.

182 The reason for this disclosure was genuine concern about the lack of care for DS and wishing to draw those concerns to the attention of the Respondent. There was no ulterior motive. The disclosure was made in good faith.

183 The next alleged protected disclosure is said to have been made to Mr Cheyette on 6 May 2014, listed together with that in the preceding paragraph in the list of issues, (paragraph 11.1 above). This was in a meeting between Mr Spencer and Mr Cheyette that day, (page 301) in which Mr Spencer went over the same ground as set out in the grievance referred to above, but he also gave some further information, as noted at paragraph 105 above. For example, he explained that only one person was allocated to support DS and they were trying to keep him mobile, in so far as they could, to avoid further complications, Ms Bickmore was offering no support. The information supplied

tends to show that there may a breach of the Respondent's duty of care to its service users, which Mr Spencer reasonably believed to be so and which is in the public interest. There were protected disclosures made in the meeting on 6 May 2014.

184 In making this disclosure, Mr Spencer was still expressing genuine concerns which he wished to draw to his employer's attention. He did not have an ulterior motive and the disclosure was made in good faith.

185 The next two disclosures relied upon are grouped together in the list of issues at paragraph 11.2, one is to the CQC and the other to Essex Police, both on 24 April 2014. We know what was said to the CQC from the email dated 24 April referred to above at paragraph 98: DS had gone to ground and remained there for 1 ½ hours before an ambulance was called, no safeguarding incident was raised, no action was taken over concerns raised about insufficient staffing for DS, no action was taken to ensure DS's needs were met. As well as the making of allegations, that is also the provision of information to the CQC.

186 The CQC is a "prescribed person" and therefore a disclosure made in good faith is potentially a protected disclosure in accordance with Section 43F of the ERA 1996.

187 Mr Spencer reasonably believed that the information that he was providing was substantially true. His motive was genuine concern about the way DS had been cared for, he was concerned that Mr Mead's preliminary outcome indicated that the matter had not been genuinely considered and he wished to escalate his concerns. His disclosure to the CQC was therefore a protected disclosure. He had no ulterior motive, he was not acting out of a desire to get Ms Bickmore into trouble. The disclosure was made in good faith.

188 With regard to the alleged disclosure to the police, (which may have been protected pursuant to section 43G) we have no information, no evidence, not even from Mr Spencer in his witness statement, as to what he said to the police on 24 April 2014. We cannot therefore find that was a protected disclosure.

189 The next disclosure relied upon, (paragraph 11.3) is said to have been made to Bernard Jenkin, MP in a meeting with him on 9 May 2014. A disclosure to an MP is potentially a protected disclosure to a prescribed person, but we have no evidence as to what was said to Mr Bernard Jenkin, MP and therefore we cannot find that this was a protected disclosure.

190 A further protected disclosure is said to have been made to the CQC on 11 September 2014, (paragraph 11.4). Once again, whilst we know that there was a further communication with the CQC, we do not know what was said to them and therefore cannot find that this was therefore a protected disclosure.

191 Mr Spencer relies upon the disclosure of Mr Craddock's forensic report to Mr Conway, (the non-executive director of the Respondent) on 18 May 2015, (paragraph 11.5). That was clearly a communication with the employer. The communication provides information; that there is strong evidence that signatures had been forged on documents. Forging documents has the potential to amount to a crime. Mr Spencer reasonably believed that he was reporting something which amounted to a crime. Further, the person

forging those signatures would have been under a legal obligation to perform his or her duties honestly and diligently and in forging those signatures, would have been in breach of that obligation. It is an obligation which would have been in the public interest, in that there is a public interest in ensuring that those working in the care sector, providing care to people in need in our society, work honestly and diligently. Mr Spencer reasonably believed that the disclosure was in the public interest. This was therefore a protected disclosure. His motive however, was to strengthen his hand in the disciplinary process. There is nothing wrong with that, but it means that the disclosure was not, "in good faith" as defined in section 49(6A) and that any compensation for a detriment because of this particular disclosure, may be reduced by up to 25%.

192 The final disclosure relied upon, (paragraph 11.6) is when Mr Spencer reported the alleged forged documents to the police on 26 or 28 May 2015. We know that Mr Spencer did report the matter to the police, for the police made contact with Ms Bickmore, (we have quoted her email about this in the findings of fact). The police are not a prescribed person. Could this amount to a disclosure under section 43G? Mr Spencer reasonably believed the information he was providing was true; he had an experts report to that effect. However, the disclosure was for personal gain, in that his purpose was to defeat the disciplinary action against him and avoid dismissal. Further, whilst he had previously made the disclosure to the employer, it had not at that stage, had the opportunity to investigate, he was therefore in breach of the Respondent's whistleblowing procedure. It was not therefore in our view, reasonable of him to have made the disclosure to the police at that time. The disclosure to the police does not therefore, meet the test in section 43G and therefore, it was not a protected disclosure.

Unfair Dismissal for making Protected Disclosures?

193 What was the reason for dismissal? The Respondent says that it was conduct. Has Mr Spencer shown enough to suggest that the reason for dismissal might not be conduct, such that the burden of proof must be placed upon the Respondent to satisfy us that conduct was the reason for dismissal? The following matters concerned us and in our judgment, were sufficient to raise doubt as to whether or not the reason for dismissal was conduct, such that the burden of proof is shifted to the Respondent:

193.1 There is the timing of the move of Mr Spencer from Harwich to Clacton. We saw from Ms Bickmore's email of 4 March 2014, (page 145) that it had been apparent for some time that Earlhams had a high management level. If it has been apparent for some time, one wonders why it is at this particular point in time, that Ms Bickmore decides to take action.

193.2 Then with regard to the move itself, we find ourselves asking why it was that Mr Spencer in particular, had to be moved? From her email of 4 March 2014, we can see that there are others apart from Mr Spencer who could be moved, yet Ms Bickmore comes up with the proposal "do we look at Barry moving"**.** We acknowledge that she acknowledges that she felt awkward about putting that forward as a proposal, but the fact of the matter is that the first consideration seems to be of moving Mr Spencer. Is it that Mr Spencer had to move? Mr Cheyette's justification in oral evidence was that he was the person who had lost the most number of hours. In other words, the amount of contracted time for support to service

users in Mr Spencer's team that had been lost was greater that in respect of any other team. There was no selection process. It might equally be appropriate that Mr Spencer be moved to manage one of the other teams in Harwich and one of the other team coordinators moved to Clacton. The Respondent says that Mr Spencer agreed to the move, but he did not agree, his evidence was he said it was not fair that he was the one that should be asked to move again, because he had been moved previously in his time with the Respondent. From the email exchange on 7 March between Ms Bickmore and Ms Ring, Ms Ring says in response to the request for volunteers, she would rather not and that she has her reasons. Ms Bickmore replies, *"that's fine – had been asked to ask – know responses I think".* That gives the impression that she is merely going through the motions, knowing what the outcome is going to be.

193.3 Reading through paragraphs 42 through to 47 of Mr Cheyette's statement, there is a sense of Ms Farrow, Ms Bickmore, Mr Mead and Mr Cheyette meeting up on 30 July and dividing jobs up between them, so as to put a case together against Mr Spencer.

193.4 Ms Froud's evidence was that Ms Farrow had said to her that Mr Spencer had been transferred to Clacton for a reason and that the implication was that he had done something wrong; that someone in the Respondent's management were out to get him. As Ms Farrow put it, *"the person had been sent to a new service because they have crossed the company, … and management wanted to sort them out…"*

193.5 Ms Bickmore instigated the disciplinary process, in that it was she that approached Mr Cheyette to start things off, as he indicated at paragraph 42 of his witness statement.

193.6 There was no investigation to speak of by Ms Bull, into Mr Spencer's suggestion that all that was happening to him, all the allegations against him, stemmed from his whistleblowing against Ms Bickmore. That allegation never seems to have been taken seriously.

193.7 It is odd that the Respondent would not allow Mr Spencer to approach any witnesses in order to prepare his defence. We are thinking of Mr Jones letter of 11 May 2015. By this time, the disciplinary investigation had been completed, so there could be no suggestion of Mr Spencer interfering with witnesses so as to change the outcome of the investigation. We acknowledge that there could have been a concern that he might seek to intimidate people, given the anonymous statements the Respondent had, but that is not the reason given for not allowing him to approach any witnesses, nor would it be a reason to prevent Mr Spencer's representative from approaching witnesses.

193.8 No one in the Respondent's organisation seemed to fully appreciate the significance of the expert's report, which was that somebody was prepared to conduct themselves fraudulently with regard to company documentation. Credence seems to be given to Ms Farrow's assertion

that there was not really any evidence. There is the startling statement by Mr Cheyette in his appeal outcome letter at page 1100 where he says, *"there is no evidence from the investigation that Sadie Farrow "forged" the signatures, just as there is no evidence to suggest that any other individual has forged these*". There is in fact about as good as evidence as one could hope to get, in the form of a forensic handwriting expert's report, that is very clear to the effect that the signatures have been forged by copy. Clearly, somebody did that. In her report at page 986 Ms Bull plays down the significance of the expert's report, suggesting that the evidence is inconclusive, (on the question of whether there was a fraudulent document). At page 987 she said there was no obvious justification why anybody would wish to manipulate the signatures. But with respect to Ms Bull, the potential justification is obvious; a supervisor might realise that he or she has not prepared a note of a supervision, that person might then prepare the note retrospectively, knowing that the documentation is likely to be the subject of an investigation. That person would need a signature from the supervisee and might therefore be tempted to use a photocopier to make it look as if there was such a signature on the supervision record. We are not making a finding that is what happened, our observation is that Ms Bull's statement that there was no apparent reason why signatures might be forged, indicates that the potential seriousness of this evidence was not appreciated or perhaps, that they did not want to appreciate the significance of the evidence. Ms Bull queried whether anybody would, by doing a potential criminal act, place their future career in jeopardy? A fair question perhaps, but somebody did. The posing of that hypothetical question appears to suggest that Ms Bull did not wish to accept that somebody did. We refer to the exchange of emails between Ms Bickmore and Mr Cheyette on 4 and 5 June 2015, quoted in our findings of fact. We note that the focus of this is all about supporting Ms Bickmore, while there is no acknowledgement of the significance of the forged documents that the police were investigating. The focus is on Mr Spencer as a nuisance, not acknowledging that there is something afoot.

193.9 Discussions at the Core Communication Meeting of 4 June, as quoted in our finding of fact, are a clear indication of a lack of open minded, even handed, thinking on the part of the Respondent's management and very specifically, on the part of Mr Jon Cheyette; the Managing Director and the person, remarkably, appointed to hear Mr Spencer's appeal against dismissal.

194 There are two reasons for dismissal given in the dismissal letter, namely the removal of the personal folder and Mr Spencer's conduct toward his colleagues. In light of the foregoing, can the Respondent satisfy us that these were genuinely the reasons for dismissal and not the protected disclosure?

195 The reasons given for finding Mr Spencer responsible for the fact that his personal folder had gone missing and to call that gross misconduct were not particularly compelling. The investigation report had been inconclusive. Ms Aganoke and Ms Merry acknowledged that there was a wider pattern of documents going missing, which may

have had more to do with inefficiency and disorganisation, in other words poor performance, rather than deliberate subversion of the Respondent's processes. There was a potential motive on Mr Spencer's part, in losing a hand written critical supervision record by Ms Upson, (equally, Ms Upson's motive might have been that she was doing Ms Bickmore's biding, as Mr Spencer alleged). Ms Aganoke and Ms Merry thought that was enough to dismiss summarily for gross misconduct, which seems a harsh conclusion on the evidence. Had they relied on that alone, they would have been in difficulty.

196 With regard to Mr Spencer's behaviour toward his colleagues and the allegation that they live in fear of him, Mr Mead met four employees at Harwich and he was convinced that they were genuine. Mr Mead was a credible witness and in evidence, Mr Spencer himself accepted that.

197 Ms Bull then met four other individuals at Clacton, we can see that one of them overlaps with Harwich, but three of them were certainly different employees. She too was convinced that their fears were genuine.

198 Ms Aganoke and Ms Merry met with the Clacton staff that had given anonymous information and they were both convinced that those individuals were genuinely scared of Mr Spencer.

199 The Respondent therefore had a situation where four managers had met with a total of seven, perhaps eight, people and each were convinced that those individuals were genuinely in fear of Mr Spencer and gave information that he behaved in an inappropriate way at work and in managing people. Having heard evidence from Ms Aganoke and Ms Merry, we are satisfied that this was at the forefront of their minds, in reaching their decision to dismiss.

200 For Mr Spencer's dismissal to be automatically unfair for having made protected disclosures, the making of the protected disclosures must have been the reason or the principal reason for the dismissal. We find that it was not, the reason or principal reason for the dismissal was Mr Spencer's conduct, specifically in his behaviour towards employees as evidenced by the seven anonymous witnesses.

Ordinary Unfair Dismissal

201 If the dismissal is not automatically unfair, was it unfair in the ordinary sense of the expression, contrary to the test of fairness set out at Section 98 of the ERA 1996?

202 We consider first of all the test in British Home Stores v Burchell. The dismissing officers Ms Merry and Ms Aganoke genuinely believed that Mr Spencer was guilty of the misconduct for which they dismissed him, primarily his inappropriate treatment of those that he managed, but also removing his personal folder.

203 Did they reach that genuine belief on reasonable grounds having conducted a reasonable investigation? We have already indicated that we were not impressed with the conclusion that Mr Spencer had removed his personal folder and that the same amounted to gross misconduct.

204 As for Mr Spencer's behaviour toward his work colleagues, Allegation 5, Mr Oxton submits that the allegations were too vague and refers us to Strouthos v London Underground [2004] EWCA Civ 402 as authority for the proposition that charges should be precisely framed. The focus of that case was that the employer had in its reasons for dismissal, gone beyond the charges which had been put, by finding that the conduct of the employee had been dishonest. It seems to us that the charge that is allegation 5 in this case, adequately explains what is that Mr Spencer has to answer and that the conclusions of Ms Aganoke and Ms Merry accord with that charge.

205 The investigation into allegation 5 can certainly be criticised for not drilling down further into the allegations being made by the anonymous witnesses. In other words, not obtaining more detail and not setting them out in a more formal statement in each case. Such statements could have been taken, with appropriate passages redacted. However, we accept as genuine, the reasons for not doing this, which were the fear that to obtain and set out more detail would lead to the witnesses being identified by Mr Spencer, contrary to the assurances which had been given to them. Furthermore, the Respondent did have seven or eight people at two different locations, who were, in broad terms, corroborating each other. Four members of management interviewed the witnesses; Mr Mead the first set and Ms Bull the second set, at the investigation stage. That was followed up by Ms Aganoke and Ms Merry, who interviewed some of the witnesses, at the disciplinary stage. They, all four, satisfied themselves that the fears and concerns were genuine. Mr Mead produced a written record of his interviews. Ms Bull produced a detailed written report, which included an account of what all 8 anonymous witnesses had said. Detailed written minutes of the disciplinary hearing were made. Copies of the statements taken were provided to Mr Spencer. We acknowledge that he was placed in a difficult position, in that he could not really challenge what was being said about him, the allegations were not very precise and the individuals were not at the disciplinary hearing to be challenged, (although actually, he never asked for them to attend). If there had been 1 or 2 such witnesses, that may have been fatal to the Respondent's case and rendered the process unfair, but 7 or 8 such witnesses amounts to a credible pattern the Respondent was entitled to take seriously, if the decision makers were satisfied that what was being said was genuine, which they were. The investigation just has to be reasonable, that of the reasonable employer, it does not have to be perfect. We could not say the decision of the Respondent not to obtain more detailed statements from the anonymous witnesses was outside the range of reasonable responses.

206 Having found that the Respondent genuinely believed in Mr Spencer's misconduct, based upon reasonable grounds after conducting a reasonable investigation, we must next ask ourselves whether the decision to dismiss was inside the range of reasonable responses. In our view it is. The evidence the Respondent had was that employees were physically scared of Mr Spencer. A significant number of witnesses, anonymous and named, portrayed a working environment that the dismissing officers understandably found unacceptable and which destroyed trust and confidence. A reasonable employer is entitled to take the view that it cannot have such a person managing its employees.

207 Nothing seems to have been made of Ms Aganoke and Ms Merry not taking into account length of service and Mr Spencer's clean disciplinary record in their decision making. This did not feature in closing submissions nor in Mr Oxten's opening note. We find that the concerns about Mr Spencer's conduct toward his colleagues is such that this

is not a failing on the part of Ms Aganoke and Ms Merry that takes the decision to dismiss outside the range of reasonable responses.

208 Mr Spencer complained that he was not permitted the companion of his choice. This appears to be only in relation to the grievance meeting on 6 May 2014, when Mr Cheyette did not permit Mr Spencer to be accompanied by Ms Eaton, on the grounds of potential conflict of interest. This does not relate to the disciplinary process. Mr Spencer was accompanied by his chosen trade union representative during the disciplinary process. There is no suggestion of this issue having any impact on the fairness of the dismissal.

209 The claim for unfair dismissal therefore fails and is dismissed.

Notice Pay

210 The breach of contract claim for notice pay fails, as the Respondent is in the circumstances entitled to dismiss without notice; treating one's fellow employees and subordinates in such a way that they are frightened, is a fundamental breach of contract on the part of Mr Spencer and is gross misconduct. It is a breach of the implied term to maintain trust and confidence.

Detriment for Having Made Protected Disclosures

211 The test here is whether the disclosures were a material, (more than trivial) influence on the detriment complained of. The bar is lower than it is for unfair dismissal.

212 The first detriment complained of is being moved from Harwich to Clacton. We saw that Jane Bickmore was behind the move, she initiated the process. The Respondent did not produce Ms Bickmore as a witness to give evidence as to her thought processes. There appeared to be no good reason for Mr Spencer being selected as opposed to his fellow team coordinators. That is supported by the evidence of Ms Froud and what was said to her by Ms Farrow. In our view, particularly given the remarkable coincidence of timing, the protected disclosure likely played a significant part in the decision to move Mr Spencer.

213 The second detriment relied upon is suspension from work. Everything started with Ms Bickmore and the timing is noteworthy; after so many years' service, suddenly there are concerns about Mr Spencer's conduct. The allegations raised do not initially seem particularly serious. Certainly, the first three allegations, (paperwork failings in Harwich, paperwork failings in Clacton and the missing personal folder) do not appear to warrant suspension. Failure to pay for beverages is an allegation of dishonesty, which might warrant suspension, given that Mr Spencer would have handled service users' money. On the other hand, it is an allegation that relates to something which had happened two and a half years previously. On the face of it, the case for suspension was not strong and as Lord Justice Elias has reminded us**,** (Crawford & Others v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402) suspension ought not to be a knee jerk reaction. However, by the October meeting, Mr Mead had spoken to the four anonymous witnesses who had connected Mr Spencer to drugs, spoken of him disappearing for long periods of time, spoken of his covering up medication issues,

spoken of people, (including themselves) being scared of repercussions because of those with whom he associates, if they were to speak out against him.

214 The evidence gathered by Mr Mead certainly added weight to the decision to suspend. However, in our view the protected disclosure was more than a trivial influence upon that decision; Ms Bickmore was one of the decision makers, it is very likely that she wanted Mr Spencer suspended, because he had blown the whistle on her. She had started the whole investigation into his conduct. She had brought forward four of the five allegations. We therefore find that the detriment of suspension was because of the protected disclosure.

215 The third detriment relied upon is that Mr Spencer was subjected to a disciplinary hearing, brought about in bad faith, as a result of having made a protected disclosure. The decision maker was Ms Aganoke. She relied on the content of Ms Bull's report. Whilst everything may have been started off by Ms Bickmore, neither Ms Bull nor Ms Aganoke were motivated by the disclosures made to this point. Ms Bull genuinely recorded what she had found and Ms Aganoke acted on what she read in the investigation report. That included the evidence gathered relating to the 5th allegation, concerning Mr Spencer's conduct generally. This arose from Mr Mead's genuine concerns, not because of the protected disclosures. This was not because of the protected disclosures.

216 The fourth detriment relied upon is the loss of 25 hours a month in overtime during the period of suspension. This is linked to the fifth detriment, namely being subjected to a period of 12 months' suspension, the period of suspension being exacerbated by the time taken to investigate the fraudulent documents and in notifying Mr Spencer of the outcome of his appeal against the dismissal.

217 To the extent that the period of suspension was prolonged by the investigation into the forged document, the decision makers over this extension of time to allow further investigation, were Ms Aganoke and Ms Merry, who were motivated not by the fact that Mr Spencer had made the protected disclosures, but by the fact that he had made allegations which required investigation, indeed, which he wanted investigated. This extended period was not therefore a detriment and was not "because of" the disclosures, in the sense that was not the motive, not a material influence on, the decision makers.

218 Delays in the disciplinary process, lengthening the period of suspension, were also caused by Mr Spencer's representative being unavailable. In particular, from 21 to 28 May and 28 July to 23 September 2015. That delay could not be said to be the fault of the Respondents nor due to the protected disclosures.

219 Delays caused by Mr Spencer's request for more time to consider the content of the investigation report and its appendices were not, in our view, a result of the protected disclosure, but as a result of inefficiencies in administration by Ms Bull and Mr Jones, which was not because of the protected disclosure.

220 The list of issues record Mr Spencer as complaining that a delay in notifying him of the outcome of his appeal was a detriment. This was not pursued during the hearing and not referred to in closing submissions in Mr Oxton's opening note. The appeal hearing was on 26 November 2015 and the outcome notified in a letter dated 4 January 2016. That was not an inordinate delay and we accept Mr Cheyette's evidence that he examined the

evidence during the intervening period before reaching his conclusions. The reason for the delay was not the protected disclosures.

221 The only 2 detriments which we uphold as being because of the protected disclosures are the move to Clacton on 1 April 2014 and suspension on 13 October 2014. These proceedings were issued in January 2016. There are no subsequent disclosures upheld. No reason has been offered as to why it was not reasonably practicable to have issued the claim in respect of these matters in time. These 2 aspects in respect of which the claim would have succeeded are therefore significantly out of time and must fail for that reason.

Employment Judge M Warren

9 March 2017