EMPLOYMENT TRIBUNALS

Claimant
Ms Tracy Jackson

Respondent
Roseberry Care Centres GB Ltd
t/a Valley View Care Home

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields On 25-27 February (deliberations 15 March) 2019

Before Employment Judge Garnon
Members Ms L Jackson and Mr R Greig

Appearances
For the Claimant in person
For the Respondent Mr W Lane Solicitor

JUDGMENT

The unanimous Judgment of the Tribunal is:
1. The claim of automatically unfair dismissal on the ground the claimant made protected disclosures is not well founded.

2. The claims of breach of contract (wrongful dismissal), unfair dismissal and subjection to detriment on the ground the claimant made protected disclosures are well founded . Remedy will be decided on a date to be fixed.

3. The claims of unlawful deduction of wages and for compensation for untaken annual leave are dismissed on withdrawal.

REASONS (bold is our emphasis and italics are quotations)

1 Introduction and issues

1.1. By a claim presented on 18 July 2018, the claimant brought claims of unfair dismissal generally and on the ground she had made protected disclosures, subjection to detriment on that ground , wrongful dismissal , holiday pay and unlawful deduction of wages. At this hearing the claimant, after she had seen more documents, accepted her holiday pay and final wages were correct and withdrew those claims.

1.2. The claimant earlier complained some documents had not been disclosed including resident's notes upon which she has allegedly written comments. The names of residents will be referred to in these reasons by letters only. The respondent says some of the documents requested simply cannot be traced. Our Employment Judge explained

the claimant may question the respondent's witnesses as to why these documents are not traceable.

1.3. The claimant claims she drew to the attention of several people within the respondent, on several occasions, instances affecting health and safety of residents at the Valley View Care Home (the home) which resulted in her being subjected to detriments. The respondent denies she was, but also denies the disclosures she alleges were ever made. It accepts she was dismissed and says the reason was related to her conduct .She says the real reason was she had made protected disclosures , but even if the real reason of the dismissing and appeal officers was related to conduct, her dismissal was unfair on ordinary principles. Also, the managers at the home subjected her to detriment by referring her for disciplinary action.

1.4. The liability issues are as follows:

Unfair dismissal
1.4.1.What was the principal reason for dismissal?
1.4.2. Was it that she had made protected disclosures or was it a potentially fair one under sections 98(1) and (2) of the Employment Rights Act 1996 ("the Act ")?
1.4.3. If the latter, did the respondent believe her to be guilty of misconduct?
1.4.4. Did the respondent have reasonable grounds upon which to sustain that belief?
1.4.5. At the stage at which that belief was formed, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?
1.4.6. Did the respondent follow a fair procedure and was dismissal a sanction within the so-called 'band of reasonable responses'?

Wrongful dismissal
1.4.7. Was the claimant in fact guilty of gross misconduct?

Protected disclosure- detriment
1.4.8. Did the claimant's communications as set out in her further particulars constitute protected disclosures?
1.4.9. Was she subjected to detriments?
1.4.10. Was an effective cause of the detriments that she had made the disclosures?

2. The General Points of Law on the Liability Issues

2.1. Section 43A of the Act says a "protected disclosure" is a qualifying disclosure (defined by section 43B) made by a worker in accordance with any of sections 43C- H.

2.2. Section 43B defines "qualifying disclosure" and includes "*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

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

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

*(5) In this Part " **the relevant failure ",** in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).*

2.3. Section 43C says
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

*(a) to **his employer**, or*

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

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

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

2.4. Section 43L(3) says "*Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to **bringing the information to his attention**.***"**

2.5. Cavendish Munro Professional Risks –v-Geduld, drew a distinction between a disclosure of information and simply voicing a concern, raising an issue or setting out an objection.That was qualified in Kilrane-v-London Borough of Wandsworth

2.6. The claimant's disclosure need not be objectively correct provided her beliefs were reasonable , Darnton-v-University of Surrey , Babula-v-Waltham Forest College .

2.7. The requirement the disclosure is "made in the public interest" does not require it to be in the interests of all the public but of a significant sector- Chesterton Global -v-Nurmohammad. **If what the claimant says is accepted, she will have drawn information, which she reasonably believed showed relevant failure to her employer or other persons responsible and done so in the public interest.** Rightly Mr Lane did not argue otherwise as his instructions were they were not made at all.

2.8. Section 47B includes
*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer **done on the ground that** the worker has made a protected disclosure.*
(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -
(a) by another worker of W's employer in the course of that other worker's employment, …
*(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is **treated as also done by the worker's employer."***

2.9. Section 48 adds

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."

(2) On (such a complaint) ***it is for the employer to show the ground on which any act, or deliberate failure to act, was done**.*

2.10. There is no "time limit" between the making of the disclosure and the subjection to detriment but the former must cause the latter to the extent we now explain.

2.11. In s47B , one is not looking for the principal reason , but **an effective cause**. Elias LJ said in Fecitt v NHS Manchester [2012] ICR 372, s 47B will be infringed "*if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*", and later " *Once the employer has satisfied the tribunal that he has acted for a particular reason,… that necessarily discharges the burden of showing the proscribed reason played no part in it. It is only if the tribunal considers the reason given is "false", whether consciously or sub consciously,* ***or the tribunal is being given something less than whole story*** *that it is legitimate to infer discrimination*"

2.12. Section 98 of the Act includes:
(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair ***it is for the employer to show*** *–*
(a) ***the reason (or if more than one the principal reason) for dismissal***
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2)A reason falls within this subsection if it relates to ... the conduct of the employee."

2.13. Section 103A provides an employee is to be regarded as unfairly dismissed if the **principal** reason for it is that she made a protected disclosure. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to **the employer** or may be beliefs held by him which cause him to dismiss the employee. The reason must exist at the time of the initial decision to dismiss and at the conclusion of any appeal. **Who for this purpose is the "employer"?** The short answer is those persons who took the decisions to dismiss and reject the appeal.

2.14. In Royal Mail Group -v- Jhuti Mitting J held a Tribunal's decision dismissal was not on the ground the claimant had made a protected disclosure because the person who decided to dismiss was misled by the claimant's line manager (to whom she had made the disclosure) and who engineered her dismissal because she had done so was not sustainable. He said : *In the vast majority of cases all that is necessary to discern is the set of facts known to the person who made the decision to dismiss. He will be the sole, or where the decision is a joint one, they will be the joint human agents of the employer who determine the decision. There is, however,* ***no binding statement in the authorities*** *that the mind of that person or those persons must in all circumstances be equated with that of the employer.*

2.15. Not cited to His Lordship (or to the Court of Appeal in an age discrimination case called CLFIS (UK) v Reynolds [[2015] ICR 1010]) was Orr-v-Milton Keynes Council. Lord Justice Sedley (dissenting) began Orr by saying "*The question at the heart of this appeal is whether an employer, when considering dismissal of an employee for misconduct, is to be taken to know exculpatory facts which are known to the employee's manager but are withheld from the decision-maker."* The claimant who is black and of Jamaican origin, was charged with misconduct. For various reasons he took no part in the disciplinary hearing and the propriety of the conclusions of the dismissing officer, Mr Cove, on the material before him was not challenged. The same was true of the internal appeal which failed. The charge was that in a discussion about working hours, the claimant had become rude and truculent to his manager Mr Madden. The employment tribunal found what had sparked the altercation was an underhand attempt by Mr Madden to reduce the claimant's working hours without his agreement. It held the dismissal was fair because it was a reasonable response **by Mr Cove** to what was

known to him at the time. For the claimant , it was argued at the time of the disciplinary hearing facts were **known to "the employer",** albeit not to Mr Cove, which exonerated Mr Orr or mitigated his offence so the Council as a matter of law knew such facts, **through Mr Madden himself**. That Mr Cove did not know, thanks to Mr Madden's concealment, did not legally (or morally) matter. Lord Justice Moore-Bick (with whom Aikens L.J. agreed) said

51. The question that has to be decided in the present case is ..who is to be regarded as the employer for the purposes of section 98 of the 1996 Act. …At one level the answer is obvious: it is the person or organisation by whom the employee was employed; but the position is not so straightforward when, as will often be the case, the employer is a large organisation or (as is almost invariably the case) a legal rather than a natural person who can act only through the agency of others.

57. .. The authorities to which I have referred establish that section 98 requires the tribunal when determining whether the dismissal is fair to consider whether the employer believed that the employee was guilty of conduct justifying dismissal and whether he had reasonable grounds for holding that belief. Since belief involves a state of mind, it is necessary, .. to determine whose state of mind was for this purpose intended to count as the state of mind of the employing company or organisation.

58. The answer to the question "Whose knowledge or state of mind was for this purpose intended to count as the knowledge or state of mind of the employer?" will be "The person who was deputed to carry out the employer's functions under section 98."

59. In the present case that person was Mr. Cove. The submission that the knowledge of Mr. Madden is to be treated as the knowledge of the Council and as such is to be imputed to Mr. Cove is in my view unsound…More importantly, however, to impute to Mr. Cove ***knowledge of Mr. Madden's behaviour that he could not reasonably have acquired through the appropriate disciplinary procedure*** *in order to enable Mr. Orr to treat as unreasonable and therefore unfair a decision that was in all respects reasonable would be to impose on the Council as the employer a more onerous duty than that for which section 98 provides.*

60. .. in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly ***if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances.*** *That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. … The obligation to carry out a reasonable investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose****. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained****.*

2.16. If in an age discrimination case the **only** act complained of is dismissal, as it was in Reynolds , again one looks at the thought process of the person who took that decision. However, Underhill LJ spelled out how the case could have been put to give

the claimant the remedy she sought , if others were motivated by her age:- *(1) By making an adverse report about the claimant , someone (Y) subjects her to a detriment (2) If Y was motivated by her age, his act constitutes discrimination (3) If that discriminatory act was done in the course of Y's employment it would be treated as the employer's act; and it would be liable (4) Y would also be liable for his own act (5) The losses caused to the claimant by her dismissal could be claimed for as part of the compensation for Y's discriminatory act, since they would have been caused or contributed to by that act.* Underhill LJ's earlier decision in The Co-Operative Group Ltd v Baddeley [2014] EWCA Civ 658 was a claim of unfair dismissal where the person who **initiated** the disciplinary process was motivated the claimant's protected disclosure but those who took the decision to dismiss were not. In Jhuti Mitting J quoted passages from Reynolds and Baddeley and held : *I am satisfied, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is* ***manipulated by someone in a managerial position responsible for an employee,*** *who is in possession of the true facts,* ***can be attributed to the employer of both of them.***

2.17. When Jhuti reached the Court of Appeal, the decision in **Orr** was cited and Mitting J was reversed on the unfair dismissal finding . Underhill LJ relying on Orr said the "Reynolds method" (set out in italics in the last paragraph) could support a detriment claim for loss arising from dismissal , but the dismissal itself would not be for an inadmissible reason unless it was in the mind of the person who took the decision. In cases under s 47B, Mitting J was plainly right. Therefore, if we reach two conclusions (a) that those to whom disclosures were made were, consciously or subconsciously, motivated to a material extent by the claimant's protected disclosures and (b) either of them, directly or indirectly, influenced or manipulated those who decided on the claimant's dismissal, her detriment claim could succeed, but her automatically unfair dismissal claim would fail .

2.18. In Kuzel-v-Roche Products Mummery L.J. dealt with reason for dismissal thus:

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

2.19. In ASLEF v Brady . Elias P (as he then was) said:

Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….. .

It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason, even a

potentially fair reason. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.

Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so.

On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.

2.20. Hadjioannou-v-Coral Casinos contained guidance approved by the Court of Appeal in Paul-v-East Surrey District Health Authority. An argument one employee received no sanction and the claimant did is relevant where
(a) there is evidence that employees have been led to believe that certain conduct will be overlooked or dealt with by a sanction less than dismissal
(b) **where other evidence shows the purported reason for dismissal is not the genuine principal reason**
(c) where , in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.

2.21. If we accept the facts given by the respondent for the genuine reason for dismissal, we must decide if any reasonable employer could view them as related to conduct. Thomson-v-Alloa Motor Company held a reason relates to conduct if it impacts in some way on the employer/employee relationship. Misconduct and incapability are sometimes hard to differentiate. Sutton and Gates (Luton) Ltd -v- Boxall held a reason related to capability if the claimant is trying her best but failing . It relates to conduct if she is failing to exercise to the full such talents as she possesses.

2.22. Section 98(4) of the Act says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.23. An employer does not have to prove, even on a balance of probabilities, that the misconduct he believes took place actually did take place. The employer simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald.

2.24. In A v B [2003] IRLR 405 the EAT said:
"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

2.25. As a general rule, a person who has been a witness to acts alleged should not hold an enquiry or decide the outcome. In Moyes v Hylton Castle Working Mens Club, an incident was observed by the Chairman and Assistant Secretary of the Club. Those two people went on to be involved in the investigation and the disciplinary hearing. The EAT held no reasonable observer would conclude that in view of their dual role justice was, or appeared to be, done. The EAT added there will inevitably be cases where a witness to an incident will be the person who has to take the decision but in the present one it was unnecessary because there were many other committee members.

2.26. Strouthos v London Underground held the employee should only be found guilty of disciplinary offences "charged" in the sense of having a particular allegation put to her so she knows what she has to answer. Pill LJ said
It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.
and later
, it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.

2.27. The following observations from Santamera v Express Cargo Forwarding concern the conduct of the disciplinary hearing.
".. cross-examination of complainants by the employee whose conduct is in question is very much the exception in workplace investigations of misconduct.

There may be cases, however, in which it will be impossible for an employer to act fairly and reasonably unless cross-examination of a particular witness is permitted. Ulsterbus Ltd v Henderson could not be read as laying down the proposition that cross-examination can never be required in any investigation carried out by a reasonable employer. The issue under s.98(4) is always reasonableness and fairness. In each case, the question is whether or not the employer fulfils the test laid down in British Home Stores Ltd v Burchell and it will be for the tribunal to decide whether the employer acted reasonably and whether or not the process was fair.

2.28. Even an admission of some misconduct may not bring the decision to dismiss within the band of reasonable responses. The Court of Appeal in Whitbread Plc v Hall [2001] IRLR 275 said:
"Where misconduct is admitted by the employee, the requirement of reasonableness in s.98(4) of the Employment Rights Act 1996 relates not only to the outcome in terms of the penalty imposed by the employer but also to the process by which the employer arrived at that decision.
Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer. Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers."

2.29. Ladbroke Racing v Arnott held a rule which specifically states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's disciplinary rules and requires an employer to consider all the facts relevant to the nature and cause of the breach, including the degree of gravity. When considering the sanction, previous good character and employment record is always a relevant mitigating factor. If an employer has a rule prohibiting a specific act for which the stated penalty is instant dismissal it does not satisfy the statutory test by imposing that penalty without regard to the facts or circumstances other than the breach itself. If that were a legitimate approach to the law it would follow that any breach of rules so framed could constitute gross misconduct warranting dismissal irrespective of the manner in which it occurred.

2.30. If there is a rule it must be clear and well publicised. In Meyer Dunmore International v Rodgers,there was a rule against fighting. Phillips P put it thus:
"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – and this is important – that ***it is plainly adopted, that it is plainly and clearly set out, and that great publicity is given to it so that every employee knows beyond any doubt whatever that if he gets involved in fighting in that sense, he will be dismissed.***

2.31. In all aspects substantive and procedural Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt, held we must not substitute our own view for that of the employer unless the view of the employer falls outside the band of reasonable responses. In UCATT v Brain, it was put thus:
"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.

2.32. Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing or a review, the question is whether the procedure as a whole was fair. If an

early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.). If the appeal officer relies without question on conclusions reached by the dismissing officer and expects the employee to formulate and express arguments in circumstances where she is clearly not capable of doing so, the appeal is unlikely to cure earlier defects.

2.33. As for the wrongful dismissal claim , a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws v London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. An example of gross misconduct is **wilful** failure to obey lawful and reasonable instructions. The requirement for wilful disobedience was affirmed by the Supreme Court in West London Mental Health NHS Trust-v-Chhabra but qualified in Adesokan-v-Sainsbury's . Such instructions may be in the form standing orders made known clearly as essential for employees to follow. The main differences between unfair and wrongful dismissal are that in the latter we may substitute our view for the employer's and take into account matters the employer did not know about at the time (Boston Deep Sea Fishing Co –v-Ansell) Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful and damages are the net pay for the notice period less any sums earned in mitigation of loss.. The statutory minimum periods of notice are set out in section 86 of the Act .

3 Findings of Fact

3.1. We heard the evidence. on behalf of the respondent, of Ms Sandra Ward, Regional Operations Manager who decided the claimant's appeal against dismissal, Ms Kelly Terry, Deputy Manager of the home and Ms Kim Teasdale, the Manager. The dismissing officer, Ms Lisa Dowson , manager of another of the respondent's homes in Bishop Auckland, left its employment in September 2018 . Ms Ward believes she resigned but was unable to tell us anything about the circumstances. No witness order had been applied for. Mr Lane said Ms Dowson had indicated she was not willing to cooperate and the respondent did not know how to contact her. An HR officer, Ms Emma Hughes, played a significant role. She was on maternity leave but there was not even a written statement from her. We heard the evidence of the claimant who called no witnesses.

3.2. In many aspects of this case we have to decide between conflicting versions of what happened, both normally and on a particular day, 27 April 2018. Both sides accuse the other of "lying". Any witness may be credible and honest but mistaken. We prefer to use the word lying to mean witnesses deliberately stating something they know not to be true. Witnesses may also (a) say something **did** happen on a particular occasion when they believe it would or should normally have happened; (b) say they remember as a certainty something which they inaccurately recollect; (c) state as a fact a conclusion they have reached by metaphorically putting 2 and 2 together and making 5; (d) embellish or exaggerate a point which is basically true. In this case, we have seen all these variations.

3.3. The home is one of 16 operated by the respondent. It accommodates elderly residents and vulnerable young people separately. The home manager is in charge and beneath her

is the deputy manager. There are senior care assistants, often called “seniors”, then ordinary care assistants, otherwise called “carers”, of which the claimant was one .

3.4. The home is regulated by the Care Quality Commission (CQC). About 2-3 years ago there was change in the way CQC assessed homes in that requirements for accurate recording of such things as residents’ food and fluid intake were given greater priority . Even if a CQC report the residents are well treated , accurate recording is not an optional extra. The home has consistently enjoyed good CQC ratings and won other awards. It is rightly determined to maintain that, and the claimant fully agrees it should.

3.5. The home became owned by the respondent about 4 years ago. The claimant worked there from 20 September 2002 under 4 separate managers and had no problems until Ms Teasdale arrived in about 2015. Ms Terry became her deputy in 2016. The claimant says the home deteriorated under Ms Teasdale’s management. Priorities may have changed partly due to the changes by the CQC and partly to a different managerial style. Both Ms Teasdale and Mr Terry described the claimant as outspoken. We found her to be so and opinionated in that she insisted her views were right and those of others wrong. She was argumentative in that when asking questions in cross examination, she would often interrupt a witness in the middle of her reply, and interrupt Mr Lane before he had finished a question he was trying to put in cross examination.

3.6. As Ms Ward explained, elderly people are at risk of dehydration and malnutrition. Accurate records of the food and fluids they consume must be kept otherwise visiting health professionals would not have a true picture of what they had taken in . Inaccurate recording is a breach of the Health and Social Care Act 2008 which could lead to action by the CQC. Ms Ward also says the importance of this is recorded in policies which are regularly drawn to the attention of staff. The policies in the bundle alone run to 67 closely typed pages. Carers would probably not have time to read them during working hours and, being paid the national minimum wage could not be expected to do so at home. The claimant makes no secret of the fact she has not read all the policies but we are satisfied she was a dedicated and experienced carer who knew the importance of these matters.

3.7. There may be a “gap” between what policies say should happen in theory and what can be achieved in practice. Provided a safe, effective and caring service is delivered to the residents the existence of a gap between the strictly interpreted letter of a policy and what happens in practice does no harm to the staff , the respondent or the residents .

3.8. As for normal practice, we prefer the evidence of the claimant for two reasons. First, her experience of what happens in the “front line” of the job is greater than that of Ms Teasdale and even Ms Terry . More importantly, her version accords with common sense and is the more likely. Normally, the day shift carers would arrive just before it officially started at 8 am, at which point the nightshift would be due to go off. However, there has to be a handover which usually takes about 10 minutes. Breakfast cannot be served until it has happened. Most residents would have got up and dressed, maybe with assistance of nightshift, and be in the lounge, only a few yards from the “big” dining room (there is a smaller one). A senior and two or three carers would **all** bring residents to the dining rooms. Making up residents’ beds would wait until after they had eaten, so the staff on duty would have no reason to leave the dining room until the residents had finished eating, unless one needed to go to the toilet, or one who was eating in their room sounded a buzzer to call help. Every resident’s food and drink intake would be observed by the staff in the dining room. Some may write down, usually on a napkin, what the resident eats and drinks.

Others, including the claimant, rely on memory in that most residents have the same every day so any departure from that would be memorable. After the meal, most if not all the residents do not go back to their rooms but to the lounge, which is why we find the respondent's version that a carer is normally assigned to bed making **during** breakfast time to be improbable. Some time after breakfast is over, a record is made, on two charts for each resident, one for food, the other for fluids, of the intake of each. Up to 16 residents will be in the big dining room at one time. If three staff are on duty there and, as they should, help residents where necessary to eat or drink, no one person can possibly observe every mouthful every resident eats, let alone make a contemporaneous record of it. **To ensure no food or drink was missed the carers often , and properly, collaborate by talking to one another to check what a particular resident has had that day .**

3.9. The food and fluid charts have the left-hand column for the time of the day to be inserted. The clearest example of a " harmless" gap between theory and reality is that on all of the fluid and food intake charts we have seen, the claimant, and every other member of staff, record the residents as having taken breakfast at 8 am. That cannot be correct. The reality is they arrive from about 8:10 onwards and eat at any time up to 9 am. Staff were told by Ms Teasdale and/or Ms Terry that when they inserted 8 am for breakfast, they should "pre-populate" the remaining lines with the times the resident **should** next be given food or drink. Obviously, they can not write in advance what the resident would then consume. We see evidence of the claimant having pre-populated only the time column, which is hardly a serious matter especially if she had been told to do it. Ms Ward agreed this would not have been gross misconduct or even a reason to justify disciplinary action. Yet not only was it raised in the disciplinary hearing but the implication was made she had not only put in the times in advance but what the residents would consume at those times. The documents show she plainly did not.

3.10. The last column is for a staff members initials. We believe the CQC or any person viewing it would expect the initials to be those of the person who was able to verify what was written . Several examples do not correspond with the person who saw what the residents ate. A carer named Dawn Pidgley has signed on 27 April for a resident who was not even in the small dining room where she was working. A carer named Pauline Smith has signed when she was not even there at breakfast. Ms Teasdale's and Ms Terry's explanation for this is that in their presence Ms Pidgely and Ms Smith physically wrote what they were told to by Ms Teasdale and Ms Terry, who were present at breakfast, and thereafter put their initials in the last column. That may be so but it makes little sense if, as Ms Teasdale and Ms Terry insist, the carers wrote the forms in their presence. Even if the help of two other people was needed to write the few words necessary on the forms, the people who knew what the residents consumed could easily find the split second necessary to append their initials. More likely is they verbally or by handing over notes told the carers what residents had consumed and left them to fill in the forms. This explanation undermines the respondent's case everything is always done to the letter of every policy, so the claimant's departure from any one must be gross misconduct.

3.11. On 27 April 2018, with no forewarning, two carers did not arrive for their rostered shifts. This was discovered at handover. Night shift stayed on for a while to help bring residents to the dining rooms. Actually delivering care to the residents is known in many care homes as "working the floor". This contrasts with working in the office as Ms Teasdale would do for nearly all of the time . Ms Terry would either be on duty as a senior carer, as she was for 3 days a week, or in the office. This was to have been one of her office days as another senior Ms Kelly Smith was on duty. On the day both Ms Teasdale and Ms

Terry decided to work the floor to cover breakfast in the big dining room. The carers on duty were the claimant and Dawn Pidgley, who the claimant told us is the only carer to keep a note of what residents consume in a notebook, which is probably why she was deemed to be the best person to go to the small dining room. Ms Teasdale decided the claimant should be sent to make up the beds and be the only carer to bring residents to the dining room. This meant only two people would be in the big dining room throughout the breakfast time of **all** the residents - Ms Teasdale and Ms Terry. Pauline Smith was not rostered to be on duty but was telephoned and asked to come in which she did as soon as she could but she was not there for breakfast.

3.12. The part of the evidence of Ms Teasdale and Ms Terry which we could not accept as remotely credible was that there existed between them and the claimant a "*good professional relationship*". As will be seen when we deal with the protected disclosure claims, there were many reasons for Ms Teasdale and Ms Terry not to like the claimant. We accept the evidence of the claimant that particularly at certain times after she had raised some concerns, neither of them would speak to her. One of the concerns the claimant raised was, on her recollection, only the week before. On 27 April we suspect Ms Teasdale decided to send the claimant to do beds etc. so as to avoid working with her.

3.13. The claimant arrived for her usual 12 hour shift but was told at handover by Kelly Smith Ms Teasdale wanted her to bring residents to the big dining room and do the beds. The claimant asked why the normal system was being changed. Ms Smith said it was on Ms Teasdale's orders. This is an example of the claimant **challenging** managerial decisions. Simply doing what she is told, no more and no less, and doing so without question does not come easily to the claimant. To a manager in the position of Ms Teasdale the claimant's robust questioning of orders would understandably have appeared to be a challenge to Ms Teasdale's authority.

3.14. The claimant's evidence of what happened next is entirely credible and the most probable version of events. A lady "A" , who needed to be brought to the big dining room by the claimant had lost her necklace when the claimant went for her. The claimant took her to the dining room. The claimant found the beds were nearly all done , presumably by nightshift. She returned to the big dining room, left briefly to try to find "A's" necklace and came back. **She then helped five residents** (three ladies "R" "C" and "H" and two men "T" and "A2") **eat their breakfast and drink their fluids**. We believed the claimant to be exaggerating, rather than lying, when she said at first she remained with those residents from the time they were served until they finished. More likely, as conceded by her in cross examination, she saw with her own eyes they had been served with the breakfasts they normally had , then left the room for short periods and when she returned noted those five people's plates and cups were empty. Their food and drink had not been spilled on the table or dropped on the floor She then made the probably accurate assumption they had consumed what had been put in front of them and **in the absence of being told anything different by Ms Terry or Ms Teasdale**, not been given any more.

3.15. In many cases we hear witnesses who assume we as a tribunal know facts which are obvious to them, such as the layout of the premises and what normally happens, which we cannot possibly know until we are told. No one told us until we asked how close the dining room was to the lounge- about 5 yards . Although in normal circumstances if the claimant was on duty in the dining room she would not leave it at all, if she did so in order to take a resident to the toilet, all the other carers and senior carers with whom she normally works would keep an eye on the residents the claimant had been looking after and tell her

if any of them had spilled a drink or been given an extra portion of food. Everybody agrees the seniors and carers who normally work together would communicate about such things as the residents, food and drink intake. Ms Teasdale and Ms Terry would hear them asking each other questions about what a resident had eaten.

3.16. Throughout this case the claimant representing herself explained matters badly so we had to exercise patience and perseverance to get her to clarify her case. In contrast, Mr Lane put the respondents gave very well, but on one point we disagree with him completely. Although in terms of numbers Ms Teasdale and Ms Terry replaced the two missing carers, in normal circumstances Ms Teasdale would very rarely be helping at breakfast and Ms Terry would do so less than other seniors. The result is “team work” on that day was not as it would normally be.

3.17. After breakfast had finished, Ms Terry went to the office to collect the food and fluid charts to fill in but found they were not there. She asked Kelly Smith if she knew where they were .Ms Smith replied the claimant and Dawn Pidgley had taken them to the lounge to complete . Ms Terry went there and saw the claimant had all the charts for the residents who had been in the big dining room and had filled in some. The claimant clearly recollects she had on the table the charts of the five she had helped and the others were on the floor. Dawn Pidgley had the charts for the small dining room. Ms Terry asked why the claimant was filling them in. The claimant replied she thought it was all right to do this. Ms Terry shouted loudly ” Really!” and left . If relations between the claimant and her managers had been good, we would have thought the claimant would have asked if Ms Terry wanted her to fill in the charts for the five people she had helped or at least told her she was going to do so. Just as they did not particularly want to work with her in the big dining room, she did not particularly want to communicate with them about in filling in the charts. As will be seen later, the claimant admits quite openly to doing what she believed was right and what she had done for many years without discussing it with any manager.

3.18. As to what happened in the lounge we prefer the evidence of the claimant . Ms Terry denies shouting “Really” and says she took all the charts and later filled new ones in herself using notes she and Mr Teasdale taken during breakfast. That version is wrong. A hand written statement from Kelly Smith at page 216 corroborates the claimant’s version that **she** took the 5 completed and 11 uncompleted charts back to the office. We now know Pauline Smith and Dawn Pidgley “helped “ complete fresh charts later for all residents. Those omitted drinks given to residents by night shift which appear on the charts completed by the claimant. Therefore, the charts Ms Terry and the others completed were themselves wrong. Mr Lane submitted the differences between what the claimant and Ms Terry had written for the 5 residents showed the claimant was guessing what they had eaten but we reject this. An example of a “difference” is the claimant writing “ jam and bread” and Ms Terry “ lemon curd sandwich” , prompting the claimant reasonably to say when he put this to her lemon curd is a type of jam and sandwiches are made with bread.

3.19. The claimant admits to filling in the five charts but says she would have left the rest for Ms Terry to fill in. Ms Ward says she was “interrupted” before she could fill in the rest but could not explain why she would do so. There is not an ounce of evidence to support the assertion by the respondent’s witnesses the claimant would have continued to complete the other 11 charts had she not been interrupted.

3.20. Emma Hughes, an HR adviser whom Ms Terry asked for advice that morning , said an investigation should be instituted, so at 9:50 Ms Terry spoke to the claimant and made a note at page 215 . It includes:
KT: This morning when I came down you were filling paperwork in for diet and fluid for this morning, is this what you were doing ?
TJ: ***Aye some of them***
KT: Why
TJ: Because I know they all get cereal cos when you said C had toast, she should not have toast she's on a soft diet
KT: But you were not aware of what they ate and drank so how could you fill it in ?
TJ: ***Because they always have the same*** *.*

3.21. Pausing there, the claimant does not admit she said the last emboldened words but if she did she meant she did not need to keep a note for the 5 because she knew they had been given that morning what they normally ate. The note then continues :
KT: Due to you ***falsifying*** *documentation I am going to have to suspend you*
TJ: When I did it the other day that was not a problem
KT: I was not aware of that
TJ: ***Fine***
We prefer the version of the claimant that she said words to the effect " *is this a joke* ". The phrase "falsifying documentation" was one Ms Hughes told Ms Terry to use. The reference to her doing it "the other day" may be to an occasion mentioned in her later investigatory interview with Ms Teasdale at page 220 when she said Ms Terry had asked her to fill in charts but the claimant refused because she had not been present. The claimant did not help herself by **appearing** to raise "two wrongs make a right" arguments.

3.22. The respondent's case , as we took care to confirm with its witnesses, is that the claimant filled the 5 charts **without the least idea of what the residents had to eat and drink that day** because she was hardly in the dining room at all at breakfast, based on **pure assumption** they had been given what they were normally given and had eaten and drunk it all- no more and no less. The claimant agrees it would be wholly wrong to fill in charts on that basis because, as Ms Ward clearly explained, even if they were given the same they may not have eaten or drunk it all, or may have asked for and been given more.

3.23. In countless cases before the tribunal we see situations in which there is a right way and a wrong way but the wrong way is easier or quicker so the employee does what he or she knows is wrong. The mystery in this case is why the claimant would do something which was not her job on the day in question, and in the wrong way, right under the nose of Ms Terry. None of the respondent's witnesses could even venture a suggestion as to why she would. Mr Lane submitted cases often occur where it is hard to see a motive for misconduct which undoubtedly took place and gave an example of a well-paid person who commits an act of petty theft or fraud at the expense of his employer. The example shows the difference. In Mr Lane's example the person has something to gain, even if it were foolhardy for him to throw away his career over something of little value. In the claimant's case she had absolutely nothing to gain. Quite the opposite, she was doing work which, had she understood the orders she had been given on that day, she would have realised was not hers to do, rather than, when all the beds were made, doing nothing.

3.24. In reply to the Employment Judge Ms Teasdale gave a reply to the effect that maybe the claimant was trying to help. That is one rational explanation. Another is that she did not understand Ms Teasdale expected that if the claimant had no bed making to do ,**she**

would not, as she normally did, return to the dining room to help. Neither explanation amounts to misconduct, let alone gross misconduct . That the claimant was immediately suspended and accused of "falsifying" is so far out of proportion with the facts known to the respondent's witnesses at the time that it casts real doubt on whether the belief they said they held (paragraph 3.22 above) was genuine. It was certainly not one which any employer could reasonably hold or, at that time, had reasonably investigated.

3.25. We wholly reject the respondent's contention this was like a normal day. This goes to the heart of Ms Ward's reason for rejecting the appeal. Underpinning her decision is the assumption that what the claimant did on 27 April was normal behaviour for her and may be repeated by her. On a normal day the claimant would not have been in and out of the dining room at all. On this day the worst which can be said is she made an error of judgment in assuming the residents had eaten what she had only in part observed , no more and no less, not having been told anything different by either Ms Teasdale or Ms Terry. The only conduct that can be described as in any way blameworthy is that ,having been given duties which would have meant she need not fill in anybody's charts, she took it upon herself to do more than she had been asked to do, which could result in an end product of a chart which was not accurate as she created a situation metaphorically of " too many cooks spoiling the broth" . When we deal with the protected disclosures we will say more about why we think Ms Teasdale and Ms Terry did not welcome help from the claimant and were keen to make this minor incident into a major issue.

3.26. There followed an investigation on 1 May by Ms Teasdale Page 219 . She accepted the claimant never admitted she had filled in any chart without having the least idea of what the resident had consumed but rather basing it on pure assumption. Most significantly, Ms Teasdale did not pass on, in any of the documentation sent to Ms Dowson who took the decision to dismiss, anything which would indicate 27 April was not a normal day. None of the evidence which tends to point towards the innocence of the claimant or provide an explanation for her doing something different from what she would normally was included. There was no written investigation report sent to the claimant or to Ms Dowson, only a number of documents including statements from other carers that they never assumed what residents had consumed . The claimant had not said she, or anyone else, ever did .

3.27. The claimant's belief is that all of this was done out of revenge and she was reported with a recommendation for disciplinary action in circumstances in which anybody else would just have been given an informal warning or guidance as to why what she was doing was wrong. In our judgment the labelling of this event as any form of misconduct was wholly wrong-if anything it was a matter capability. To label it as gross misconduct was nothing short of ludicrous. The question is why did that happen?

3.28. We need to digress from the facts in relation to the ordinary unfair dismissal claim to deal with the protected disclosure claims. The claimant, despite being ordered by Employment Judge Arullendran at a preliminary hearing to set out what disclosures she had made, and being requested by the respondent's representatives to set out her case clearly, said she cannot be more specific as to **what she said, where, when, and to whom** without more disclosure. She says there are entries in the care notes on individual files and in documented one-to-one meetings every 6 to 8 weeks with Ms Teasdale or Ms Terry where salient matters were recorded. When we asked her the right questions, we found she only failed to recall the "**when**". The detail of allegations still had to be drawn from her. We are satisfied she was not being deliberately obstructive . As she did in the hearing before us, she remembers points piecemeal and fails to express them clearly even

when she does. For example, she had never before mentioned carers, as a prank, taking the false teeth of a resident , which she insisted was "*theft*" . We find the claimant did not invent this bizarre event during this hearing , she had just not mentioned it before. We had to be quite stern to prevent her expanding on this point because it simply is not fair to "spring" allegations of which no forewarning has been given . As will be seen , that is what Ms Dowson did to the claimant at the disciplinary hearing . Neither "ambush" is fair.

3.29. The sheer volume of paperwork in respect of each resident can be seen from what the respondent did eventually provide to the claimant. The notes for two residents over a two-month period run to 247 pages. The broad nature of the main concerns the claimant claims to have reported are:
(a) Mr G sexually touching another resident Ms B and the respondent not informing Ms B's family on a number of occasions---reported verbally to Ms Teasdale and Ms Terry and written in care files with the date
(b) Kelly Smith and Ms Terry shouting at Ms L who kept asking for a man by name, that the man was dead--- reported verbally to Ms Teasdale and written in supervision documents.
(c) Ms Terry leaving medication on dining room and bedside tables in reach of other residents ---reported verbally to Ms Teasdale
(d) "Drag lifting" Ms E ---reported verbally to Ms Teasdale , written in supervision documents , and recorded on tape in May 2018 as said to Ms Hughes (HR) and Ms Dowson in the disciplinary meeting and to Ms Ward during the appeal .
(e) Kelly Smith refusing to contact a GP or urgent care team when Mr A had an accident causing head injuries ---reported verbally to Ms Teasdale and written in Mr A's care plan and supervision documents. Other staff Sharon Field and Shane Ballas, a handyman, also reported this incident.

All the above tend to show the relevant failures identified in paragraph 2.2 above. We have no doubt the claimant reasonably believed they did and that any reports she made were in the public interest . Mr Lane did not argue otherwise . His instructions were the reports were not made. We find they were.

3.30. We suspected the claimant may have mentioned these matters in a way which flowed over the heads of the people hearing them and certain entries in documents had been made but not spotted by managers. We asked her to describe **where** she made the oral disclosures to which she replied she went to the office on a regular basis, or as she put , "*I was always in there*". She never read the whistleblowing policy but did use some formal means of raising concerns about the above matters which she thought to be been of considerable seriousness. What was said in the privacy of the office is "one word against another" but , largely due to our findings in relation to the written disclosures which follow, we find on balance of probability the oral disclosures were made to the people she says in a way which must have "registered" with them. We took care to establish the respondent's case which was these matters were never reported orally, (save for something in respect of Ms E which was acted upon), and no record has been found in any documents they have of them being written. It follows logically they do not say the claimant raised concerns, but that her doing so was not resented.

3.31. We first assessed the credibility of the respondent's case no disclosures were made in writing. The claimant says some were recorded in her supervision meeting records especially in 2017 which the respondent says are not available due to an "archiving error". The claimant is very suspicious this was a convenient error and we

share her concern. However looking at only what we do have and starting with disclosure (a) , we were particularly struck by extracts in the notes of Mr G which show on pages 428 and 468 a tendency to touch sexually female residents and become angry at staff who tell him to stop. The claimant says she was assaulted by Mr G and reported that to Ms Teasdale and Ms Terry. Had they said in the vast volume of documentation the entries had not come to their attention or not cme across as referring to Mr G's conduct to female residents, that would perhaps have been credible. It was agreed by Ms Teasdale , Mr G was on "15 minute obs" meaning his behaviour was observed every 15 minutes by a carer. She said it was his aggression to staff which was being monitored. We cannot think of a reason why any risk to carers, who are able to report anything done to them, would require "15 minute obs". We can think of every reason they would be required to monitor his behaviour to vulnerable residents who may not themselves be able to report it. The evidence of Ms Teasdale and Ms Terry that nothing was said or written about Mr G's conduct to female residents is simply not credible.

3.32. Although we have no documents to corroborate whether disclosure (d) was or not made to Ms Teasdale, in the audio recorded disciplinary meeting with Ms Dowson the claimant said at page 242
"..*I was asked to do the weights with Pauline Smith but I refused to do it* " Ms Dowson asked why and the reply is shown as
" *Because she wouldn't use the hoist, so she got Kim to do it . So Kim,Pauline* …."
The sentence is obviously incomplete and the claimant, who has heard the audio recording which we did not, agrees the words cannot be heard by a person delegated to type up the transcript . The claimant says the missing words were " *drag lifted*" .

3.33. Neither the claimant nor any of the respondent's witnesses explained until we asked what drag lifting is. It involves two carers putting an arm under the armpits of a resident to lift and move her. According to the claimant it is strictly forbidden to do this and explained by the people who teach manual handling that anyone caught doing it would be dismissed. The respondent did not challenge this. It said the claimant did raise concerns some time ago about the moving of Ms E and Ms Teasdale responded by ensuring the availability of a hoist. The claimant accepted there was a hoist but said some cares failed to use it.

3,34. It is acceptable for carers to put their arms in that position to steady or assist somebody to move. Ms E has balance problems but according to Ms Teasdale and Ms Terry her legs are strong enough to enable her to stand if supported. Instead of accepting this, the claimant argued during her cross examination that a person who cannot stand alone by definition cannot "weight bear". Again we told the claimant this was not a helpful. Then and only then did she say something we believe she does recollect , that on the occasion she was talking about Ms E's feet were off the floor . She added a colourful phrase Ms E was " *swinging like a monkey*" . She did not put this allegation to Ms Teasdale when she was cross examining. Indeed her cross examination was poor even with the assistance we gave her to formulate her questions. If Ms Teasdale's case had been the claimant alleged "drag lifting" when all she and Pauline Smith had done was support Ms E, it would have been a credible statement and we may have found the claimant's belief that drag lifting was occurring was unreasonable. The evidence of Ms Teasdale that **nothing was said or written** about drag lifting Ms E is simply not credible.

3.35. A point in relation to disclosure (c) shows why the claimant believes Ms Teasdale brushed aside protected disclosures validly made, whilst we believe in respect of some of them Ms Teasdale did act correctly but did not tell the claimant what she had done because

in her eyes it was none of the claimant business to hold her to account. The claimant says after she had made the report about Ms Terry's leaving medication in the reach of other residents on one occasion she saw Ms Teasdale keeping observations on Ms Terry. Ms Teasdale may have " had a word" with Ms Terry and concluded no other action was needed. The problem the respondent has is having denied the claimant made the report it has to deny Ms Teasdale keeping observations. Again, the evidence of Ms Teasdale that nothing was said about Ms Terry leaving medications insecure is simply not credible.

3.36. The point in relation to disclosure (e) which caused us concern is why the respondent has not called, or even produced a written statement of, Sharon Field and Shane Ballas denying they reported this incident. As for disclosure (b) it is simply the claimant's word against that of Ms Teasdale and Ms Terry. On balance, we find the claimant made both disclosures.

3.37. One of the respondent's arguments was that the claimant, had she been genuinely concerned would have made her disclosures more formally. An example given to show the claimant was capable of raising complaints formally was that she took to the managing director an issue about being told to remove a necklace. When we asked the claimant about this she said a new senior manager visited the home and told Ms Teasdale she did not like the way the claimant looked or spoke. It was that insult which the claimant raised with the managing director. It was not brushed aside. Action was taken against the senior manager in question but the claimant does not know what. We find the claimant took the disclosures she relies upon in this case as far as she thought necessary.

3.38. The detriments of which the claimant complains are Ms Teasdale and Ms Terry
(a) not letting her work with colleagues with whom she had a good relationship in particular Joan Trueman, Sharon Field and Liz Baron (ex-employee).
(b) telling her to remove jewellery when other carers were allowed to wear it . Ms Terry wore a necklace and bracelet. A carer called Ms Curry wore a necklace and a carer called Ms Dixon (mother of Ms Teasdale) wore a ring and hoop earrings.
(c) telling her at lunch breaks to remain on the premises when Mr Ballas went home for lunch, Ms Lyn went for sunbeds and Ms Middlemiss to see her horses.
(d) " punishing" her for use of social media which other members of staff also did, but were not punished for.
(e) not speaking to her, especially after she raised complaints.

3.39. The respondent denies (a) and we accept the fact the claimant was not rostered to work with the named persons could be a mere co-incidence . As for (b) the respondent says no staff are allowed to wear jewellery other than plain wedding bands and it has a constant battle with several staff to enforce that rule and the claimant was treated no differently to others . On this point we accept the respondent's evidence. As for (c) Ms Teasdale and Ms Terry say the claimant was allowed to leave the building and did to see to her dog. The claimant retorts this was only on one occasion when her dog was ill and we accept that version. As for (e) " not speaking" is a matter of perception and degree , but we prefer the evidence of the claimant in the sense we find Ms Teasdale and Ms Terry did avoid communicating with her as they would with other staff.

3.40. The important one is (d). The claimant was suspended in October 2017 for making an inappropriate comment on her personal social media account. However, following an investigation, no disciplinary action was taken and the claimant returned to work. The comment was during a Facebook conversation the claimant was having with a friend

"SM" which ,with punctuation inserted, reads ," *Am fine. Just getin back from Turkey again haaa. Valley getin worse. Kim's shit. Doesn't give a shit. Must just like wages haaa x* ". SM replies " *Haaa you probably shouldn't have wrote that on here, she might see it.* ***Valley was always a nice home though*** *x*"

3.41. In her 15 years at the home the claimant had no disciplinary record.The reason Ms Teasdale pressed this matter ahead as a disciplinary one is not because the claimant had made a protected disclosure, but because of what she had written. As in the present case, an investigation was conducted by Ms Terry which was very short page 142. She referred the claimant for a disciplinary hearing which came before Ms Karen Taylor-Williams, manager of another of the respondent's homes, advised by Ms Kim Litster of HR . The claimant's defence was the reference to "Valley" was not to the home but to a holiday complex owned by her sister whose name was Kim. This explanation was accepted by Ms Taylor- Williams. However, it was not accepted by Ms Terry or Ms Teasdale who to this day believe, as did SM, it was a reference to the home and Ms Teasdale. The notable difference between the disciplinary conducted by Ms Taylor-Williams and that conducted by Ms Dowson is the style of questioning. Ms Taylor-Williams was looking for the truth and giving the claimant help to explain her case . Ms Dowson was trying to catch the claimant out. In the minutes of the disciplinary meeting at the top of page 146 the claimant says " *I wouldn't put on about the home, I love my job. I wouldn't say I don't have issues with Kim, I have. She makes me feel discriminated* ***because I speak up for myself. If you go to Kim about a problem on abuse she doesn't want to know. It's hard having the deputy in her because they are friends. If you are a manager or a deputy you should be looking after the home.*** "

3.42. The reply Ms Teasdale gave when our Employment Judge asked her how she felt about these comments was that she smiled at them. That is not credible . On a visit earlier in 2017 by Ms Dowson to the home to see Ms Teasdale, with whom she was friendly, the claimant was introduced by Ms Teasdale as " *the gobby one*". "Gobby" is a local term for being outspoken. We are convinced there was a tense relationship between the claimant and both her managers. Ms Terry admits she found the claimant "loud" . In her oral evidence the claimant said she is convinced that when Ms Teasdale referred the matter for a disciplinary hearing, she told Ms Dowson she wanted rid of the claimant because, in the claimant's words, " *she's a nightmare*". Mr Lane submitted the outcome of the 2017 disciplinary showed " the respondent" had no ulterior motive to get rid of the claimant as the facts in 2017 were a golden opportunity to do so . We accept the respondent as an organisation had no such motive, however Ms Terry and/or Ms Teasdale tried to achieve that, but failed. We believe they did view the claimant as a nightmare but it would be a leap of logic to conclude without more that they did so, even in part, because she had made protected disclosures. We will deal with that after what remains of the "ordinary " unfair dismissal claim .

3.43. The charge put to the claimant in a letter of 2 May calling her to a meeting said:
"*Alleged serious non-compliance with the requirements of the company compliance policies further particulars being that you falsified the nutrition and fluid charts for vulnerable service users on the 27th April 2018 stating their nutritional and fluid intake following breakfast* ."
There is not the least indication of in what way she is alleged to have "falsified" them . The language in which the charges are put may be intelligible to the HR officer who helped Ms Teasdale to draft the letter but would be practically meaningless to the claimant.

3.44. The disciplinary on 8 May took place at the home with the claimant, Ms Dowson and Emma Hughes of HR . Ms Terry was not present . Neither was Ms Teasdale to present the case or be questioned as to the accuracy of anything she had said. Ms Teasdale was not only the main investigator, she was an eye witness to whether the claimant was present in the big dining room at all during breakfast service on 27 April. If she was anywhere within the home, Ms Dowson could easily have called her into the meeting or adjourned it to seek clarification on any point

3.45. Ms Dowson gave the claimant the opportunity to look at the charts which she had not been sent in advance for confidentiality reasons. The claimant declined saying:
TJ: I'm not denying I didn't do it, I did do it
LD: So it is alleged that you falsified the nutrition and fluid charts on 27 April
TJ: Yeah but…
LH: And you're stating there that you're saying you have done it
TH: I did write that, yes. But I did see them eating their breakfast
LD: Did you see them finish their breakfast?
TJ : Well I moved the dishes off the table.

3.46. This is the first but not only passage in which Ms Dowson was speaking as if she was "prosecuting" the claimant not being an independent judge. Further down the page the claimant explained that having brought Ms A to the dining room and then going to look for her necklace , she returned to the dining room , went to 2 residents, whom she named, and helped them eat and drink . On the next page she named more people she helped. If Ms Dowson was interested in getting to the truth she would have made some attempt to get Ms Teasdale's version of whether the claimant did help these named people to consume their food and/or drink. No such effort was ever made.

3.47. The meeting diverted onto the accuracy of measurements of fluids , something which the claimant said was done in reliance on what she had been told, mainly by Ms Terry, as to what quantities cups and beakers contained. Ms Dowson said the claimant had documented 200 ml of fluid when the cups she was using held 400 ml. The claimant said she and all staff for the last 18 months been documenting 200 ml, as would appear from the recorded charts. Ms Dowson refused to look at them. The claimant could not have anticipated from what she was told before the meeting measurements of drinks generally, or on 27 April, was to be a topic for discussion and was not prepared to dispute it.

3.48. Next Ms Dowson digressed on to the question of writing a time 10:00 when it could have been 10:20 by the time the drink was given. To this the claimant gave the obvious answer that is how everybody did it which the documents show to be true. Further down page 239 she is asked how she remembers what people have had .She replies " *Because you've seen them. You see them* ***getting it and eating it****. When you know what's on the menu, a soft option, righto, to an ordinary meal, we know what that person can eat and what that person can't eat*" .She is not admitting to **assuming** anything.

3.49. On page 240, Ms Dowson puts the theory that the claimant was prevented from completing all of the notes. She says
*LD: **But you've documented on everybody's notes until Kelly stopped you**"*
TJ: Kelly didn't stop us Lisa. Kelly didn't stop us at all. Kelly came down and asked why whose paperwork I was doing and I said C's. And then she turned around and said well how do you know what she's had to eat
LD: And what did you say?

TJ: I said cereal I seen her eating the cereal
LD: You'd seen eating it or did you see a finish it?
TJ : I seen her eating it. And I moved her dish, her empty dishes, off the table…
As we said earlier, there is no basis for the suspicion the claimant was "stopped" or that she wrote anything on the charts of people other than the 5 she named.

3.50. Many pages follow about matters that are of no relevance to the charge put to the claimant in the letter calling her to the meeting. At page 249 Ms Dowson refers to "CareBlox" , a computerised clocking in system on which messages are displayed at the side. The claimant freely admitted she did not notice such messages . Ms Dowson put to her this would mean she would not know which company policies were " policy of the month". This is nothing to do with the allegation against her and a good example of Ms Dowson looking for anything she could use to find fault with the claimant. At page 251 towards the end of the meeting there is the following exchange
LD: When we first sat down, when we first came in, you said I admitted I've done it .So what are you admitting you've done
TJ: That I've wrote them down when I've just….. well I didn't actually give them their breakfast I'd just seen the eating it.
LD: So you're admitting that you've…..
TJ: I've actually seen them eating it.
LD: So why would you admit to something wrong?
TJ: Actually I don't think I've done wrong. When I do now off the fluids because you've just told us that about the amount that's in the little cup and the amount that's in the glass."
This is not the answer of a person who is not prepared to accept she may have made a mistake but neither does it give any basis for finding the claimant guilty of misconduct.

3.51. That apart there was absolutely no admission of wrongdoing by the claimant in this extensive interview. Many of her replies would have prompted any reasonable disciplinary hearing manager to make further enquiries. Ms Dowson made none and in our judgment that was because she had already made up mind what the outcome would be before the meeting started. Her questions to claimant were not aimed at getting to the truth but at " catching her out" for something , even if that something had not been put as part of the charge against her, as in fluid measurements. The claimant sometimes gave ambiguous answers. Her responses to being questioned very properly by Mr Lane did more to obscure then clarify her case, because she was on her guard . In reply to us, she was far better, as she was to Ms Taylor- Williams in 2017. Ms Dowson seized on any interpretation adverse to the claimant and ignored anything which pointed to the need for further enquiry.

3.52. At the end of the meeting the claimant asked how long the decision would take as she was going on holiday on 10 May. Ms Dowson said she would hear before she went only 2 days later. While she was on holiday her son telephoned her on 15 May and said there was a letter. She asked him to open it and read it out. The letter, written on 10 May, does not stick to the point but repeatedly uses the word "*falsification*"

3.53. The letter is the only evidence we have of Ms Dowson's reasoning. It is hard to follow. Parts are a distortion of what was said in the meeting . The points which seem most important to Ms Dowson are (a) the claimant completed a chart for C " *using your own thoughts instead of establishing the facts of what she had actually eaten or drank that day*" (b) it was the responsibility of the two allocated to the dining room to do the charts and as the claimant was allocated to making beds **she was not in the dining room** (c) she pre-populated the charts with times for the remainder of the day which " *shows further*

falsification" (d) she had failed to measure the fluid in the various cups . She then quoted what the claimant had said *I'm not denying I didn't do it, I did do it.* and said later she could not confirm exactly what she was admitting.

3.54 She then says "*You acknowledged towards the end of the hearing that you "don't think I've done wrong apart from the fluids" regarding the intake levels, however I have reasonable belief that you have falsified the nutritional and fluid charts by completing them without accurate and factual knowledge of what each service user had actually eaten or drank during their breakfast*". At the foot of page 259 it concludes " *Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct for the allegation has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship to which summary dismissal is the appropriate sanction. I have referred to our standard disciplinary procedures when making this decision* ***which does not permit recourse to a lesser disciplinary sanction.***

3.55. This is plainly written by an HR professional. The is no factual basis for the core conclusions that the claimant (a) having been allocated to bed making did not also spend time in the dining room or (b) completed any charts without the least knowledge of what the residents had eaten. However, although we have no hesitation in finding Ms Dowson did not have reasonable grounds for her beliefs, the more difficult question for us is whether she **genuinely** believed it. If she did, that belief rather than some other reason probably was the reason for dismissal. This will be dealt with as part of our conclusions.

3.56. As for the fairness of the sanction the author of the letter ignores Ladbrooke Racing -v-Arnott. It is not what the policy says anyway. It allows for each case to be considered on its merits no matter whether it fits a definition in the list of examples or not . We do not agree with Mr Lane it fits the sixth bullet point on page 113 because that is about financial falsification but it does fit the ninth bullet point on page 114. The letter said she could appeal within five days. She emailed a letter to her son to copy to Emma Hughes.

3.57. At the appeal meeting Ms Ward started by saying :" *it is for you to present any further evidence to support why you feel it is "unjust and unfair" and as to why you believe that the evidence is not accurate . It's not to rehear the disciplinary , it's for you to give me evidence to say why you don't agree with the outcome .Okay .So we're not going to go all the way back through the disciplinary process , it's for you to tell me why you disagree with the outcome of your dismissal basically* ".

3.58. The claimant put forward the same arguments that she had seen people eating . Ms Ward asked why Ms Terry would not give a correct account to which the claimant replied

TJ: Do you want the truth
SW: Yeah
TJ: Because they don't like us
SW: Right. Okay. Why do you think that?
TJ: ***Because I get on with it and do it.***

This last comment may be very important to our decision and will be dealt with as part of our conclusions.

3.59. Ms Ward made no attempt to get to the bottom of any of the conflicts of evidence. The meeting finished with the claimant saying again neither Ms Terry nor Ms Teasdale liked her and adding

TJ They've tried to get rid of us for ages
SW Why? How have they done that?
TJ: Because I report stuff. ?
None of this prompted any further enquiry by Ms Ward.

3.60. The appeal rejection letter on page 291 is very short. It sets out quite accurately the claimant's case then says "*further investigations*" have been carried out which include only *"a review of the full disciplinary paperwork*". It then says
Having given the matter full consideration I am now writing to confirm that the original decision taken by Lisa Dowson stands for the following reasons:
You did not bring any new evidence to overturn to original decision and although you initially said that you saw the ***residents*** *eating, in contrary to your disciplinary hearing response, you then later change your story saying you didn't see them eating*"
It is a distortion of the minutes of the disciplinary and appeal hearings to suggest the claimant had "changed her story". This meeting falls far short of the Taylor-v-OCS standard for curing the many earlier defects in the investigation and disciplinary process.

4. Discussion , More Law and Conclusions

4.1.We believe we have said enough in our findings of fact to show the claimant's conduct fell far short of the requirements of gross misconduct as stated in paragraph 2.33. There was no wilful disobedience. Nothing she did on 27 April was a fundamental breach of her duties to the respondent or those for whom she cared .

4.2. As for the unfair dismissal , it is for the respondent to show the reason for dismissal and in this instance it is hampered by the fact Ms Dowson is not here and can only rely upon what she put in her dismissal letter. We find Ms Hughes had a hand in writing it but she is not here either. If the principal reason why she acted as she did was related to the claimant's conduct **as she saw it**, we conclude no reasonable employer could have interpreted what the claimant did as the misconduct with which she was charged. It would have been better if the claimant had communicated what she was doing to other people on 27 April but that apart there was no misconduct at all .

4.3. Ms Dowson's belief was neither reasonable nor based upon a reasonable investigation. The cases we cited in Part 2 are relevant to our conclusions in these ways. The initial investigators were the key witnesses Ms Teasdale and Ms Terry (Moyes). Their purported investigation focused not at all on evidence which pointed towards the claimant's innocence or offered any mitigation for any errors she had made. Information entirely focused on securing her dismissal was passed to Mr Dowson. All exculpatory material, eg the unusual circumstances of that day, was not passed on to her (A-v-B). The charge put to the claimant was cryptic and evidence presented at the disciplinary hearing strayed far from it (Strouthos). There was no one there the claimant could challenge as to how long she had spent in the dining room on 27 April and although that of itself would not be fatal to fairness, even in the face of clear evidence from the claimant requiring Ms Dowson to make further enquiries of Ms Teasdale and/or Ms Terry she failed to do so (Santamera) . The sanction of dismissal was imposed , expressly, on the basis it was the only one available when (a) it was not, (b) Ladbooke Racing says that is unfair (c) although publicity is given to policies, including by entries on the clocking in computer, they are so wide ranging and vague no carer could be expected to know initialling charts based on partial or shared knowledge would be an offence which would normally attract instant dismissal (Meyer Dunmore) and (d) that practice

happens regularly and provably so on the 27 April as seen by Pauline Smith and Dawn Pidgley's initialling of charts , so no carer would see that as misconduct (Hadjioannou).

4.4. Mr Lane rightly cites London Underground-v-Small as authority for the proposition a tribunal must be wary of forming a view based on a better performance given by the claimant in the tribunal hearing than she gave at the disciplinary hearing. In this case the claimant's performance on both occasions was abysmal but we looked at the case from a neutral point of view and with an open mind. Ms Dowson did not. She went into the process to "deliver" Ms Teasdale's wish to get rid of a "nightmare" (Whitbread-v-Hall) . For a company of the size and administrative resources of this respondent , which has an HR department, the decision was well outside the band of reasonable responses.

4.5. We have found the claimant made protected disclosures and she was subjected to the two of the five detriments listed in paragraph 3.38 ,not being spoken to, after she made protected disclosures and normally being required to remain on the premises at lunchtime. The most important detriment alleged is the sending of a one sided investigation to Ms Dowson which, even had she not been asked by Ms Teasdale to get rid of "the gobby one", inevitably led to the decision to dismiss. Why were these things done, and are they perhaps connected? The cases already cited which guide us are ASLEF-v-Brady, Kuzel, Hadjioannou and Fecitt .

4.6. Evasive or equivocal replies by the respondent's witnesses and failure to give a credible explanation may be enough to establish the ground for the treatment was as the claimant alleges. However, the mere fact the employer acted unreasonably will provide no basis for inferring why it did so. In an old discrimination case Law Society -v_ Bahl Elias J as he then was said

101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."

4.7. In Eagle Place Services Ltd –v- Rudd Judge Serota Q.C. cited from Bahl in the Court of Appeal with approval and added inference of a reason for a person's behaviour *"may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made.* ***Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason****."*

4.8. The difficulty for Mr Lane in this case was that he was shackled by his instructions and the evidence of his witnesses, that the claimant made no disclosures. There is then little or no room to argue any other defence. An analogy may help to explain. Suppose Mr A and Mr B are enemies. One night A spots B and attacks him. B defends himself successfully leaving A badly injured. When arrested and questioned B denies he and A are enemies , denies he fought with A and says he was elsewhere at the time, so has an alibi. He maintains that position up to his trial where the alibi is blown apart and the jury convict. It is too late to say he was acting in self defence. Even a plea in mitigation at sentencing that B provoked him would have a hollow ring to it.

4.9. In Panayiotou-v-Kernaghan a tribunal concluded the employer acted as it did because of the manner in which the claimant had pursued his complaints which was separable from the fact he had made protected disclosures. There have been cases in which a respondent says the claimant raised so many concerns it did not appreciate some were a protected disclosure. We checked with Mr Lane in his closing submissions he was not saying Ms Teasdale or Ms Terry took objection to the way in which the claimant raised concerns, the defence in Panayiotou, or felt the concerns were invalid or did not understand them or had other reasons for disliking the claimant .He confirmed those were not his instructions and no part of the respondent's case. At one point he properly objected to the Employment Judge putting to witnesses the possibility Ms Teasdale resented the claimant, especially due to the post she had put on Facebook, on the basis of that was not part of the claimant's case. He was right, but as the Employment Judge explained in the absence of any other explanation we could be driven to the conclusion it must have been, at least in part, the making of protected disclosures which caused them to act as they did, because under section 48 the burden is on the employer to show it was not.

4.10. We conclude Ms Teasdale and Ms Terry did not like the claimant and part of the reason was she raised protected disclosures. That other parts emerge from certain comments the claimant is recorded as making in documents, the evidence she gave at the hearing and the argumentative opinionated way in which she dealt with cross examination of her and by her. She had worked at the home for over 15 years under different owners and managers. She showed no respect for Ms Teasdale or Ms Terry to whom she was subordinate. She said during her appeal when asked why they did not like and why they would not give a correct account "*Because I get on with it and do it."* On 27 April if the claimant, who had been given a job by Ms Teasdale of bringing residents to the dining room and making up beds, had done what she was told , no less **and no more**, **or** if she had nothing to do had **asked** Ms Teasdale or Ms Terry if they would llke her to do the charts of the five she had helped, **or** at the least told one of them she was going to do it , this case would not have arisen. In short, the claimant by her actions made it difficult for Ms Teasdale and Ms Terry to manage her.

4.11. Whilst in the claim of ordinary unfair dismissal, the dismissal is plainly unfair both substantively and procedurally, we do not find on the available evidence the making of protected disclosures was the principal reason in the mind of Ms Dowson when she took her decision, still less in the mind of Ms Ward when she rejected the appeal. Applying Jhuti , although it is a possibility the reason Ms Dowson acted as she did was because she was aware of the claimant had made protected disclosures, there is no positive indication that was **her motivation or her principal reason** . We do not think Ms Teasdale would have told Ms Dowson **why** she found the claimant so difficult to manage.

4.12 . The claimant made disclosures to Ms Dowson and Ms Ward during their hearings. The law is meant to prohibit detrimental treatment on the ground of the making of the disclosure , not to enable an employee to render herself immune from disciplinary action. A small but significant minority of claimants use the protection given to whistleblowers in a cynical attempt to defeat legitimate disciplinary allegations. It is the respondent's case the claimant did so but we conclude she did not. However, we accept Ms Dowson and Ms Ward thought she was and that is why they ignored her disclosures . They dismissed her **despite** the fact she was making them, not **because** she was.

4.13. Finally and briefly, we have dealt with cases involving care and healthcare where the evidence causes serious concern as to the wellbeing of persons receiving it. **This case does not**. The claimant and the respondent's witnesses came across as caring and competent as did the respondent as an organisation. Minor departures, for good practical reasons, from the letter of policies does not indicate neglect or risk, let alone abuse.

5. The Remedy Issues

5.1. The dismissal was substantively and procedurally unfair. If better procedural steps had been taken they could not have resulted in a fair dismissal. No reduction under the principle in Polkey v AE Dayton will be made

5.2. There are two elements to unfair dismissal compensation: the basic award which is an arithmetic calculation set out in s 122 , and the compensatory award explained in s 123 which is such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Where a tribunal finds the dismissal was to any extent caused or contributed to by culpable and blameworthy conduct of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding Section 122(2) empowers us to reduce the basic award on account of any conduct of the claimant before the dismissal. We make these points to forewarn the claimant of issues the respondent may still raise. We need to hear further argument.

5.3. There can be no award for injury to feelings in the unfair dismissal claim but there can in the detriment claim. We should never in assessing compensation be looking to punish the respondent. A remedy hearing should take half a day. The claimant would be wise to seek advice as to how to present her claim for remedy.

Employment Judge Garnon

Signed on 18 March 2019