EMPLOYMENT TRIBUNALS

Claimant: Miss K McGarr

Respondent: Equity Solutions Property Services Limited

HELD AT:	Sheffield	**ON:**	1, 2 and 3 October 2019 13 to 15 January 2020
BEFORE:	Employment Judge Little Dr P C Langman Mrs S Robinson		(16 and 17 January 2020 in Chambers)

REPRESENTATION:

Claimant: In person

Respondent: Mr S Lewinski of Counsel (instructed by DWF LLP)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that : -

1.The complaint pursuant to the Employment Rights Act 1996, section 47B (detriments) succeeds.

2. The complaint of automatically unfair dismissal contrary to the Employment Rights Act, section 103A succeeds.

3. The Claimant contributed to that dismissal to the extent of 30% (which will be reflected in terms of remedy in due course).

4. The complaint of unauthorised deduction from wages contrary to the Employment Rights Act, section 13 also succeeds.

5. Remedy will be determined at a hearing on a date to be fixed.

REASONS

1. **Procedural history**

Ms McGarr presented her claim to the Tribunal on 2 January 2019. The claim was listed on the basis that the complaints were unfair dismissal and unauthorised deduction from wages. That was a listing for a one day hearing on 3 May 2019. In the event, and for the reasons set out in the order which the Tribunal subsequently made, that hearing did not proceed as a hearing of the merits of the claim. Instead, in effect, there was a preliminary hearing for case management. The essential reasons for that were that even if the claim had been that which it was assumed to be there would have been insufficient time to hear the case in one day having regard to the extent of the evidence and documentation.

The other significant reason was that it became clear at the 3 May hearing that the claimant was not only bringing a complaint of ordinary unfair dismissal but was complaining that her dismissal was automatically unfair because the reason or principal reason for it was that she had made a protected disclosure. Furthermore there were complaints that the claimant had been subjected to detriments.

In respect of that part of the case further case management orders were made and the claim was listed to be heard over three days commencing 1 October 2019.

2. **Developments since 3 May 2019**

As required by the Order made at that hearing, the claimant provided further and better particulars of her claim. That was in a document she entitled "Written clarification of complaint". That document, which was filed and served on 7 June 2019, was a lengthy document, running to 23 pages. Within it the claimant contended that she had made four qualifying protected disclosures and that she had been subjected to some 27 detriments during the period September to October 2018.

The respondent presented an amended response on 28 June 2019, again in accordance with the order which had been made in May.

On 23 September 2019, just over a week prior to the commencement of our October hearing, the respondent's solicitors wrote to the Tribunal indicating that one of their witnesses, Hannah Winspear, had recently broken her collar bone and so would not be able to attend the hearing. They sought the Tribunal's "guidance" as to whether the hearing would proceed and added that "given the length of the bundle and supplementary witness statements we have concerns that three days will not be enough to hear the matter in full in any event".

The same day, the claimant wrote to the Tribunal indicating that she strongly objected to the hearing being rescheduled. She pointed out that this was the first time the respondent had suggested that three days would not be long enough. She pointed out that it had only been a matter of days before the hearing in May that the respondent's solicitors had realised that one day would not be sufficient. The claimant's preference was that the hearing should continue with the proviso that there would need to be a subsequent hearing to receive the evidence of Miss Winspear.

The parties' correspondence was referred to Employment Judge Little on the basis that he had reserved this case to himself. The Judge's decision was that in the regrettable circumstances, the best course was to proceed and get as far as possible during the allocated three days. A relevant factor in this decision was that at the May hearing it had been difficult to re-list the case, primarily because of the respondent's availability.

In these circumstances, and to avoid any risk of going part-heard again, on adjourning the hearing part-heard in October the resumed hearing was allocated five days.

3. **The complaints**

The complaints which this Tribunal is required to determine are as follows:-

- Unauthorised deduction from wages.
- Detriment on the ground that the claimant made protected disclosures (Employment Rights Act 1996 section 47B).
- Automatically unfair dismissal (public interest disclosure) Employment Rights Act 1996 section 103A.
- Unfair dismissal – ordinary principles.

4. **The relevant issues**

These were agreed to be as follows:

<u>Public interest disclosure detriment</u>

4.1. Did the claimant make one or more of the four alleged qualifying protected disclosures she relies upon?

4.2. Did all or any of the alleged detriments occur?

4.3. If they did, was the claimant subjected to those detriments on the ground that she had made one or more protected disclosures?

<u>Automatically unfair dismissal</u>

4.4. Was the reason or if more than one, the principal reason for the claimant's dismissal that she had made a protected disclosure?

<u>Unfair dismissal – ordinary</u>

4.5. Can the respondent show a potentially fair reason to dismiss – that is a reason within the Employment Rights Act 1996 section 98(1) and (2).

(The respondent seeks to show the reason of conduct).

4.6. If so, was that reason actually fair having regard to the statutory test of fairness set out in Employment Rights Act 1996 section 98(4) and in particular by reference to the alleged unfairness as set out in paragraph 17 of the narrative to the Tribunal's order of 3 May 2019.

4.7. If the claimant succeeds in respect of ordinary unfair dismissal, but not automatically unfair dismissal, and the reason for the unfairness was procedural, would a fair procedure have made any difference and if so what? How should this be reflected in terms of remedy?

4.8. If the claimant is found to have been unfairly dismissed (automatically or on ordinary principles) did the claimant contribute to her dismissal and if so to what degree? How should that be reflected in terms of remedy?

Unauthorised deduction from wages

4.9. Was the respondent authorised pursuant to Employment Rights Act 1996 sections 13 and 14 to make the following deductions from the claimant's pay:-

- The cost of recovering a company vehicle from the claimant's premises (£162.50).
- The cost of a spare key for that vehicle (£167.77).
- The cost of a replacement lock at the respondent's business premises at Jordanthorpe Sheffield.
- By ceasing to make payment of an increment for being on the duty manager rota (from the date of suspension on 17 September 2018.
- By withholding a pay award made to the claimant on 31 August 2018.

5. Evidence

The claimant has given evidence. That is by reference to the forty page witness statement which had been served prior to the abortive May 2019 hearing; the clarification of complaint document referred to above and a nine page supplementary witness statement. Evidence on behalf of the claimant has been given by Mr M Harrison who was formerly employed by the respondent as a lead property manager.

The respondent's evidence has been given by Mr J Keegan, general manager of an associated company and the investigating officer; Ms H Winspear, lead property manager; Mr A Dwan, managing director and dismissing officer (statement and supplementary statement) and Ms A Sarginson, development director of an associated company and the appeal officer (statement and supplementary statement).

6. Documents

There was an agreed bundle comprising 384 pages. On day two a few more documents were added to the bundle including a document of the respondent entitled "Getting the facts right", issued following a BBC Panorama programme broadcast on 10 September 2018. During the course of the January hearing the respondent put in a floor plan of the Norfolk Park Health Centre (366a) and the CCTV Policy of Community Health Partnerships Limited (the tenant) now at pp395 to 401.

7. The Tribunal's findings of fact

7.1. The claimant's employment commenced on 18 January 2016. It was on that date that the claimant signed the contract of employment a copy of which is now in the bundle at pages 48 to 57. The claimant's job title was trainee assistant property manager. On an unknown date, but towards the end of 2016 the trainee period ended and so the claimant became an assistant property manager.

7.2. The contract of employment contains a clause whereby the employee authorises the company to deduct from remuneration any overpayment of salary, any debt owed by the employee to the employer and "any other sum or sums which may from time to time be required or authorised pursuant to S13 of the Employment Rights Act 1996." (Page 51).

7.3. The respondent describes itself as a "national organisation providing expert estate management and strategic planning across the Equity Solutions asset portfolio predominantly in the health sector" (see paragraph 5 of Mr Dwan's first witness statement. The claimant describes the respondent's business as a property management company which built medical centres under a government scheme known as Local Improvement Finance Trust (LIFT). Under that arrangement, a company called Community First Sheffield Limited, a public – private partnership is the landlord and a company called Community Health Partnerships Limited is the head tenant. The premises are occupied by the NHS.

7.4. The claimant's job involved the production of reports following fortnightly site visits to the various medical centres under this arrangement in the Sheffield area, when faults would be logged for rectification by the respondent.

7.5. The claimant's employment until August 2018 was, for the purposes of these proceedings, uneventful. However we should record that it is common ground that the claimant had a clean disciplinary record and was regarded as a good employee.

7.6. That this was the respondent's impression of her is indicated by the annual review which was conducted on 31 August 2018 by Ruth Cureton. The Tribunal have seen what appear to be extracts from the documentation for that review at pages 370 and 371. On the latter page it is recorded that the claimant was awarded a salary increase so that her gross annual pay became £21,000.

7.7. There has been dispute in the evidence before us as to who the claimant's line manager was at the material time. The respondent contends that the line manager was Ruth Cureton and we note that she is described as such in the annual review form to which we have referred. Ms Cureton was based at the respondent's Oldham premises whereas the claimant worked out of the respondent's Sheffield office which was located within a medical centre at Jordanthorpe Sheffield . Ms Hannah Winspear was also based in Sheffield and she was the lead property manager at the material time. The claimant contends that Ms Winspear was her line manager. Ms Winspear disputes this and says that Ms Cureton was in overall charge. The respondent contends that Ms Cureton was the line manager, albeit that the claimant was not, because of the geographical distance, actually visible to her. The evidence from Mr Harrison, called by the claimant, and who was Ms Winspear's predecessor as lead property manager in Sheffield, was that whilst he had day to day visibility of the claimant such matters as appraisals and reviews of the claimant were undertaken by Ms Cureton. On balance, we find that Ms Cureton was the claimant's line manager.

7.8. The 31 August 2018 was also significant in that, somewhat ironically having regard to the annual review which had taken place earlier that day, this was the occasion when the claimant allegedly committed the misconduct for which ostensibly she was dismissed on 4 October 2018.

7.9. The claimant's case is that on Friday 31 August 2018 she visited Darnall Medical Centre very early in the morning at a time when the medical centre was closed. Her intention had been to inspect the flooring there as there had been a problem. The claimant says that on the previous day she had made an entry in what she describes as the online calendar diary which indicated that she was making the inspection at Darnall and would have written words to the effect that she was starting work early and so would be leaving early. There is no print out from such a diary indicating this type of entry on 30 August 2018. The claimant says that this diary was accessible via her laptop. She was required to surrender her laptop when, subsequently she was suspended from employment and has not had access to that computer since. The respondent has not disclosed any entries from such a diary during these proceedings and says that the laptop was subsequently wiped. The claimant contends that the diary entry that she made on 30 August would have been visible to others and that it was not just a personal diary. The claimant's witness Mr Harrison has explained the procedure for others to access what he referred to as the Blue Support diary, but he also referred to a personal diary to which others would not have access unless they made a request.

There are copies of entries in the Blue Support calendar within the bundle (pages 212A and 213) but these do not include any comment to the effect that the claimant would be in early on Friday and so be leaving early.

7.10. In the event, although the claimant was able to gain access to the Darnall Medical Centre, she realised that the fob which she needed to access the room where the faulty flooring was had not been left for her. In those circumstances the claimant left the Darnall Medical Centre and went to her usual place of work, the respondent's office in the Jordanthorpe Medical Centre. The claimant says that she arrived there at approximately 6.30am. There was no signing in book at Jordanthorpe but the claimant says that on her arrival she spoke to domestic staff who would have been able to verify her time of arrival if the respondent had, during the subsequent disciplinary investigation, interviewed them.

We should add that the respondent's concern in the subsequent disciplinary process was not about the time when the claimant arrived at work on 31 August but rather the time when she left. As to which Mr Dwan's first witness statement at paragraph 25 points out that "at no time was the claimant's start time questioned".

7.11. Later that morning, and it seems to be at approximately 8.35am, the claimant made two entries in the Blue Support calendar. One was in respect of her intention to carry out a fire risk assessment (FRA) at the Norfolk Park Medical Centre with a start time of 14.30 and an end time of 15.30 (page 212A). The claimant made a further entry in the calendar to do an FRA at the Darnall Medical Centre with a start time of 15.30 and an end time of 16.30 (page 212).

7.12. The claimant's evidence is that she worked through her lunch break at Jordanthorpe and that this would have been observed by Ms Winspear and possibly district nurses at the Jordanthorpe medical centre. The claimant then set off again for Darnall. The signing in sheet for Darnall Primary Care Centre is at page 217. This indicates that the claimant signed in at 14.00 and signed out at 14.20.

7.13. The claimant then drove to the Norfolk Park Medical Centre and the signing in sheet for that centre at page 219 shows the claimant signing in at what appears to be 14.30 and signing out at 15.00 hours. It is the claimant's case that she left the Norfolk Park Medical Centre at or about 15.00 hours. We say 'about' because the claimant during cross-examination mentioned in passing that she might have rounded that figure up.

7.14. The fire risk assessments which the claimant was undertaking at those two health centres required the claimant to carry out inspections of the parts of those premises that were occupied by the respondent, rather than by the tenant. Those were such areas as the plant rooms. The assessment was based on a proforma document of the respondent and it was necessary for the claimant to complete this as a paper document during the course of the assessment. Unfortunately it is not the respondent's practice to retain the paper copy and the claimant confirms that the actual handwritten forms that she completed for both health centres on 31 August were, as she put it 'binned', once the information from those forms had been uploaded. It is therefore the uploaded versions that are within the bundle. The FRA for Darnall begins at page 338 and the FRA for Norfolk Park begins at 354. The claimant describes the assessment as a tick box exercise with very simple questions and says that an assessment would take between 10 and 20 minutes to do depending on the size of the room. However the evidence of Mr Dwan, a former fire officer, was that fire risk assessments would take longer than 10 to 20 minutes. Ms Winspear was asked about this by the claimant during cross-examination. She said that, depending on the site, an FRA would take between 20 minutes to an hour. Mr Harrison's evidence was that he would expect a fire risk assessment for a plant room to take approximately 15 minutes although he acknowledged that at Darnall Medical Centre there were three plant rooms and so that might take in the region of 40 minutes.

7.15. The claimant is critical of the respondent's procedure for preparing the uploaded version of the FRA. She contended this involved using a Word document which would in fact be the preceding FRA. This would then be overwritten with the relevant information gleaned from the inspection and as recorded in the handwritten form. The claimant says that this caused practical difficulties and she described the software as temperamental. She pointed out that there were particular difficulties when it came to entering tick boxes. Here she relied upon an email which Ms Winspear had subsequently written on 10 September 2018 (page 372) which related to the Darnall and Norfolk FRA's as subsequently updated by Ms Winspear. The email is a request by Ms Winspear to a Chantelle Cooper to format the documents which Ms Winspear had prepared. Ms Winspear writes *"the tick boxes have gone slightly crazy and I'm going to kill myself if I mess with them any longer. The table on the second page won't even let me amend my name!!*". However the claimant's criticism goes further than that because she says that where it was necessary to complete a narrative box, the system would not always permit the new text to be saved and reproduced into the uploaded document. The claimant in fact suggested that some things were saved and others were not. The evidence which the claimant gave in this regard was when being questioned about the absence of information about out of date fire extinguishers in the assessment she uploaded, in contrast with matters found and recorded by Ms Winspear

when on 10 September 2018 Ms Winspear re-inspected those two sites. As will be seen, this is a different explanation or position than the claimant had adopted during the course of the subsequent disciplinary process. We should also add that when Mr Harrison was cross-examined on such alleged shortcomings of the system he explained that he had no experience of information not being properly saved or changing when attempting to upload. Moreover, the Respondent's case is that blank templates were available.

7.16. There has also been a difference between the parties in relation to the significance of the time slots in the diary, in particular in relation to the two relevant FRA's on 31 August. The claimant's case, which is supported by Mr Harrison, is that what is entered in the diary is intended as a rough guide as to where a particular employee will be at a particular time and as a reminder for the employee of the tasks to be undertaken. The claimant's case therefore is that when she made the entries in the diary for 31 August those were not appointments with anyone at Darnall or Norfolk Park. The claimant explains that it is for that reason that she arrived at Darnall at 2pm as opposed to the time given in the diary which was 2.30pm. Mr Harrison's evidence (paragraph 8 of his witness statement) was that what was in the diary was not a strict timetable because flexibility was paramount to the working operation of the property management team. It was normal practice to input an hour for any single appointment but it was accepted that the property team may be on site less, or possibly more, than was indicated on the calendar. The more accurate record of time at a particular site would be gleaned from the signing in book at the relevant medical centre.

7.17. The respondent's case however is that, in effect, the diary means what it says and accordingly the respondent seeks to place considerable weight on the diary entry indicating that the claimant would be at Norfolk Park until 4.30pm. Mr Dwan's evidence was that this suggested that the claimant had no intention of requesting an early finish, as he put it in paragraph 36.2 of his first witness statement.

7.18. One time that is not in dispute with regard to the events of 31 August is that the vehicle which the claimant was driving on the M1 southbound between junctions 26 and 25 was caught by an automatic speed camera at 15.27. The claimant contends that this is not inconsistent with her having left the Norfolk Park Medical Centre at 3.00pm on that day. This is by reference to the specific route which the claimant took and the fact that as she freely acknowledges she had been driving fast. The recorded speed had been 71 mph in a 60mph zone. The route which the claimant says she took to get on to the M1 is different from the two possible routes which, during the course of the subsequent disciplinary process, the respondent was considering.

7.19. A notice of intended prosecution dated 3 September 2018 was received by North Consulting, an associate company of the respondent, on 4 September 2018. A copy appears at page 132.

7.20. On the same day, 4 September 2018, the claimant alleges that she made a qualifying protected disclosure to Ms Winspear. The claimant says that the context was Ms Winspear informing the claimant that the respondent's management wanted it to be relayed to all staff that claims about another associated company, Bright Tribe, which were about to be aired in a BBC

Panorama programme were not true. Bright Tribe is, we understand an associated company that is operated by Michael Dwan, Andrew Dwan's brother. The allegations were about the Academies which that company provided maintenance and fire assessments for and so it was not directly about the business for which the claimant worked. The claimant contends that this led to a discussion with Ms Winspear which took place in the kitchen at the Jordanthorpe office, whereupon the claimant suggested that there might be similar abuses being conducted by the respondent and/or Blue Support in relation to their work for medical centres. The claimant says that she referred to the issue of re-charges and other unethical aspects of the business. The claimant said that she believed that the respondent had been improperly issuing re-charges to the NHS.

7.21. Mr Keegan defines 're-charge' in paragraph 7 of his witness statement and denies that they are a misuse of public money. He says that there are two scenarios in which such a re-charge could occur. The first would be where the associated company, Community First, provides services which were outside the scope of the lease plus agreement (LPA). In that context he says that a tenant would from time to time agree to pay such additional charge. The second occasion when there could be a re-charge would be if the tenant had caused physical damage to the premises in breach of the LPA. The respondent's case therefore is that so called re-charges are transparent and above board.

7.22. However what the claimant was discussing with Ms Winspear was to the effect that the respondent was improperly issuing re-charges to the NHS which tenants were paying without being aware that they were being improperly charged. In other words the thrust of the claimant's case was that the respondent was issuing invoices that it was not entitled to in the hope that the tenant would pay without noticing. The claimant also says that she referred to other potentially unethical aspects of the business whereby the respondent conspired with Blue Support to hide serious failings – such as structural problems – from the NHS. The claimant said that in respect of a faulty roof at the Wincobank Medical Centre the tenant had endeavoured to rely upon an 'unavailability of premises' clause in the LPA – which would have involved a refund to the tenant and instead left the NHS with no choice but to make what the claimant considered to be a fraudulent claim on their insurance cover for repair works whereas the claimant felt that it was Blue Support who were responsible for shoddy work.

7.23. The claimant suggested that if the practice manager at Wincobank saw the Panorama programme he might be put on enquiry as to whether there were any fire safety issues at his premises. The claimant says that she suggested to Ms Winspear that it wouldn't take much for the misuse of public money in the health care sector to be exposed once people realised the conflict of interest between Equity Solutions and Blue Support. The claimant gives this evidence in her clarification document. We note that although in that document the claimant contends that this was a qualifying protected disclosure, when dealing with the same conversation in her first witness statement (paragraph 27) she describes this exchange as "just chatting while in the kitchen and I never thought it would get back to management".

7.24. In Ms Winspear's witness statement she simply denies that any conversation took place with the claimant in the kitchen on this date (see paragraphs 5 onwards). We make our findings as to this alleged protected disclosure within our conclusions set out later within these reasons.

7.25. Also on 4 September 2018 a Ms Coral Heavyside sent an email to Ms Cureton which had attached a copy of the notice of intended prosecution. Ms Heavyside said that she hadn't come across one of these before and didn't want to complete it incorrectly. Ms Cureton emailed the prosecution notice to the claimant without comment. The claimant's reply was that she would sort it out when she got it through the post (see page 120). The claimant says that this suggests that at this time no point was being taken about the time when the offence had been committed.

7.26. On 7 September 2018 a Zoe Openshaw sent an email to Ruth Cureton (page 119). She informed Ms Cureton that she had completed the part of the prosecution notice form that the registered keeper of the vehicle had to, indicating who was actually driving it at the time of the offence. To her email Ms Openshaw added the following:

"*Just wanted to point out though she was on the motorway in Nottingham at 3.30pm on Friday!!"*

The claimant says that Ms Openshaw was Mr Andrew Dwan's PA and hence there is a sinister connotation to that comment. However the respondent says that Ms Openshaw was a director of another company (also related) and was involved as a fleet manager for the respondent and so it was perfectly normal for her to be dealing with this type of matter. They say that it is likely that Ms Openshaw's suspicions were aroused because the normal expectation is that a person in the claimant's position would have been working until 5.30pm, these being the core hours. However, Mr Harrison's evidence confirmed that of the claimant, to some extent. Whilst there were core hours of 8am to 5.30pm, he said the expectations of what the property team were required to do required flexibility particularly because they would sometimes have to work round the needs of tenants and so visit properties out of hours. However, property managers would not come and go without their manager or colleagues knowing. He also confirmed that it was common practice to leave early if the employee had started early, or even if they had started earlier on a day prior to the day of early departure. He also confirmed that, contrary to the respondent's case it was not necessary to get formal permission to leave early in these circumstances, but it would be expected that the accessible (Blue Support) diary would be completed to show what the employee's movements were.

7.27. The 7 September 2018 was the last day which the claimant worked before going on a weeks' annual leave.

7.28. On 10 September 2018 the Panorama programme was broadcast.

7.29. In Mr Dwan's first witness statement (paragraph 7) he says that it was on 10 September 2018 that he was made aware by an HR manager, Sally Jarvis, that Ms Jarvis and Ms Cureton had discovered the time the speeding offence had been committed. In fact of course this had been pointed out by Ms Openshaw to Ms Cureton.

7.30. Ms Cureton has not given evidence, but it would appear that as a result of Ms Openshaw's email on 7 September (page 138 in the bundle), Ms Cureton investigated the matter.

7.31. On 10 September 2018, a Monday, at 8.03am she sent an email (p138) to Ms Jarvis which referred to conversations that had taken place on the preceding Friday. Referring to entries that had been put "into the diary" Ms Cureton acknowledges that the claimant had recorded that she would be carrying out an early morning site inspection at Darnell and leaving work early. As this note is not visible on any copy diary entries that are in the bundle, we assume that this must have been seen by Ms Cureton in the diary which was on the claimant's laptop and was subsequently wiped. Ms Cureton goes on to note that leaving early had not been agreed with either herself or Ms Winspear. Ms Cureton was dubious as to whether the claimant had been at Darnall at 6.30am on 31 August because she had not signed in and, according to Ms Cureton had not taken the building keys with her (although of course the claimant says that it was just the fob that was missing). Ms Cureton referred to the diarised site visits later in the day at Darnall and Norfolk Park between 2.30 and 4.30pm and she acknowledged that the claimant had signed in at each site, but went on to write *"but I suspect that she was there for minutes and has therefore falsified the times"*.

7.32. Ms Cureton contended that a fire risk assessment would take approximately 45 minutes to an hour if carried out properly. Ms Cureton, using the AA route planner, thought that it would have taken the claimant approximately one hour to reach the location of the speeding offence and so she felt that she must have left Sheffield at approximately 2.30pm to cover a 45 mile distance. She felt that it would have been impossible for her to cover that distance within the 27 minutes if she had left Norfolk Park at 3pm. She thought that it would take about 20 minutes just to get on the motorway from there. She also thought that the claimant's journey might be explained by the fact that she had got tickets to watch a live broadcast of Big Brother.

7.33. Although Ms Cureton's 10 September email is not addressed to or copied to Mr Dwan, it appears that it came to his attention prior to the time when he was subsequently dealing with the disciplinary hearing. That must be so because in paragraph 9 of his first witness statement he acknowledges that it was he who, as a result of what are described as initial findings of the preliminary report by Ms Cureton, authorised a formal investigation and appointed Mr Jon Keegan as the investigating officer. However the evidence of Mr Keegan was that he was appointed by the HR manager Sally Jarvis (see paragraph 10 of his witness statement). His recollection was that the invitation had been verbal as he worked within the same building as Ms. Jarvis. We have not seen any letter of appointment or invitation.

7.34. Prior to Mr Keegan beginning his investigations, Mr Dwan, although he would in due course be the disciplinary hearing officer, decided that it was necessary for the claimant to be suspended whilst the further investigation took place. At this time the claimant was on leave and so the suspension was not communicated to her until her return – as to which see below.

7.35. On 12 September 2018 the respondent advertised a vacancy for a graduate property manager at their Sheffield 8 office. A copy of this advert is at page

382. The claimant, who became aware of the advert on 4 October 2018, believes that this was her job being advertised. However the respondent's evidence is that there was a pre-existing vacancy and in his supplementary statement Mr Dwan says that the respondent was short staffed and ultimately three assistant property managers were recruited. He denies that this was the claimant's job being advertised prior to her dismissal.

7.36. The claimant returned to work after annual leave on 17 September 2018 and was immediately invited into a meeting with Ms Jarvis and Ms Winspear. No notes of this meeting were taken but the claimant was given a pre-prepared letter which is at page 142 to 143. That letter noted that a preliminary investigation of the circumstances surrounding the speeding offence had "highlighted the following allegations which potentially constitute gross misconduct". Those allegations were being absent from work on the afternoon of 31 August 2018 without authorisation and allegedly falsifying company documentation, including the signing in sheets at Norfolk Park and Darnall Health Centres and the fire risk assessments *"that were allegedly carried out at Norfolk Park and Darnall Health Centres*." As noted above, the claimant was required to surrender her laptop. One of the conditions of the suspension was the claimant was not to have any contact with other employees without express permission of the company.

7.37. Immediately after this meeting and as she left the meeting the claimant suffered what she describes as a breathing attack. The claimant has explained that she has generalised anxiety disorder. The claimant was issued with a fit note on the same day (page 235) which signed her off for two weeks because of a condition described as work related stress and anxiety (see page 325). On 10 October 2018 a further fit note was issued to the claimant which signed her off until 29 October 2018 (although in the meantime the claimant had been dismissed). The condition on this occasion was as before but with the addition of "exacerbation of asthma". That fit note is at page 326. The claimant did not provide either fit note to her employer on the basis that she felt that there was no need because she was suspended at the time.

7.38. Also on 17 September 2018 the claimant sent an email to Ms Jarvis (page 121). The claimant referred to the suspension meeting as triggering an episode of breathing difficulties and she explained that she had sought medical attention and had been instructed to have two weeks off in order to allow herself to re-balance. The claimant went on to request that *"all future questions and answered (sic) should be submitted in writing, rather than verbal encounter which would be more stressful for me and could delay a resolution to the matter."*

7.39. The respondent acceded to this request and on 18 September 2018 Mr Keegan wrote to the claimant enclosing a list of 21 questions that he required to be answered as part of his investigation. The claimant complains that as she did not get this letter until 19 September and was required to provide the answers by the close of business on 20 September, that she was under pressure and did not have enough time.

7.40. In fact the claimant was not able to reply until 21 September and that reply is at pages 152 to 155. The claimant contends that within that reply is a further qualifying protected disclosure. The claimant wrote that when she

was in better health she might formulate some questions of her own and in any event went on to query why Ms Cureton's apparent routine acceptance of the speeding offence had now developed into a disciplinary investigation.

7.41. Answering the questions which had been posed by Mr Keegan, the claimant said that on 31 August she had finished work at approximately 3pm but had started the working day at approximately 6.30am. She acknowledged that she did not have authorisation to leave early but said that there was an established working practice that if you came in early you could also leave early.

7.42. The claimant was required to answer questions about the times she had arrived at Darnall and Norfolk Park without the benefit of the signing sheets that she had completed for those visits. In those circumstances she estimated that she had arrived at Norfolk Park at 2.30pm and left at 3pm. The claimant confirmed that she had uploaded the fire risk assessments for both medical centres to a system called HOST, which we are told is the in house estate management database. That can be accessed by among others the tenant.

7.43. The claimant was also asked why, when there was a reinspection of Darnall and Norfolk Park on 10 September, various matters were discovered which should have been noted on the fire risk assessment which the claimant had done, including two fire extinguishers being out of date. The claimant suggested that such matters as the accumulation of cardboard boxes and rubbish in the plant room could have occurred subsequent to her inspection on 31 August. The claimant also said that she would need to see the notes which she took on the day in order to be able to properly answer these questions. The claimant acknowledged that there was possibly a fire extinguisher issue and acknowledged that if this was not on the uploaded HOST fire assessment then *"perhaps it should have been*". The claimant went on to suggest that for improved accountability hard copies should be kept and perhaps a duplicate or exact copy of what had been completed on site should have been uploaded "to avoid data input errors".

7.44. In relation to the fire risk assessment for Norfolk Park the claimant explained that the existing fire risk assessment had, as was the usual practice, on her case, been used as a template for the assessment she had done "with appropriate editing and overriding". The claimant acknowledged that she had made an error by not overwriting some of the previous information and she apologised for this. The claimant does not however make any reference in her answers to problems completing the tick box parts of the form nor suggest that she had made the correct observations in hard copy but that the system had then not saved or only partially saved the information so as to give the impression from the uploaded document that there was missing information.

7.45. The matters which the claimant says were protected disclosures within these answers are twofold. She refers to a leaking pipe which is something which Ms Winspear had mentioned in her subsequent report but which the claimant had not put into her own assessment. Whilst the claimant queried the location of the pipe she went on to acknowledge that there was a leaking pipe in the generator room and that had been logged by her approximately 300 days previously. However she went on to write "*we have been*

instructed to simply ignore (and sometimes close) jobs that have been open for more than 100 days due to lack of resources in Blue Support".

Secondly when answering one of the written questions – *Was it usual for no actions to be highlighted on the fire risk assessment?* - the claimant wrote:

"*I can confirm, as should other employees past and present, that we have, at times been instructed to omit or amend certain issues that require Blue Support action/outline, lack of compliance (ie on the landlord fire risk assessment and landlord audit). This process is dependent on Blue Support resources, similar to when we get an email instructing is (sic) to close jobs we have identified on our site visit report as requiring attention, if they have been open for longer than 100 days. Additionally, on occasions, the Property Team have also been instructed to backdate fire risk assessments that have been carried out the month after they were due, so the tenant will be under the impression they were completed during the due period. Clearly, my suggestion that company policy would be more accountable to upload the exact carbon copy of the inspection of* (sic) *the day would be more appropriate"*.

The final question the claimant was asked was when she had inserted the calendar entry stating "KM leave early due to early start". The claimant replies (page 155) that she inputted those into her calendar on the Thursday eg 30 August. The claimant said that she then on Monday 3 September recapped after the weekend. She realised that this entry was not in the joint calendar and therefore she copied it across retrospectively. She pointed out that this had been done before any notification of a speeding offence had been made.

7.46. On 26 September 2018 Mr Keegan produced his investigation report and a copy is at pages 122 to 128 followed by various appendices. Mr Keegan, in addition to the information he had obtained from the claimant, had submitted written questions to both Ms Cureton and Ms Winspear. He identified the allegations as being absent from work without authorisation, falsifying company information - sign in sheets and falsification of the Fire Risk Assessment. He had not identified that there was a specific allegation of falsifying diaries, although on page 126 there is a finding that the claimant had added or modified appointments into the shared activity diary.

7.47. In terms of the hours which the claimant had worked on 31 August, Mr Keegan found that there was no evidence either way as to the time that the claimant had started work that day. However, in terms of leaving time, Miss McGarr had not sought and so was not granted authorisation to finish at 3pm. Because the diary entry stated that the visit at Darnall would be between 3.30 and 4.30, Mr Keegan felt that that suggested the claimant had no intention of requesting an early finish and that having regard to what was in the signing in sheets, the recording of those appointments "could be regarded as deceitful".

7.48. As regards the claimant's movements on the afternoon of 31 August, Mr Keegan was doubtful that the claimant could have travelled from the Darnall Health Centre to the Norfolk Park Health Centre within 10 minutes, which is what the signing in sheets indicated. He was even more doubtful about the claimant's departure time from Norfolk Park, having regard to the

speeding offence being recorded at 3.27pm. He accepted that it could not be clear which camera had captured the incident but he had assumed it was the nearest one to Sheffield and that he calculated was 33.9 miles from Norfolk Park Health Centre. According to Google maps that journey would take between 40 and 65 minutes. As the claimant stated that she had travelled that distance in 27 minutes, it would have been at an average speed of 75.33 miles per hour. Mr Keegan concluded that it defied credibility that the journey could have taken the claimant only 27 minutes. He concluded that the time which the claimant had signed to say she had left Norfolk Park must have been false and it was "therefore reasonable to assume that all other data she recorded on sign in sheets for 31 August 2018 are false as well".

7.49. Turning to the allegation of falsification of company information because of the way in which the fire risk assessments had been completed, Mr Keegan reported that Ms Cureton had said that the established practice was for FRAs to be passed to her or to Hannah Winspear for review before being uploaded to HOST but this had not happened on 31 August, or when the claimant subsequently uploaded those assessments. We should add that the claimant disputes that that was the procedure and she points to the exchange between herself and Ruth Cureton at page 162 where, in response to the claimant's email of 3 September 2018 informing Ms Cureton that she had now typed up and uploaded to HOST the FRAs that she had done for Darnall and was about to do the one for Norfolk Park, the only response from Ms Cureton is "thanks Kelly".

7.50. Mr Keegan went on to point out that there were various discrepancies or omissions from the FRAs which the claimant had completed including the fact that for Norfolk Park there were no recommended actions. In respect of the Darnall FRA the date had been left as 2017 and Hannah Winspear's name given as the assessing inspector. In other words the claimant had not overridden this information. Mr Keegan concluded that because of her training and experience the claimant understood how to undertake FRAs and their importance because they were required by law. He felt that the evidence before him supported the case that the claimant uploaded the two FRAs knowing that they had been compiled with such little level of care and attention that they were barely different from the previous year's reports. He felt that a conclusion that the FRA's were compiled and published by the claimant with the knowledge that they contained false information could be reached and overall it was Mr Keegan's belief that there was sufficient evidence to warrant recourse to the disciplinary process in respect of all three allegations.

7.51. We should point out that in the written questions that had been posed, whilst there was a question about the time the claimant had left Norfolk Park Health Centre, there was no question about what route the claimant had followed so as to get on to the M1, or how she had managed to get to the location of the relevant speed camera within 27 minutes, on her case. Perhaps for that reason, the claimant does not volunteer any information about this herself in her written answers. In her evidence to us, as we have noted, she says that she followed a different route to the two that were being considered by Mr Keegan; that the roads were quiet and, that as she freely admits, she was driving too fast. The claimant said that she was not driving

too fast because she was rushing anywhere in particular but rather she had a habit of driving too fast and had incurred speeding fines previously. The claimant also indicated that the vehicle she was driving, a BMW Mini, was perfectly capable of going fast, contrary to a suggestion made by Mr Keegan in his report where he refers to speeds that would be "beyond the maximum speed capable of her car".

7.52. On 27 September 2018 Mr Andrew Dwan wrote to the claimant (page 221). It was an invitation to a disciplinary hearing on 4 October 2018 at the respondent's head office in Stockport. It appears that Mr Dwan had decided to appoint himself as the disciplinary officer. The allegations were described as falsifying company documentation (although which documents was not specified) and being absent from work without authorisation. The claimant was warned that as those would be gross misconduct she could be dismissed.

7.53. On 1 October 2018 the claimant wrote to Mr Dwan (page 229). She referred to her ill health. She also referred to the questions which she had raised whilst answering Mr Keegan's questions and pointed out that she had not received any answers to what she described as the important questions raised. She went on to say that she required those answers before she was able to provide further submissions. She felt that the absence of that information inhibited her submission of evidence. She indicated that she intended to "re-collate" (we assume reiterate) those questions together with some further questions. She hoped to do that by the close of business on the following day, 2 October. She said that once she had received the full reply she requested a minimum of two days to consider the answers. She went on to ask that the process should continue by means of all communication being in writing. Although the claimant did not seek it in terms, the timetable which she had suggested meant that she would not be in a position to provide submissions by 4 October.

7.54. On 2 October 2018 a Ms Mills, HR officer, wrote to the claimant (page 232) informing her that the disciplinary hearing arranged for 4 October would go ahead as planned. The claimant replied and said that the suggestion of a face to face hearing would pose a health risk to the claimant because of the stress and unusual environment. She said that she was struggling to type her questions as she had to use her phone because the laptop had been surrendered.

7.55. Ms Mills wrote to the claimant again on 3 October 2018 (page 231) explaining that the claimant's versions of events was a key part of the investigation and a discussion in person of the findings to date would always be the respondent's preferred option. However if the clamant wished to put forward any written submissions she should do so by 4pm that day.

7.56. The claimant wrote again to Ms Mills on 3 October (page 245) asking for a screenshot of what she described as the diary for September 10th for both the fire risk assessments that were carried out on that day (that is carried out by Ms Winspear). The claimant explains in paragraph 81 of her first witness statement that she wanted to use that document to show that all single appointments were blocked out as one hour and that fire risk assessments would normally take between 10 and 20 minutes. The respondent failed to provide this information to the claimant in that Ms Mills

wrote again on 3 October (page 235) saying that if it was part of the claimant's defence that fire risk assessments on 10 September were completed in the same way that the claimant had done them on 31 August "*then tomorrow is your opportunity to state this*". The letter went on to say that the claimant was in receipt of all information "*that we will be relying on in the meeting tomorrow".*

7.57. The claimant sent a further email to the respondent, for the attention of Mr Dwan at 4.11pm on 3 October 2018 (pages 247 to 248). Attached to that email was a document which reiterated some of the questions that the claimant had posed which she believed had not yet been answered and there were some new questions. That document is at pages 249 to 255. Within the email itself the claimant asked Mr Dwan to reconsider the date of the hearing to allow time for the questions she was posing to be answered. She felt that failing this there would not be a just process. The claimant pointed out that she had not been provided with the diary screenshot she had requested.

7.58. Among the questions now raised by the claimant were several which went to the rationale of the disciplinary process being started against her and the claimant pointed out that Mr Keegan's fact finding had failed to include questioning of domestic staff at Jordanthorpe or consideration of CCTV footage which would, she believed, have corroborated her case about time of departure and her movements.

Reiterating what the claimant now contends was a qualifying protected disclosure the claimant again referred to the alleged instruction for jobs to be closed if open for 100 days; the omission or amendment of certain issues that otherwise required Blue Support action and the backdating of fire risk assessments (see page 250).

A further alleged protected disclosure is set out on page 253 where, referring to Ms Winspear's email of 10 September 2018 (page 372), the claimant quotes the passage which reads:

"*They* (*actions detailed in the final table of the FRA prepared by Ms Winspear) will need completing ASAP so I can update the FRA and upload to HOST with no outstanding actions".*

The claimant's comment in her questions document is "this shows that there is a desire to construct the upload of the fire risk assessments in a way that avoids having any outstanding actions being visible to the head tenant".

This we understand is a reference to a category of work designated by the respondent as priority 5 or P5. The claimant's evidence is that if on a site visit building faults are logged, they must be given a priority either 4, 3 or 2 depending on their nature. However the claimant alleges (paragraph 3 of her first witness statement) that unbeknown to the NHS and the tenant, the respondent had created a priority 5 list allegedly hidden from the tenant and NHS, so that certain jobs could go unreported. This the claimant contends gave control to Blue Support Services so that they could choose what they wanted to spend money on and rectify faults to their timescales instead of the requirements of the lease. It is in this context that the claimant says that she was instructed to ignore all jobs that had been open for more than 100 days.

When Mr Keegan was re-examined on this issue he told us that matters which were designated P5 were those which were outside the LPA contract and represented the engineer's 'to do' list.

7.59. In terms of the merits of the claimant's actions on 31 August, the claimant did, in her second email of 3 October, provide information about the route she had taken to get on the motorway and with regard to the calendar or diary entries she had made. The claimant said that the diary entries showing that she would be out on the FRAs between 2.30 and 4.30pm were made prior to the claimant working through her lunchbreak. The claimant denied that she had only been at Darnall on the afternoon of 31 August for a few minutes. The claimant contended that the journey time to the point on the M1 where she was caught speeding was actually 40 minutes, based on obeying the speed limit. The claimant believed that the distance to the relevant speed camera from Norfolk Park was 32 miles and that travelling at the legal limit would have taken 37 minutes. However travelling at 10 miles per hour in excess of the speed limit would reduce the time to 32.8 minutes. On this basis the claimant considered that she was being required to account for just five minutes time. That, she said, underlined the ludicrous nature of the accusations that were being made.

In terms of the procedure for undertaking FRAs, the claimant denied Ms Cureton's assertion that a new blank form was used for each report and she pointed out that the difficulties that Ms Winspear had documented in her 10 September email (p372), flowed from the fact that she too was overwriting an earlier report – in this case in fact the claimant's from 31 August.

Nevertheless, the claimant stated that whilst it was not her intention to do so, she had made a 'silly mistake' when uploading the FRAs but felt that that was down to time constraints. not the time she needed to leave work that day but the fact that 31 August was the last day for FRAs to be done. The claimant concluded the questions document by accepting that she had made mistakes on one day only but that was throughout her entire period of work and she felt that the "*persecution for this has been absolutely unjustified."*

7.60. On 4 October 2018 at 8.35am the claimant sent an email to Ms Mills and others for the attention of Mr Dwan. A copy is at page 258 to 259. The claimant said that she had not received any response to the questions she had posed the previous day, nor to her request for rescheduling of the hearing in order to allow her health situation to improve. The claimant went on to say that she had completely lost trust and confidence because of an unjust process combined with "incredulous accusations". She said that it was clear from the unwillingness of the respondent to answer any questions in writing that there was ultra-sensitivity following what the claimant described as the shocking revelations in the Panorama documentary. The claimant referred to the advertisement for what she believed was her own job. She went on to write that she saw the only way ahead to achieve justice was pursue a case of constructive dismissal. However, as an alternative and as recommended by her occupational health therapist, the claimant sought what she described as a quicker clean break through a negotiated exit so as to limit any further negative impact on her health.

In her evidence before us the claimant contended that by a 'negotiated exit' she did not mean that there should be a financial settlement in her favour. Instead the claimant just wanted to clear her name and possibly receive a reference with time to look for another job.

7.61. Unsurprisingly the claimant did not attend the disciplinary hearing on 4 October 2018, but that hearing went ahead in her absence. It was conducted by Mr Dwan and Ms Mills of HR was the note taker. At pages 275 to 278 there is, in effect a statement from Mr Dwan. He refers to questions that he would have asked the claimant had she attended. He refers to what he describes as wide ranging allegations made by the claimant of "accepted work practices". Mr Dwan believed that there was overwhelming evidence to support the allegation that the claimant had falsified diary entries, signing in books and at the very least had been careless with regard to the FRAs. He believed that entries subsequently made into the Blue Support joint diary had been put there by the claimant in order to cover her tracks. He went on to refer to the claimant making "serious and potentially defamatory allegations against colleagues, managers and the company itself". Although in his second witness statement Mr Dwan seeks to distance himself from these comments, or at least contend that they were in respect of something other than the alleged protected disclosures, we find that those comments and others which are set out in Mr Dwan's first witness statement (at a time when we suspect that he was unaware that the claimant was bringing a whistle blowing complaint to the Tribunal) indicate clearly that the reference to "*potentially defamatory allegations"* was directed at the alleged protected disclosures.

7.62. As to the claimant's health condition, Mr Dwan reached the conclusion that her claim to be incapable of attending meetings was not true and this had simply been a ruse to delay the process "in the hope of further salary during the process in addition to somehow supporting her futile case for some form of financial payment to her from the company". It follows that Mr Dwan was not impressed by the claimant's suggestion that there should be a negotiated exit. Mr Dwan was going to take that suggestion into account when considering his decision as well. We observe that neither the genuineness of the claimant's health condition nor the suggestion of a negotiated settlement were disciplinary charges at this time, or in fact at all.

7.63. Having apparently adjourned to consider his decision, the statement, note at page 278 records that after due consideration Mr Dwan had decided that the allegation that the claimant had falsified company documentation and was absent from work without authorisation were correct. He also found that the claimant's "*behaviour via her responses to legitimate and fair questioning during the investigation process, whilst suspended from the company, to be deplorable.*

Ms McGarr has deliberately defamed her colleagues, managers and the company to such an extent that I shall be referring her written communication to our defamation legal team to consider action against her".

7.64. Mr Dwan went on to describe the claimant's "final threat" to make a claim or seek a settlement to be a form of blackmail against the company. The rationale concludes:

"It is my judgment that the outcome of this hearing is that Miss McGarr is guilty of gross misconduct both for her actions or inactions regarding the first allegations (which in the context seems to be that the allegations which had actually been put to the claimant*) and then compounded by Miss McGarr's repeated vexatious claims regarding the company and its trusted employees during her suspension"*.

The claimant was therefore to be dismissed without notice.

7.65. As noted above, in Mr Dwan's first witness statement he records as matters of particular importance when reaching his decision that the claimant's responses to questions posed by Mr Keegan were obstructive and that he found the claimant's assertion that there was a procedure of editing and overriding fire risk assessments not to be the procedure adopted by the team (see paragraph 35.1). In paragraph 35.8 Mr Dwan refers again to the claimant having made very serious and potentially defamatory allegations against her colleagues, managers and the respondent particularly with reference to the procedure surrounding the fire risk assessment. He considered that those allegations had been made without any supporting evidence and only after the claimant had been suspended. He also takes issue with the claimant's allegation that jobs open more than 100 days were to be ignored.

7.66. When giving evidence in that statement as to the reasons for finding the allegations against the claimant were well-founded, Mr Dwan includes (paragraph 36.5) that since the claimant's suspension she had sent numerous emails making serious and defamatory allegations. In paragraph 39 of his witness statement, when explaining why he considered that summary dismissal was the most appropriate sanction, of the three reasons given, one is described as because "the claimant had resorted to making unsubstantiated and defamatory allegations against the respondent and I could not tolerate her continued employment with the respondent".

7.67. In his supplementary witness statement, Mr Dwan says that at the time of the disciplinary process he was unaware that the claimant had allegedly made protected disclosures to Ms Winspear. Whilst obviously he was aware of the matters which the claimant had raised when corresponding with Mr Keegan and as reiterated to him in the disciplinary process, he says that he saw those comments "as a distraction from the investigation into the allegations against the claimant and in no way alleged protected disclosures" (Paragraph 10). In paragraph 30 of the supplementary witness statement Mr Dwan seeks to suggest that his reference to "repeated vexatious claims" in earlier documents was limited to the criticism which the claimant had raised about Ms Cureton, which Mr Dwan summarises in paragraph 29 of his supplementary statement. Those are criticisms which the claimant does not contend to be protected disclosures.

7.68. The dismissal letter dated 4 October 2018 is at pages 224 to 225. The letter seeks to summarise the findings which Mr Dwan had made and these included a finding that the claimant had, since her suspension, sent numerous emails making serious and defamatory allegations against colleagues, managers and the company itself without any supporting evidence. The letter concluded with the following:

"Your written correspondence whereby you have deliberately defamed your colleagues, managers and the company have been sent to our defamation legal team to consider action against you".

7.69. On 7 October 2018 the claimant sent an email to Ms Mills in which she appealed against the decision to dismiss. That email is at pages 282 to 283. The claimant contended that the outcome had been pre-determined, not least because her job had been advertised during the suspension period. The claimant again denied that she had been absent from work and although it was now alleged that she had falsified diary entries, she had not understood that to be one of the accusations. The claimant's request for the disciplinary hearing to be postponed had been refused. The claimant's preparation of a defence against the charges had been hindered because she did not have access to her work laptop.

7.70. The person appointed to hear the claimant's appeal was Ms Sarginson who is development director of an associated company, North Consulting Limited. She says that she was asked to do this by HR.

7.71. Ms Sarginson sent a copy of the claimant's appeal grounds to Mr Dwan for his comments and, interspersed into the claimant's document on pages 288 to 290, are Mr Dwan's comments. Among other things, Mr Dwan referred to the claimant having decided that instead of seeking or requesting information to deal with the allegations against her, she had launched a series of questions for Mr Dwan to answer and wide ranging allegations against her managers, colleagues and the company (Page 289). Mr Dwan's final comment (page 290) is:

"Kelly is deluded to think that her actions would result in a payment to her from the company. Throughout this procedure she has behaved in a deplorable manner, insulting colleagues, being obstructive in the pursuit of affair (sic) hearing and being abusive when challenged".

7.72. In the event, Ms Sarginson decided that there should not be an appeal hearing. She gives her reasons for this in paragraph 29 of her witness statement. She felt that if an appeal hearing had been arranged the claimant would not attend as she had not made any efforts to attend the disciplinary hearing. Ms Sarginson also was concerned that if there was a hearing "there would be no chance of there being a focussed discussion surrounding the grounds of appeal. The claimant appeared intent on making allegations against others … rather than actually engaging in the disciplinary process …"

7.73. Accordingly, the procedure adopted by Ms Sarginson was to consider the matter on paper without, for instance, giving the claimant the opportunity to comment on the observations which Mr Dwan had made about her appeal grounds. Ms Sarginson then prepared an appeal report (pages 305 to 311). One of the recorded considerations of Ms Sarginson (page 309) was:

***"**KM makes a number of very serious allegations against colleagues and the company. Her reference to the BBC Panorama programme and inferring the company will be under an investigation are viewed as aggressive and are being treated seriously by the company."*

In her conclusions (page 311) Ms Sarginson decided that there were what she described as no grounds for a full re-hearing. She therefore upheld the original decision to dismiss. She viewed the disciplinary process as fair and reasonable; the claimant had not provided any new evidence to suggest that the allegations were incorrect and the sanction of dismissal was appropriate. Finally, Ms Sarginson recorded *"KM's conduct during the disciplinary process and after her dismissal will be actioned separately to any correspondence about her appeal".*

7.74. Ms Sarginson wrote to the claimant on 23 October 2018 (page 312) informing her that she had decided to uphold the original decision to dismiss. The reasons for this were essentially the bullet points mentioned in the conclusions in the report. The claimant says that she was not provided with a copy of the appeal report and Mrs Sarginson confirmed to us that that was probably correct.

7.75. On 8 October 2018 Ms Jarvis wrote an email to the claimant (page 295) informing her that the company car and company property would be collected the following day from the claimant's home address. The claimant replied saying that she would not be available. Nevertheless a representative from the respondent attended on that date and removed the car. There was additional company property that needed to be returned but the claimant had also left some of her belongings in the Jordanthorpe office. On or about 16 October 2018 the claimant attended the Jordanthorpe Medical Centre during opening hours. However there was no-one in the respondent's office and so the claimant apparently let herself in and retrieved her property.

On 18 October a representative for the respondent visited the claimant's house and collected from the claimant herself the company property that she still had.

7.76. It was against this background that Mr Dwan wrote to the claimant on 19 October 2018 (pages 302 to 303) informing the claimant that the costs of recovering the company vehicle, the cost of a spare key for that vehicle and a replacement lock at Jordanthorpe (which respondent felt was necessary because they believed the claimant had attended those premises without permission) would all be deducted from the claimant's final salary. The amount was £450.27. The final payment which the claimant received was based upon the claimant's original, pre-annual review increase, figure and without the on-call allowance. With regard to the latter, the respondent's case is that the DPM allowance was only payable if an assistant property manager was capable of being on call and that did not apply during the period of the claimant's suspension (see paragraph 15 of Mr Dwan's supplementary statement). However the claimant has drawn our attention to a part of the respondent's sickness absence policy (p100), which says that the DPM payment will only cease where an employee has been absent, albeit by reason of ill health, for more than four weeks.

With regard to not honouring the pay rise, Mr Dwan's evidence (paragraph 19 of the supplementary statement) was that good character would be taken into account as well as performance when making a pay award and, in effect he says that good character was absent in circumstances where the claimant was dismissed for gross misconduct.

We have not seen any documented pay policy which the respondent might have.

8. **The parties' submissions**

8.1. <u>The claimant's submissions</u>

The claimant said that the respondent's approach to it's business was to amend or omit so as to increase profit. The respondent could have accessed the CCTV at Norfolk Park but had not wanted the claimant to see that. The claimant made reference to the Panorama documentary.

The claimant believed that the removal of her laptop on suspension had prevented her giving the Tribunal evidence of her protected disclosures. On 31 August 2018 the claimant said that she had mentioned her early start that day at the review meeting that was conducted later that day with Ms Cureton. She had then worked through her lunch and that was why the diary was inaccurate when it indicated that she would be at Norfolk Park until 4.30pm. She said that that had happened before when she worked through her lunchbreak. However she had not falsified anything.

The claimant reminded us that her evidence was that during the suspension meeting she had been told to stop talking. In terms of the detriments, the claimant contended that Ms Openshaw had suddenly become the fleet manager. Ms Cureton had no problem with a speeding ticket at first and then only four days later did she have a problem and the only thing the claimant contended had changed had been her 4 September conversation with Ms Winspear in the kitchen. The claimant contended that Ms Cureton had not asked her to simply explain what had happened on 31 August as she was angry because of the 4 September conversation with Ms Winspear.

The claimant had not been asked any questions during the suspension meeting and the claimant suggested that this could have cleared matters up. Subsequently her laptop had been wiped and recycled. There was nothing in the respondent's disciplinary procedure which provided for the removal of an employee's laptop on suspension.

The claimant's pay rise and DPM allowance had been removed on the basis that neither were now deserved and she said that that decision had been made prior to the disciplinary process and again was because of her protected disclosure on 4 September.

The suspension meeting had been flawed. It was clear that there had been a decision to suspend the claimant.

The claimant suggested that Mr Keegan had been brought in to do a hatchet job. The claimant had only been allowed a short time to answer his 21 questions. Mr Keegan had also disregarded her protected disclosures. His investigation had been completely biased. The claimant contended that a page from the annexe to Mr Keegan's investigation report had been purposely omitted from the copy of that report which she had been sent.

Mr Keegan had also failed to take account of the shortest route between Norfolk Park and the position of the camera on the M1. His reasons for not viewing the CCTV at Norfolk Park was not logical. The respondent had subsequently viewed CCTV at Jordanthorpe when it was in their interests

to do so. It had been vital for the respondent to speak to the district nurses at Norfolk Park but that had not been done.

Mr Dwan had acknowledged when giving evidence that the 31 August issue could have been dealt with differently so that the sanction was simply foregoing some leave.

The allegations about allegedly falsifying documents had changed from falsifying the FRA to falsifying the diary. Mr Dwan had appointed himself as the disciplinary officer. The claimant had asked for a rescheduling of the disciplinary hearing but that and her requests for documents had been refused. Her own job had been advertised prior to dismissal.

Ms McGarr contended that the dismissal letter made reference to her protected disclosures and also referred to the respondent's defamation legal team. Mr Dwan had been venting his anger.

With regard to the unauthorised deduction complaint there was nothing in the contract of employment which permitted this. The claimant felt that she had been within her rights to attend at Jordanthorpe unannounced to retrieve her personal property.

With regard to the appeal, the claimant contended that Mr Dwan had interfered with this and an appeal hearing had been denied. There had been no likelihood that Ms Sarginson would go against what Mr Dwan had said.

The claimant then mentioned that Ms Winspear had also made errors when she subsequently did the FRAs at the two premises. The claimant had not falsified the FRAs.

8.2. Respondent's submissions

Mr Lewinski had prepared a written submission which we took time to read. He had also provided us with copies of two authorities on which he relied. These were **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR4 and **Parsons v Air Plus International Limited** UK EAT/0111/17/JOJ. The relevant portion in **Korashi** was what the Employment Appeal Tribunal had said about how reasonable belief should be assessed in the context of a disclosure tending to show one of the statutory matters. That involved the objective standard but also its application to the personal circumstances of the discloser. If the whistle blower was an insider, the question of whether their belief was reasonable had to be on the basis of what a person in their position would reasonably have believed to be wrong doing.

The relevant part of the **Parsons** Judgment was the correct approach to whether a disclosure had been made in the public interest or whether it was something said to provide protection to the individual, so that it was self-interest only.

Although Mr Lewinski canvassed our views on whether we wanted him to revisit points he had raised in his written submission, and we indicated we did not, that is essentially what Mr Lewinski chose to do. He described the case before us as being a relatively straightforward one, at least as far as the respondent was concerned. Although he acknowledged that the claimant's case had turned it into a more complicated animal involving

effectively an allegation of conspiracy. It was obvious that when the respondent realised that the claimant had been heading down the M1 when she should have been at work that the matter had to be taken further. The claimant had been in a position of trust but had abused that trust. It was nothing to do with any protected disclosure. In any event Ms Winspear denied that the conversation on 4 September 2018 had taken place. The company's position on the Panorama investigation would not have been known until 6 September. We were reminded that the claimant had accepted in cross-examination that she did not ask Ms Winspear to escalate whatever had been discussed and that the claimant had said that she did not expect that Ms Cureton would learn of it.

Mr Lewinski suggested that as in the **Parsons** case, what the claimant had raised was simply for self-preservation. There had just been gossip in the kitchen.

The alleged subsequent disclosures to Mr Keegan were simply attempts by the claimant to absolve herself or were a diversionary tactic.

The claimant knew enough of the contractual structure to mean that she could not have had genuine concerns about such matters as the re-charges. She was simply making an assertion. Likewise, the respondent charging for its engineer to supervise a contractor was and should have been known to the claimant to be permissible. Nor could her alleged concerns about incidents at the Wincobank Medical Centre have been based on a reasonable belief. Mr Lewinski went on to describe the alleged protected disclosures as an enormous red herring and the real issue was where the claimant was at a given time on 31 August 2018.

Mr Dwan had prepared his rationale for deciding to dismiss the claimant. The claimant's case had effectively been one which contended that a property manager could come and go without notifying others. But that position had not been supported by Mr Harrison's evidence. Mr Dwan had been entitled to conclude that the FRAs which the claimant had done had been completely wrong.

At paragraph 47 of his written submission, Mr Lewinski submitted that on the central facts Mr Dwan had concluded that the claimant could not have been where she claimed to be by reference to the signing in sheets and so those documents had been falsified. He had also concluded that the claimant was absent without authorisation. Those factual findings were rational and available to Mr Dwan on the evidence he had before him. In the light of those findings it was well within the bounds of reasonableness for the employer to dismiss.

Turning to the appeal, a matter which was not addressed in the written submission, Mr Lewinski noted that the claimant had sought to suggest that Mr Dwan had influenced the appeal process and that Ms Sarginson had simply cut and pasted his comments into her appeal report. However Ms Sarginson had plainly reached her own conclusions and Ms Lewinski commented that she had displayed a striking grip of the detail whilst giving evidence. She was an independent decision maker. She was sufficiently senior to make a decision which, if need be, overruled the managing director. She had explained that she had done so in another disciplinary process in another case. (Our recollection of her evidence here was that

she had 'closed down' a disciplinary investigation which had been started by Mr Dwan).

Whilst there had been no appeal hearing, the claimant had throughout said that she wanted matters dealt with on paper. We were reminded that when counsel had asked Ms Sarginson in re-examination whether, after hearing all the evidence in the case before the Tribunal, she would have reached a different decision on the appeal said that she would not.

In respect of the wage deduction complaint, Mr Lewinski contended that the costs which the respondent wished to recover – those of recovering the company vehicle; a replacement key for that vehicle and putting new locks in at Jordanthorpe – all properly came within the definition of debt and were therefore recoverable under the relevant provision in the contract of employment by way of deduction.

Mr Dwan had also been entitled to withhold the pay rise on the basis of the disciplinary matters which had subsequently arisen.

9. **The Tribunal's conclusions**

9.1. Did the claimant make one or more qualifying protected disclosures?

We remind ourselves that a qualifying disclosure is defined in the Employment Rights Act 1996 at section 43B in these terms:

"*In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following - …. (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".*

We direct ourselves that whilst it is information which must be disclosed, information can be contained within an allegation. In the case of **Kilraine v London Borough of Wandsworth** [2018] WLR 382 the Court of Appeal indicated that allegation and information are not mutually exclusive terms. However words which are too general and devoid of factual content capable of tending to show one of the factors listed in section 43B(1) will not amount to information.

We also bear in mind the guidance given on what is a reasonable belief and when a disclosure is likely to be in the public interest from the two authorities to which we have been referred by the respondent's counsel.

It is trite law that there does not need to be an actual breach of, for instance, a legal obligation as long as the whistle blower has a reasonable belief that that has or is likely to have occurred.

We instruct ourselves that although it is obviously necessary for the information to be disclosed, usually to the worker's employer, it is not necessary for that employer to be aware that that disclosure satisfies the requirements of the statute so that it is a qualifying protected disclosure.

9.1.1. The first alleged protected disclosure – the claimant's conversation with Andrew Binder

In her "Written clarification of complaint" document the claimant refers to her first disclosure as being to Andrew Binder, a Blue Support engineer. The claimant cannot give a date for that conversation which she describes as part of the "everyday daily interaction with Blue Support". The claimant says that the conversation involved a discussion of the contents of a Panorama documentary, although the conversation took place it seems prior to that documentary being aired on 10 September 2018 and also prior to the respondent making it's internal announcement on 6 September 2018 in anticipation of the broadcast. The claimant says that what she disclosed to Mr Binder was that the claimant had discovered that the respondent's contracts for the medical centres did not permit recharges whereas the NHS were being falsely led to believe that that was part of their contract. When being cross examined about this matter the claimant acknowledged that no-one would have overheard this conversation and she said that whilst Mr Binder could have reported it to others, he had probably not done so.

Whilst we must of course reach a conclusion on this point, it is fair to say that this alleged disclosure has not featured heavily in the way the case has been presented to us.

In the claimant's first witness statement, she makes no direct reference to any conversation with Mr Binder, saying only:

"*Naturally, colleagues discussed the issues under investigation by Panorama. I commented that I had noticed the contract Equity Solutions has for the Medical Centres doesn't permit recharges … some of my colleagues didn't realise this and when they asked me why, I made a remark along the lines of Ruth Cureton being the Senior Property Manager in the North".* (paragraph 27).

We conclude that this casual conversation with a colleague cannot amount to a qualifying protected disclosure. Without needing to analyse whether all the necessary ingredients are present, it has been possible for us to reach our conclusion on the basis that clearly the context here was a casual discussion or conversation between colleagues.

9.1.2. <u>The alleged disclosure to Hannah Winspear on 4 September 2018</u>

We have found that Ms Winspear was not the claimant's line manager although she was, as lead property manager in Sheffield, senior to the claimant. As we have noted, in her first witness statement the claimant has referred to conversations or discussions with colleagues on unknown

dates prior to the Panorama programme being aired. Within the latter part of paragraph 27 in the first statement, all the claimant says about what is subsequently put forward as the 4 September protected disclosure is that during the week commencing 3 September 2018 *"(w)hen talking about it (the recharges) I said it was taking advantage of public money by abusing the contract and talked about other things I found unethical in the business. This was just chatting while in the kitchen and I never thought it would get back to management*".

It follows that the claimant does not identify a specific conversation and nor does she refer to Ms Winspear as being one of the colleagues.

However within her written clarification document the claimant gives considerably more detail and, over two pages, purports to set out the things which she told Ms Winspear. In addition to the recharges, the claimant refers to the engineer supervising the subcontractor issue and various matters at medical centres where the respondent had allegedly been conspiring with Blue Support to "hide serious failings from the NHS".

We observe that when presenting her Claim to the Tribunal the claimant may not have had a full understanding of the concept of protected disclosures and how they were potentially relevant to her case. Whilst the clarification document is in response to the Order made in May 2019 for further details of this part of the case, there is such a striking difference between what the claimant says in her first witness statement and what she says in the clarification document to lead us to the conclusion that the claimant has sought to embelish what was actually said at the time. We also again have to take into account context. Originally the claimant described what is now said to be a protected disclosure as "just chatting while in the kitchen". As we have noted, Ms Winspear was not the claimant's manager and although she was a manager of property, as far as we are aware she was not a manager of any other employees. We also find that it is telling that when asked about this matter during cross-examination the claimant accepted that she had not asked Ms Winspear to escalate the matter and that she actively did not want Ms Cureton to find out because "she would take serious issue with it" and if she had raised it with Ms Cureton she would have denied it. As to whether or not that is the case, we do not know and we have not had the benefit of any evidence from Ms Cureton. However we conclude that an employee making a protected disclosure would usually do so to someone within the organisation in a position of authority and so able to do something about the matter which is being disclosed. Even if the other ingredients for a protected disclosure were present, the claimant would be now basing her case on the premise that something which she had not

intended to happen and did not wish to happen – Ms Winspear conveying what the claimant had said to Ms Cureton - had actually occurred. Ms Winspear during the course of her cross-examination denied that there had been a conversation on 4 September and she described what had been said on that occasion or possibly on other occasions as nothing more than what she described as 'Chinese whispers'. Ms Winspear denied that she had reported to Ms Cureton anything which the claimant had said to her about the Panorama programme. We should add that despite Ms Winspear accepting that there had been 'Chinese whispers' prior to 6 September 2018, the claimant had only asked her about the Panorama documentary after the internal announcement had been issued on 6 September 2018 (page 391).

In all these circumstances we find that the claimant had not made a qualifying protected disclosure to Ms Winspear on 4 September 2018.

9.1.3. The third alleged protected disclosure

9.1.3.1 The claimant contends that she made this disclosure when providing her written answers to Mr Keegan's questions. That was in her document of 21 September 2018 which begins at page 152 in the bundle. On page 154 the claimant writes:

"*…. There is a leaking pipe in the generator room that was logged by me approx. 300 days ago. We have been instructed to simply ignore (and sometimes close) jobs that have been open for more than 100 days due to lack of resources in Blue Support"*.

The context in which the claimant made that statement is that it is her answer to Mr Keegan's question as to whether the claimant could explain various shortcomings in her fire risk assessment in contrast to conditions on the ground when Ms Winspear re-inspected on 10 September. One of those issues was that there was pipe work leaking on to the floor in the generator room.

We conclude that this cannot be regarded as a qualifying protected disclosure because the reasonable belief in the public interest is missing. The situation here is in line with the **Parsons** case where the disclosure was made in self-interest. In **Parsons** that seems to have been protection for the future. In the case before us it is the claimant seeking to defend or mitigate her own potential failings.

9.1.3.2 There is a second alleged public interest disclosure within the claimant's answer document. It is set out on page 155. In answer to question 19 posed by Mr Keegan which was -

"Is it usual for no actions to be highlighted on fire risk assessments?", the claimant writes :

"I can confirm, as should other employees past and present, that we have, at times been instructed to omit or amend certain issues that require Blue Support action/outline lack of compliance (ie on the landlord fire risk assessment and landlord audit) … Additionally, on occasions, the property team have also been instructed to back date fire risk assessments that have been carried out the month after they are due, so the tenant will be under the impression they were completed during the due period. Clearly, my suggestion that company policy would be more accountable to upload the exact carbon copy of the inspection of the day would be more appropriate".

Although there is some element of self-interest here we consider that because of the broad nature of the question which the claimant is answering there can also be discerned the claimant's belief that this was in the public interest. She is going beyond a mere defence of her position and in our view is identifying a problem with the respondent's system and suggesting an improvement to it. We conclude that making this suggestion underlines what we find was the claimant's genuine concern about this matter. The impression we have gained of the claimant is that she is an intelligent, although somewhat obstinate individual, and that supports our decision that the claimant had a genuine concern about what she believed to be backdating of fire risk assessments, and that was over and above her desire to defend the disciplinary proceedings.

9.1.3.3 Reasonable belief in 'tending to show.'

The respondent has contended that the claimant could not have reasonably believed that this disclosure tended to show that the respondent had failed to comply with any legal obligation to which it was subject. Essentially in the circumstances of this case that would mean the contractual obligations in the Lease Plus agreement. Mr Lewinski has, when dealing with the **Korashi** case, reminded us of the need to assess reasonable belief on the basis of the whistle blower's particular circumstances and knowledge – the 'insider' point. On the basis that Mr Lewinski told us that he felt the claimant had not adequately put to his witnesses this issue, he spent some considerable time re-examining Mr Dwan as to how the matters which the claimant allegedly had disclosed were incorrect with the result that there was no actual breach of the contract and that the claimant would have known that. In relation to the issue of backdating FRAs, Mr Dwan said that there was no financial penalty if an FRA was late because the statutory regime provided for checks on a three year cycle whereas the respondent voluntarily provided checks every year. The respondent had never failed to meet the three year period. In relation to permitting FRAs to be

amended, Mr Dwan's evidence was that an FRA was a live document and so would be amended from time to time.

We need to consider the claimant's circumstances. As an employee of the respondent she was to that extent an 'insider'. However we observe that at the material time Miss McGarr was 26 years old and had been employed by the respondent for just over two years. She had begun as a trainee but at the material time was an assistant property manager. Accordingly we find that the claimant was young and relatively inexperienced. Moreover she was not at managerial level. She primarily undertook field work – the site inspections. We find that she did not have (nor did she need to have) detailed knowledge of the complex contractual situation as set out on the flow chart which we have been provided with (page 402). This shows the interrelationship between the respondent, Blue Support Services Limited, Community First Sheffield Limited and Community Health Partnerships Limited.

We also instruct ourselves that the threshold for reasonable belief in the context of section 43B is commonly regarded as being relatively low. In the circumstances as we have found them we determine that applying the appropriate level of "insider knowledge" the claimant is to be assessed as having reasonable belief.

Accordingly we find that the claimant's answer to Mr Keegan's question 19 was a qualifying protected disclosure.

9.1.4. <u>The fourth alleged protected disclosure</u>

The claimant contends that this was contained within the attachment to an email which the claimant sent to Mr Dwan on 3 October 2018. That attachment is at page 249 which the claimant heads with:

"Questions relating to first submission asked on 21 September that have still not been answered and require answering prior to any fair hearing, and should have been answered prior to the conclusion of the preliminary investigation".

On page 250 question 4 posed by the claimant is:

"In relation to the findings from Hannah Winspear's FRA dated 10 September, which you believe I should have documented on my FRA I ask the following questions which still have not been answered".

Among those questions are the following:

"*Can you explain why the property team have been instructed to omit or amend certain issues that require Blue Support action/outline lack of compliance (ie on the landlord fire risk assessment and landlord audit)?*

and

"Can you explain why the property team have on occasion been instructed to back date fire risk assessments?"

The claimant was therefore reiterating some of the the matters which she had set out in her correspondence with Mr Keegan. For the same reasons as given above, we find that these were qualifying protected disclosures.

The claimant also refers to Ms Winspear's email of 10 September 2018 (page 372) where Ms Winspear had written-

"*They will need completing ASAP so I can update the FRA and upload to HOST with no outstanding actions".*

The claimant's comment about this is:

"*This shows that there is a desire to construct the upload of the fire risk assessments in a way that avoids having any outstanding actions being visible to the head tenant"*. (Page 253).

On the self-interest/public interest point we observe that the claimant is again going beyond merely defending her performance on 31 August and we take from the impassioned and forthright way the claimant has expressed herself that there was a reasonable belief in the public interest. That is particularly so when the claimant was now addressing the managing director of the respondent, whom she might reasonably expect to be in a position to do something about the concerns which she had.

For the same reasons that we have expressed above we also find that there was a reasonable belief that this tended to show the breach of a contractual obligation.

We find this to be a further qualifying protected disclosure.

9.2. <u>The alleged detriments</u>

The claimant has set out the alleged detriments in her Clarification of complaints document. There are in the region of 27 alleged detriments.

Quite a number of those alleged detriments are said to have been applied prior to 21 September 2018. The obvious significance of that is that we have found that it was only on that date when the claimant made her first qualifying protected disclosure. It follows that whether or not the earlier matters were detriments, they could not be detriments on the ground that the claimant had made a protected disclosure.

We also observe that numerous of the other alleged detriments concern the disciplinary process and we consider that it is apt to deal with these as part and parcel of that process in the context of the claimant's unfair dismissal complaint brought under the provisions of section 103A.

Of the remaining potential detriments we therefore need to make findings of fact as to whether those detriments occurred, where there is a dispute, and then go on to determine the causation issue. Was the claimant subjected to the detriment on the ground that she had made a protected disclosure?

9.2.1. <u>The "withdrawal" of the claimant's pay rise</u>

The claimant alleges that this was a detriment and also complains that it was an unauthorised deduction from her wages. The latter complaint we deal with later.

It is common ground that in Mr Dwan's letter of 19 October 2018 (pages 302 to 303), he purported to cancel the claimant's pay rise. He wrote:

"*You have not received any salary uplift nor bonus as these are at my discretion and it is my decision that they are not warranted nor deserved"*.

It is clear that at this stage Mr Dwan was aware of what we have found to be a qualifying protected disclosure within the answers document provided to Mr Keegan on 21 September 2018. In his letter Mr Dwan specifically refers to the claimant's allegation that-

"*the property team have been instructed to back date fire risk assessments."* Mr Dwan goes on to describe that statement as being -

"false, defamatory of the Company and could equally be defamatory of any colleagues you allege to have acted in that manner. Further, those statements are likely to cause harm and damage to the Company and to any such individuals. This may include financial harm.

We therefore advise that, should such defamatory statements be repeated we will not hesitate to take legal action against you. This may include a claim for damages and reimbursement of our legal costs."

In paragraph 19 of Mr Dwan's supplementary witness statement he explains that when considering whether to award a pay rise, performance as well as good character is looked at. He goes on to say that the alleged protected disclosure made on 3 October 2018 (which we have found to be an actual protected disclosure) post-dated the decision to remove the pay rise. However it did not pre-date the earlier protected disclosure of which Mr Dwan was clearly aware when writing the 19 October letter. It is common ground that the claimant had actually suffered the detriment by not receiving the pay increase in the salary paid or which would otherwise have been paid on 28 September. Whilst in his witness statement Mr Dwan limits his criticism of the claimant's character to her alleged behaviour on 31 August 2018, we find that in the 19 October letter there is a clear connection between Mr Dwan's decision that the pay rise was

not "warranted nor deserved" and the allegations he makes against the claimant in respect of "false and defamatory statements", which in our judgment included the protected disclosure. In these circumstances we find that there is sufficient causation to uphold this detriment complaint.

9.2.2. Threat of legal action

It is common ground that in the dismissal letter Mr Dwan concluded by stating that:

"*Your written correspondence whereby you have deliberately defamed your colleagues, managers and the company have been sent to our defamation legal team to consider action against you."*

Within the same letter Mr Dwan refers to the claimant having sent numerous emails since her suspension making serious and defamatory allegations against colleagues, managers and the company itself without any supporting evidence. Those emails obviously include the two which contained the claimant's protected disclosures. Accordingly we find that there is a clear connection between the making of the disclosures and being threatened with legal action for 'defamation'. The reality, as we now analyse it, is that the claimant was being threatened with legal action for making protected disclosures. Whilst as far as we are aware no further action was taken against the claimant, it must naturally be a detriment to have the stress and worry of a threat of legal action. We therefore find that this detriment complaint is also made out.

9.2.3. Repeated threat of legal action

9.2.4. The threat of legal action for alleged defamatory statements was repeated in Mr Dwan's letter of 19 October 2018 (Page 302) which we have referred to above. Whilst the claimant received this letter after her employment had ended (although whilst the appeal was in train) we instruct ourselves that a former employee can pursue a claim for an alleged detriment to which they are subjected after the employment has been terminated (see **Woodward v Abbey National Plc (No 1)** [2006] ICR 1436).

The 19 October letter makes plain the connection between the "defamatory statements" (protected disclosures) and the intention to commence proceedings, but the additional detriment on this occasion is the reference to the recovery of damages and in particular reimbursement of legal costs. We find that this is a further detriment on the ground that the claimant had made protected disclosures.

We note that the claimant has also claimed a detriment in respect of -

- Mr Dwan's response to the claimant's suggestion of a negotiated settlement – where the allegation was 'blackmail' and
- the claimant's concern that in order to obtain CCTV footage from the tenant at Jordanthorpe, the respondent had implied that the claimant had either committed a potential data breach or a crime, those being the conditions which had to be satisfied under the CCTV policy.

  Whilst we can understand the claimant's concern about these allegations, we do not find that they flow from or were caused by the protected disclosures which we have found.

9.3. The S103A Unfair dismissal complaint

9.4. Was the reason or principal reason for the claimant's dismissal that she had made protected disclosures?

As we have noted, among the findings which Mr Dwan made and which are recorded in the 4 October 2018 letter of dismissal (pages 224 to 225) are that the claimant had sent numerous emails making "serious and defamatory allegations". Although that was not one of the two disciplinary charges which had been notified to the claimant, it is clear in our judgment that the 'defamatory comments'(protected disclosures) had a substantial influence on Mr Dwan's decision to dismiss. We observe that during cross-examination Mr Dwan said that the claimant had behaved appallingly during the suspension period, having made serious allegations against her colleagues. He described that as 'pure aggression' by her. Also during cross-examination Mr Dwan said that if the claimant had accepted her fault in terms of her alleged actions on 31 August, the matter could have been dealt with at what he described as the 'local level' and the sanction would probably have been no more than loss of a half days' leave.

Whilst the question of the claimant's own conduct is a matter we will return to, we find that, bearing in mind the claimant's hitherto good performance (as acknowledged for instance by Ms Winspear), the apparent award of a pay increase and her clean disciplinary record, it is unlikely that a reasonable employer would have dismissed for a first offence, assuming that a reasonable employer would have concluded that the claimant was at fault on 31 August 2018.

This suggests to the Tribunal that the underlying, or principal reason for the claimant's dismissal was something more. We find that that something more was Mr Dwan's anger that the claimant had raised what he at that stage considered to be defamatory statements but which we have found to be protected disclosures. We reach this conclusion based upon what Mr Dwan says in the dismissal letter and also what is said in the contemporaneous notes of 4 October "hearing". In particular, in the rationale part of that document (page 278)Mr Dwan describes the claimant's behaviour "via her responses

to legitimate and fair questioning during the investigation process, whilst suspended from the company, to be deplorable".

There is also the reference to which we have referred alleging that the claimant has deliberately defamed colleagues etc and the letter concludes:

"*It is my judgment that the outcome of this hearing is that Miss McGarr is guilty of gross misconduct both for her actions or inactions regarding the first allegations* (eg those that she had actually been charged with) *and then compounded by Ms McGarr's repeated vexatious claims regarding the company and its trusted employees during her suspension".*

Nor does Mr Dwan hold back in expressing his feelings for the claimant's actions in his first witness statement. He describes the document within which the claimant made a protected disclosure to him on 3 October 2018 as being "very accusatory in tone" (paragraph 22). He describes the claimant's responses to the questions posed by Mr Keegan (which of course included the protected disclosure to Mr Keegan) as "obstructive" (paragraph 35.1). In paragraph 35.8 he refers to the claimant having made very serious and potentially defamatory allegations which were made without any supporting evidence. In paragraph 36.5 he again refers to the numerous emails which make serious and defamatory allegations.

It is also significant in our view that Mr Dwan's supplementary witness statement, made after the abortive hearing in May 2019, and after the claimant's further particularisation of the whistle blowing complaint, seeks to tone down this attack on the claimant and re-focus his comments onto what Mr Dwan now describes as the claimant's criticisms of Ruth Cureton (paragraph 29), which are not the protected disclosures.

Whilst we accept that the respondent's view of what the claimant did or did not do on 31 August 2018 was part of the reason for her dismissal, we find that the principal reason for her dismissal was the making of the two protected disclosures which we have found. It follows that the claimant's dismissal was automatically unfair pursuant to Employment Rights Act 1996 section 103A.

In these circumstances we do not consider that it is necessary for us to make any further findings or articulate a conclusion on the ordinary unfair dismissal complaint.

9.5. Did the claimant contribute to her own dismissal?

We direct ourselves that the Employment Rights Act 1996 section 123(6) which permits a Tribunal to reduce compensation where it finds that the dismissal was to any extent caused or contributed to by the actions of the employee, applies equally to complaints under section 103A (see **Audere Medical Services Limited v Sanderson** EAT 0409/12).

Whilst clearly the claimant cannot be regarded as contributing to her dismissal because of making a protected disclosure, we have to take into account that those disclosures were made during a disciplinary

process which, to a certain extent, the claimant had brought on herself. That process commenced because of the claimant's actions on 31 August.

Here the Tribunal must make its own findings on the balance of probabilities – it is not a question of considering the actions of a reasonable employer or the reasonable band.

We find that the claimant left her place of work, specifically Norfolk Park Health Centre that afternoon, considerably earlier than what would be her normal leaving time of 5.30pm. It is common ground that the claimant had not sought permission to leave early. Whilst she says that she mentioned starting early during the review meeting conducted earlier that day, she does not contend that she said anything about her intention to leave early. We have taken into account that the claimant's witness Mr Harrison did support the claimant's case that specific consent to leave early was not required but we accept that he qualified that by saying that any change in hours should be recorded in the generally accessible diary. We also perceive that the regime which Mr Harrison had operated when he was lead property manager may have been somewhat tightened up by Ms Winspear when she began to undertake that role.

It follows that the diary entries we have seen showing among other things that the claimant should have been at Norfolk Park until 4.30pm were inaccurate.

We also find that there is evidence to suggest that the claimant rushed the fire risk assessments and we note that she has given conflicting reasons for missing out information. Initially during the disciplinary process she accepted that she had made a 'silly mistake' as she put it but when giving evidence before us she suggested that all the right information had been recorded but that the system had not saved it properly. This was a topic where Mr Harrison did not accept the claimant's explanation.

The claimant candidly says that when she entered 3.00pm as her leaving time in the signing out book at Norfolk Park she had 'rounded that up' which we find to be a tacit acceptance that she had in fact left prior to 3.00pm, but had given inaccurate information in the signing out sheet.

There is also of course the fact that the claimant had committed a road traffic offence. Whilst that was not conduct occurring during the course of her employment it was clearly the catalyst for the disciplinary process.

Taking all these matters into account we consider that a fair assessment of the claimant's contribution to her own dismissal is that it amounted to 30%. Accordingly such compensation as, in due course, we award to the claimant for automatically unfair dismissal will be reduced by 30%.

9.6. Unauthorised deduction from wages

9.6.1. Failure to pay the DPM increment

Within the claimant's contract of employment (page 58) it is noted that there was a requirement for the claimant to carry out on call duties. There is also a reference to the claimant being required to act as duty property manager and so be on call 24 hours a day. In recognition of that the claimant would receive an additional allowance of 10% of her monthly gross pay. It is common ground that the claimant routinely received such a DPM payment. The respondent's disciplinary procedure, whilst dealing with suspension (Clause 8 on page 87 of the bundle) does not explain what effect a suspension would have in terms of DPM payments. The claimant has referred us to the respondent's sickness absence policy. Clause 10 on page 100 in the bundle provides that employees who receive the additional payment for being on the DPM rota will cease to receive it if they have been absent for more than four weeks.

The question of whether the claimant has suffered an unauthorised deduction from wages in respect of the DPM payment depends on whether she had a contractual right to receive it and the circumstances in which that contractual right could be limited. We take from the provision in the sickness policy, that the respondent would pay a manager who through sickness was not actually able to be on call. Although there is the hiatus in the disciplinary procedure as to the consequences of suspension, we conclude that a similar provision must be regarded as applying if an employee cannot be on call because they are suspended. We remind ourselves that suspension is supposed to be a neutral act or at least one which does not deprive the employee of core contractual entitlements such as pay. In these circumstances we find that the deduction made by the respondent as articulated in Mr Dwan's letter of 19 October 2018 (pages 302 to 303) amounts to an unauthorised deduction from wages and accordingly the claimant is entitled to this payment. The amount will be clarified and confirmed at the remedy hearing.

9.6.2. <u>The salary increase</u>

Again the question is whether the claimant had a contractual entitlement to that. We have not seen any pay policy which the respondent might have. We have however seen an extract from the claimant's review conducted on 31 August 2018 (page 371). Under the heading "Details of any agreed action salary/bonus/rewards" there is the following:

"Salary increase How much? <u>£21,000</u>."

Although the document is not terribly clear, the pay award was not of course an additional £21,000, but rather bringing up the claimant's annual salary to that amount. We find that an agreement had been reached on 31 August 2018 that the increase would occur, as evidenced by page 371.

As we have noted, Mr Dwan in support of his decision to countermand that pay rise has sought to introduce the condition that to qualify for a pay award the employee must be of "good character" (see paragraph 19 of his supplementary witness statement). In the 19 October letter he suggests that salary increases are at his discretion and that his decision was that a pay rise was not warranted nor deserved. We have seen nothing to suggest that pay rises were in fact discretionary, still less that if they were the employee's character was a factor to be taken into account. It follows that we find that the claimant did have a contractual entitlement to the pay rise and that the respondent's failure to pay that represented an unauthorised deduction from her wages. Again the precise amount of that will be addressed at the remedy hearing.

9.6.3. <u>Deductions for the cost of recovering the company vehicle, a spare key for that vehicle and a replacement lock at Jordanthorpe</u>

The Employment Rights Act 1996, section 13 provides that an employer shall not make a deduction from wages of a worker unless, among other things, that deduction is authorised by a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

The respondent seeks to rely upon Clause 5.1.6 in the contract of employment (page 51). That clause reads as follows:

"*The employee hereby authorises the company to deduct from any remuneration, accrued and due to them under the terms of this agreement (whether or not actually paid during the term of this agreement) or from any pay in lieu of notice:*

(a) any overpayment of salary or expenses or payment made to the employee by mistake or through any misrepresentation;

(b) any debt owed by the employee to the company; and

(c) any other sum or sums which may from time to time be required or authorised pursuant to section 13 of the Employment Rights Act 1996."

Specifically the respondent relies upon the "debt" provision. They further contend that the relevant circumstances are that the claimant did not co-operate by being available when a representative called at her house to collect the company car with the result that cost was incurred in recovering the car (the detail of which has not been explained) and that a spare key had to be obtained for the vehicle. We should add, for what it is worth, that the claimant contends that she explained that the only date proposed by the respondent for recovery of the

car was inconvenient and she so advised the respondent but their driver/agent turned up anyway.

The other relevant circumstance is that the claimant had, post-dismissal used her office keys to gain access to the Jordanthorpe Health Centre when she retrieved her personal possessions. Again, for what it is worth, the claimant contends that the respondent was being difficult about her having the possessions returned to her and that she had accessed the premises during opening hours but apparently whilst no one was around, although that was not her original intention. The respondent having viewed CCTV footage of this which it had managed to obtain considered that it was necessary in the interests of security to change the lock.

Mr Lewinski contends that thereby the claimant had created a debt or was otherwise indebted to the respondent and so the contractual provision applied.

We observe that for there to be a debt, in the legal sense, there would usually need to be a contract. When the Employment Judge asked Mr Lewinski where the contract was that created the debt in the case before us he said that that was the contract of employment. However we cannot accept that submission. There is nothing in the contract of employment which could be regarded as creating a debt or imposing liability for a debt in the circumstances which are relevant to this case. Instead we find that the respondent is in effect seeking to recover damages for what it believed was wrong doing by the claimant. Whether or not there had been wrong doing and whether or not the respondent might be entitled to seek compensation for that, making a deduction from the claimant's wages was not the lawful way of dealing with the issue. Accordingly we find that there was an unauthorised deduction in respect of the recovery of the company vehicle (£162.50); and in respect of the cost of the spare key (£167.77) and further in relation to the cost of the replacement lock at Jordanthorpe (£120).

Employment Judge Little

Date 17th February 2020