EMPLOYMENT TRIBUNALS

Claimant: Mr J U Ahmed

Respondent: Randomlight Limited

Heard at: Manchester **On:** 13, 14 and 15 August 2018
10 October 2018

Before: Employment Judge Batten
Mrs P J Byrne
Mrs J Newsham

REPRESENTATION:

Claimant: Mr T Wood, Counsel
Respondent: Mr Cater, Advocate

JUDGMENT having been sent to the parties on 26 October 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant claimed that he was subjected to detriments and subsequently dismissed because he had made a protected disclosure. The respondent denied the claimant had made a protected disclosure or that he was subject to any detriment or dismissal as a result of such. The respondent claimed that the reason for dismissal of the claimant was that he had not made satisfactory progress during his probation period.

2. The hearing took place over three days from 13-15 August 2018 and returned to the Tribunal on 10 October 2018, because the evidence and submissions were concluded during the afternoon of the third day and there was not sufficient time for the Tribunal to reach a decision on that day. The Tribunal therefore concluded its deliberations on the morning of 10 October 2018 and

the parties attended at 2pm that day for oral Judgment. Thereafter, the Tribunal proceeded to deal with remedy.

Evidence

3. The parties compiled an agreed bundle of documents to which was added, on the second hearing day, a further document, being a statutory notification to the Care Quality Commission in relation to the incident on 21 July 2017 at the respondent's Care Home, and also a Lancashire County Council provider-led safeguarding enquiry report also arising from the incident on 21 July 2017.

4. The Tribunal heard evidence from the claimant and, for the respondent: from Mr Joshua Henley-Adams, its Registered Manager; and Mr Gerald Taylor, the Operations Director. All witnesses gave evidence from a written witness statement which stood as evidence in chief and was subject to cross examination. In addition, the respondent tendered a statement from Ms Michelle Campbell, the Deputy Manager of the Care Home. Ms Campbell did not attend the Tribunal hearing to give oral evidence or be cross examined and therefore the Tribunal gave Ms Campbell's statement little weight.

The Issues

5. The issues which the Tribunal had to determine were agreed by the parties and contained in a written List of Issues which was prepared following a preliminary hearing on 31 January 2018.

6. At the start of the hearing, the List of Issues was amended in relation to the first issue because it was conceded by the respondent that the claimant had in fact made a protected disclosure, namely his report of TY's conduct towards a service user amounting to abuse. The Tribunal therefore was asked to determine <u>when</u> the claimant made that disclosure of information.

7. The issues to be determined were therefore agreed to be as follows:

(1) When the claimant made a disclosure of information that was agreed to be a protected disclosure.

(2) Whether the claimant was subject to any of the following:

(a) The conduct of an additional probationary review meeting on 31 August 2017 when he had completed the same;

(b) The allowing and/or encouraging of staff to submit misleading evidence;

(c) The failure to follow the respondent's grievance procedure in relation to allegations made against him;

(d) The production and assertion of misleading and inaccurate evidence against him;

(e) The failure to disclose the evidence in respect of the allegations;

(f) The finding of serious and uncorroborated allegations including, but not limited to, psychological abuse, verbal and physical aggression and inappropriate sexual conduct;

(g) The being made subject of a campaign of unfair and unreasonable treatment following the protected disclosure such to include interrogating members of staff in respect of the claimant when it had no reason and/or grounds to do so;

(h) The being alienated by colleagues following the protected disclosure;

(i) The being placed in fear of losing his practising licence;

(j) The being unable to carry out all training recommended and agreed by the respondent;

(k) The being subjected to an unfair and biased appeal hearing in which his position was not considered properly or at all; and

(l) The being subject to reputational damage.

(3) Whether any of the treatment in paragraph (2) amounted to a detriment.

(4) If so, whether the claimant was subject to any detriment by either the respondent (section 47B(1) Employment Rights Act 1996) or another worker of the respondent (section 47B(1A) Employment Rights Act 1996), namely Joshua Henley-Adams for which the respondent accepts vicarious liability, on the ground that he had made a protected disclosure.

(5) Whether the reason or principal reason for the claimant's dismissal was that he had made a protected disclosure (section 103A Employment Rights Act 1996).

Findings of Fact

8. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on a balance of probabilities. In doing so, the Tribunal took into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

9. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal has not simply considered each particular allegation, but has also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination/detrimental treatment.

10. The findings of fact relevant to the issues which have to be determined in this case are as follows.

11. The claimant worked for the respondent from 15 February 2017 as a Registered General Nurse. The respondent operates a Nursing Home, Heightside House Nursing Home, in Rossendale, Lancashire, which provides residential care for people with mental health conditions. In Unit C, where the claimant worked, there were approximately 20 residents.

12. The claimant originally came to work for the respondent through an agency and applied for a full-time position with the respondent when one became vacant. The offer of permanent employment for the claimant was nevertheless subject to the satisfactory completion of a 6 months' probation period despite that the claimant had already worked for the respondent before.

13. When the claimant commenced employment he was given copies of the respondent's IT policy and its mobile phone policy and procedure.

14. In addition the respondent had a protected disclosure policy and also a safeguarding adults policy. The protected disclosure policy provides that: "Staff who have concerns should raise them with their line manager in the first instance" and that "In the event of a concern being of an extreme and potentially serious nature, employees should raise it directly with the Registered Manager or another Director. Concerns can be raised orally or in writing. When a concern is raised, the appropriate person will make initial enquiries, write to the individual raising the concern within ten days to acknowledge what has been raised and indicating how it would be dealt with. The individual raising the concern will also be kept informed of progress and receive a full and final response subject to any legal restraints."

15. The respondent's safeguarding policy is taken from a policy drawn up by or on behalf of Lancashire County Council and the Clinical Commissioning Groups in the area, in consultation with NHS England. The safeguarding policy provides that "A worker who becomes aware of concerns of abuse must report those concerns as soon as possible and in any case within the same working day, to the relevant senior manager/safeguarding lead within the Home. If a worker is unable to speak to an internal source, they should refer concerns to the Local Authority immediately. In addition if it is thought a crime could have been committed the police should be contacted". Alerts should be raised as soon as abuse or neglect is witnessed or suspected. The policy provides that this can be done directly to the safeguarding team or out of hours' service or via whistle-blowing procedures of the respondent where necessary.

16. On 6 July 2017, the claimant had a supervision meeting with Michelle Campbell, the respondent's Deputy Manager. The notes of the meeting appear in the bundle at page 142. Miss Campbell raised with the claimant the issue of his occasional lateness to work and his use of Google/the internet whilst at work. These matters were resolved at the meeting, with Miss Campbell accepting the claimant's explanations. In addition, the record of the supervision meeting states that the claimant was "very supportive to residents and provides a good level of support to his colleagues". The record concludes

that the claimant is "positive, approachable, keen/has good ideas and is a valued member of the team".

17. On Friday 21 July 2017, between 6.00pm and 6.30pm there was an incident at the Care Home involving a service user and a member of staff (TY), which the claimant witnessed. The claimant believed that TY had been deliberately trying to trap the service user's fingers in a door. The claimant rushed to push TY to one side and release the service user, in response to which TY commented, in the claimant's hearing, "I do not fucking care about his fingers". It was apparent to the claimant that TY was acting in a reckless manner with regard to the safety and welfare of the service user.

18. The claimant was in shock. He was in the middle of administering a medication round and finishing his shift. He did not know what to do and did not know the reporting procedures. The claimant went home, reflected that night on what he had witnessed and became very anxious about the incident.

19. The following day, Saturday 22 July 2017, the claimant came to work and spoke to Sheridan Kelly, the Clinical Lead and his line manager. Ms Kelly instructed the claimant to phone the Registered Manager of the Home, Mr Joshua Henley-Adams. The claimant tried to call Mr Henley-Adams but could not get through. Eventually, having failed to contact Mr Henley-Adams, the claimant went to another unit in the respondent's Home where Mr Henley-Adams' wife, Catherine Adams, was working. Ms Adams gave the claimant another telephone number which the claimant used to call Mr Henley-Adams, and the claimant then reported the previous day's incident to Mr Henley-Adams.

20. On Sunday 23 July 2017, the claimant was asked to write a witness statement account of the incident which appears in the bundle at pages 153a and 153b. The claimant also filled out one of the respondent's incident report forms giving a brief description of the matter.

21. On Monday 24 July 2017, the claimant was interviewed by Mr Henley-Adams. The notes of that interview appear in the bundle on page 169. There is, within that interview, no mention of any delay in the claimant reporting the matter; instead the interview focusses on the behaviour of TY.

22. As a result of the claimant's reporting of the incident, TY was suspended from work that day, 24 July 2017, and invited to an investigation meeting on 1 August 2017. A disciplinary process ensued. The respondent made findings about TY's conduct including her having used foul and abusive language towards a member of staff when they challenged her actions in relation to the service user on 21 July 2017, that she had also used foul and abusive language whilst residents were present despite her training in such situations and that she had made further derogatory comments when she visited the Administration building of the respondent that day. The respondent considered TY's actions to be gross misconduct and a gross breach of trust, but it took account of her previous good service at Heightside House Nursing Home in mitigation. As a result, TY was given a first and final written warning

for 12 months from 5 September 2017 and she was also directed to re-sit the 'Respect training'.

23. On a date after 10 August 2017, Miss Gill Heslop, an employee of the respondent, made a complaint about the claimant's attitude to her during 10 August 2017 and other comments. Miss Heslop was asked to put her complaint in writing and she did so at a later date with the help of Rosanne Peters, another staff member. The date of the written statement in the bundle at page 176, which Ms Heslop later gave has been altered and is unclear.

24. In the meantime, Mr Henley-Adams commenced an investigation and interviewed a number of staff at the Home. Formal records of interviews, all held on 16 August 2017, were made for Diane Hanson, Zoe Ashworth, Rosanne Peters, Cora English and Paula Kenny. In addition, Michelle Prentiss and Lyndsey Lloyd put in statements about incidents with the claimant but they were not interviewed about the substance of their statements. In addition, the claimant's line manager was not interviewed about the concerns raised.

25. On 17 August 2017, TY was asked by Mr Henley-Adams about issues with the claimant. She did not reply until sometime later.

26. On 18 August 2017, Mr Henley-Adams drew up a letter to the claimant headed "Probationary Review Meeting" which was described as being "to discuss [his] performance in the role of Registered Nurse". The letter contains a number of general and vague allegations about the claimant's conduct, and appears in the bundle at pages 195-195. The claimant did not receive the letter.

27. On 22 August 2017, TY emailed Mr Henley-Adams with a list of matters involving the claimant which TY felt had been having a negative effect on the Unit. The allegations were more specific than those previously made by staff and involved dates and names of witnesses. However, Mr Henley-Adams did not return to any of the witnesses named to investigate these matters.

28. On 25 August 2017, the respondent sent a second "Probationary Review Meeting" letter to the claimant, the contents of which were the same as the previous letter drawn up on 18 August 2017. The contents were not updated to include any further allegations about the specific matters identified by TY. None of the witness statements, interview notes or evidence from the investigation was given to the claimant at this time.

29. On 29 August 2017, having received the respondent's letter inviting him to a Probationary Review Meeting, the claimant replied by letter which appears in the bundle at page 202, attempting to respond to the allegations and explain things. He suggested ways in which the respondent could check up on the substance of some of the complaints, but Mr Henley-Adams did not take any action to do so. At the end of the claimant's letter, the claimant says he feels that the allegations have arisen since he reported a member of staff for abuse of a resident and that he felt there had been a concerted effort by some staff to cause trouble for him.

30. On 31 August 2017, the claimant's Probationary Review Meeting took place. At the outset of the meeting, Mr Henley-Adams said the meeting was a "performance review and to investigate the complaints he had received". At no time, did Mr Henley-Adams give the claimant copies of the evidence against him, although he referred to having eight witness statements during the course of the meeting and referred to what the statements say, from time to time.

31. In relation to the fact that the claimant had reported TY's conduct towards the resident, Mr Henley-Adams confirmed that the claimant was correct to have reported this, but comments that the claimant's report "just wasn't quick enough".

32. On 4 September 2017, the respondent wrote to the claimant to confirm that it had decided to terminate the claimant's employment with effect from 10 September 2017, noting that the claimant was on leave until that date and that such period of leave therefore constituted a week's notice. The claimant was also given a right of appeal. The letter appears in the bundle at page 209.

33. On 7 September 2017, the claimant appealed against his dismissal, repeating the points in his previous letter which he had written before the probationary review meeting, and making the point that the respondent had produced no evidence other than hearsay and innuendo.

34. An appeal hearing took place on 21 September 2017. This was conducted by Mr Gerald Taylor, the respondent's Operations Director. On 25 September 2017 a letter was sent by Mr Taylor to the claimant saying that he found the claimant's explanations of matters to be unsatisfactory and that he supported the respondent's decision to terminate the claimant's employment on grounds that he had not achieved the required standards during his probationary period.

The Law

35. A concise statement of the applicable law is as follows.

<u>Public interest disclosure detriment and unfair dismissal</u>

39. By section 47B(1) of ERA, a worker has the right not to be subjected to a detriment by any act "done on the ground that he or she has made a protected disclosure".

40. Section 103A of ERA makes a dismissal automatically unfair where the reason or the principal reason is that the employee has made a protected disclosure.

41. Disclosures qualifying for protection are defined by section 43B ERA as:

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

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

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

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

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

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

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

42. The protected disclosure regime came under scrutiny from the EAT in Cavendish Munro Professional Risks Management Ltd-v-Geduld [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts. In Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, the Court of Appeal noted that an allegation can contain factual information and may be boosted by context or surrounding communications. Allegations are therefore to be subjected to evaluative judgment by the Tribunal in light of all the circumstances of a case.

43. Qualifying disclosures are protected where the disclosure is made in circumstances covered by sections 43C-43H ERA. Section 43B(1) provides that for any disclosure to qualify for protection, the person making the disclosure must have a reasonable belief that the disclosure is made in the public interest.

46. The Tribunal has jurisdiction to consider complaints of public interest disclosure detriments by section 48 (1A) ERA. Subsection 2 stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

47. A 'detriment' arises in the context of employment law where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see for example, Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

48. In Fecitt v NHS Manchester [2012] IRLR 64 the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the

employer's action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal under section 103A ERA, where the question is whether the making of the protected disclosure is the reason, or at least the principal reason, for dismissal. The claimant must establish a causal link between the protected act and his dismissal and must establish, on a balance of probabilities, that the protected act, or acts, was the reason or principal reason for his dismissal.

36. The Tribunal was referred to the case of **Monie v Coral Racing Limited** [1980] IRLR 464 by Counsel for the claimant in submissions on liability. The Tribunal took such as guidance and not in substitution for the provisions of the relevant statutes.

Submissions

37. The Tribunal heard detailed submissions from both parties as follows.

Respondent's Submissions

38. The respondent's submissions were that the timing of the claimant's protected disclosure was relevant and significant because there was a dispute of fact as to whether he reported on the Saturday morning or Sunday afternoon. The respondent relied on the claimant having accepted that he did not report the incident on Friday 21 July 2017 when the respondent contends he should have done. The respondent's case was that there was a genuine reason for dismissing the claimant for breach of its procedures. However, it relied on the fact that the claimant was subject to a probationary period and review after six months and there were issues which needed to be addressed. The respondent contended that if it had wanted to discipline/dismiss the claimant for his protected disclosure it could have relied on the safeguarding policy but it did not do so and did not rely on that in its decision to dismiss the claimant. The respondent said it would have been easier than taking three weeks to canvas or orchestrate complaints from staff, which it denied, and submitted that the claimant had not satisfied the burden of proof on this aspect.

39. In addition, the respondent relied on what it described as partial admissions by the claimant to a number of the criticisms of him, which the respondent said led to his dismissal. It gave examples: the claimant's absences from work and emergency leave, lateness to work and the reports that the claimant had been on the internet at work. In response to the claimant's belief that he passed his probationary period on 6 July at his supervision meeting, the respondent pointed out that this was not noted nor raised by the claimant when he was subsequently invited to a probationary review meeting.

40. The respondent denied that it had orchestrated its staff or colluded with them to provide evidence with which to dismiss the claimant. Rather, the respondent contended that Mr Henley-Adams had received information from Ms Heslop which mentioned others, that it was then reasonable for him to speak to them, whereupon employees then came out with other issues, from which the investigation grew. The respondent contended that the timing of its investigation, coming 2-3 weeks after the protected disclosure, was a

coincidence and that staff had simply had enough of the claimant and were tired for covering for him not doing his job and not providing support or leadership. The respondent accepted that its investigation was not perfect but contended there was no evidence of collusion between Mr Henley-Adams and the employees involved.

41. The respondent did accept that the claimant was not provided with any of the evidence against him, the individual statements or records of interviews, but it submitted that it had put sufficient detail in the letter it sent him regarding the probationary review meeting because he was able to respond to this in a letter and also because the claimant put forward responses to the allegations at the meeting.

42. The respondent also submitted that there was a lack of evidence of a "clique" of employees as the claimant suggested, and that the claimant was simply mistaken in his view that his treatment and dismissal was because he was a whistle-blower. It pointed to the letter of dismissal as dealing with each point from the probationary review meeting and that, at appeal, the claimant had alleged collusion but provided no evidence of it, and that in any event there were four matters which had been known and discussed with the claimant before his protected disclosure and that this also supported the respondent's contention that the claimant was not dismissed because of having made a protected disclosure. The respondent also contended that there was no ulterior motive and submitted that the respondent is not the type of organisation to deliberately target an individual because of a protected disclosure, particularly where this would expose management to reputational and regulatory risk, and that it was beyond a reasonable belief that the respondent would act in that way.

Claimant's Submissions

43. Counsel for the claimant submitted that the chronology of the case spoke volumes, and pointed out that the claimant had been known to the respondent through his agency work, had been recruited with very positive reports. Five months on, he attends a supervision meeting that is also positive. He then makes a protected disclosure and none of the actions required by the respondent's policy are carried out. The claimant is not kept informed nor given a final outcome, and the safeguarding report was only sent to Lancashire County Council on 23 April 2018. Instead, Counsel submitted, what took place was that Mr Henley-Adams had stood as "judge, jury and executioner" of the claimant and that, if the Tribunal found that Mr Henley-Adams went looking for evidence against the claimant because of his protected disclosure, then it followed that the dismissal must be for the same reason - if collusion and conspiracy are alleged that is an unattractive allegation, but it happens. In this case it was contended that there is more than enough evidence to support the claimant's suspicions when the claimant became the subject of an investigation.

44. Counsel asked why that investigation commenced and contended that the respondent has gone looking for evidence, whereas a fortuitous discovery of wrongdoing by the claimant, if any, does not mean that such is the real reason

for his dismissal. Counsel pointed to the statement of Ms Heslop which had the date, and month in particular, changed and, in any event, the contents of Ms Heslop's statement were never mentioned in any of the investigative interviews. The statement, said to have come to the respondent's attention in August 2017, together with the complaint by Ms Lord, referring to a telephone conversation on 10 April 2017, were never dealt with by the respondent as grievances or investigated, when it was reasonable to expect the respondent at least to speak to those witnesses and that what happened instead was an investigation into the claimant about matters not raised in those two complaints which were said to be the catalyst. Counsel contended that there were so many inconsistencies in the respondent's case, and in Mr Henley-Adams' evidence, that its version of events and reason for dismissal was not credible.

45. Counsel also pointed to the fact that, at the end of the investigation process, the claimant was invited to a probationary review, which was not set up in anticipation of him completing six months' service but as a response to the respondent's investigation. Counsel contended that, on the respondent's evidence, the claimant had gone from being a "valued member of the team" to one of the worst employees in a matter of 4 – 5 weeks, accused of psychological abuse, to giving no support or leadership, and that it was not reasonable to conclude that the claimant had changed so much in such a short period of time. Counsel submitted that the only thing occurring between 6 July and 18 August was the claimant's protected disclosure.

46. In addition, Counsel contended that the claimant was given no proper opportunity to defend himself against the allegations raised as he was given none of the evidence against him. The claimant's efforts to respond to the allegations were rejected and the evidence of the employees was preferred at every point. At his appeal, the claimant highlighted that he felt something was going on but this was not looked into by the respondent and there was no satisfactory explanation why not. Further, Counsel for the claimant pointed to the differential treatment between his client as a whistle-blower who was not kept informed and was dismissed, in contrast to TY who was found guilty of abuse and gross misconduct but not dismissed. In the absence of an explanation, Counsel submitted that the Tribunal had ample material from which to conclude that the claimant was dismissed and treated the way he was because of his protected disclosure.

Conclusions (including where appropriate any additional findings of fact)

47. The Tribunal applied its relevant findings of fact and the applicable law to determine the issues in the following way.

48. First of all, on the question of when the claimant made his protected disclosure, the Tribunal found that the claimant made a protected disclosure verbally on 22 July 2017 to Sheridan Kelly, his line manager and Clinical Lead at the respondent, and again on that day to Mr Henley-Adams, the Registered Manager of the home. The next day, 23 July 2017, the claimant wrote a witness statement to confirm what he had previously reported. The Tribunal considered this effectively to be a further protected disclosure in writing

although it amounted to confirmation of what had already been reported the previous day.

49. In terms of the detrimental treatment contended for, in the List of Issues at section 2, the claimant had a supervision meeting after 5 months in his permanent role, on 6 July 2017. The notes of this meeting appear in the bundle at pages 142-145. The general outcome of that meeting was positive; there were one or two concerns but they were not followed up with any action against the claimant and the meeting record noted that the next supervision will be in October 2017. There is no mention of a forthcoming probationary review meeting. Nevertheless, after 6 months' service, it might be expected that a probationary review meeting would take place on or around 15 August 2017. Therefore, the Tribunal considered that the meeting on 6 July 2017 was a regular supervision meeting and the probationary review was a separate matter.

50. The claimant's 'probationary review' was arranged to and did take place therefore slightly later than might be expected, on 31 August 2017. What transpired was that the respondent turned this meeting into an investigatory interview. The Tribunal noted that, at the end of the letter inviting the claimant to the probationary review meeting, it states that one outcome might be the termination of the claimant's employment, because of the allegations listed in the letter. In addition, Mr Henley-Adams' commented at the start of the meeting, about it being not only a performance review but an investigatory meeting. However, the notes of the meeting are headed "investigatory meeting", as if the probationary review purpose had been forgotten. The Tribunal asked itself: what was it that happened to change the nature of that meeting? The only event of significance to the respondent, which is apparent from the evidence is that, in the interim, the claimant had reported TY's conduct on 22 July 2017.

51. The Tribunal considered the investigation that Mr Henley-Adams decided to commence. He said this was in response to complaints even though the first such complaint came in written form some time later and relates to one matter. The Tribunal was concerned, from reading the letters of complaint in the bundle and the investigation notes, that several witnesses had stated that they were responding to an enquiry by Mr Henley-Adams, or a request of them for information; in particular TY, on 22 August 2017, suggests the purpose was providing information about negative things: the implication is that she had been asked to do so.

52. The Tribunal considered that Mr Henley-Adams' investigation had all the hall-marks of a trawl for evidence against the claimant. The questions posed of staff members were leading and often concerned matters which were not relevant to a probationary review nor were they relevant to the complaints made about the claimant. For example:

- "Do you see the claimant using his mobile phone whilst on duty?"
- "How often is he on his phone/Facetime?"

- "Has the claimant borrowed money off you?"
- "Have you observed the claimant on Google?"
- "Do you trust the claimant?"

53. In response to such questions, the witnesses gave bald general assertions, and hearsay was recounted without enquiry or challenge. Vague or generalised comments were accepted by the respondent often without question about dates or detail, and witnesses' answers were not probed for corroboration in the way an investigation should be expected to do. Comments like "he's late", "he's not supportive", and "I wouldn't trust him" were simply accepted. Mr Henley-Adams did not question its staff in any depth and did not ask why individuals said things, to any extent. When Ms Ashworth said she "wouldn't trust [the claimant] as far as she could throw him". Mr Henley-Adams asked her to explain what she meant and she said, "It's intuition, you just get that feeling about him. Nothing in particular" and DH says, "It's gut instinct". The respondent asked PK: does the claimant perform all the duties of a nurse as he should? and PK says, "In short, no" but PK is not asked to give any basis for that conclusion nor to give examples of how the claimant might fall short. PK goes on to comment, "It's petty things, not major, little things here and there" which is accepted by the respondent without question when examples could have been sought. Later, DH says, "I don't see him as much as others but I do believe he's useless" without being asked to or offering anything to substantiate that conclusion. The respondent made little attempt to probe, or check out such general statements or to seek any factual background to support the conclusions offered.

54. The Tribunal also noted that a number of the allegations made in August 2017 were historic and unspecified but were nevertheless accepted by the respondent and used against the claimant. The complaints received were not treated as grievances and no grievance procedure was instituted as might be expected. In light of the evidence gathered, the Tribunal concluded that no effective investigation was conducted. Rather, the Tribunal formed its view, on the evidence presented, that the respondent was gathering evidence against the claimant, allowing its staff to submit vague generalised and potentially misleading evidence without question and without consideration as to treating the complaints as grievances under its policies as might be expected.

55. In his letter of 29 August 2017, the claimant gave examples of how the respondent could investigate and check some of the allegations against him, for example by looking at his timesheets. However, it was apparent that the respondent did not follow up on the claimant's suggestions, nor did it show any interest in checking independently what was being alleged against the claimant. The Tribunal considered that the respondent's mind was closed. The meeting of 31 August 2017 focussed only on the allegations in the letter of invite, and the meeting notes reflect the fact that there was no attempt to review the claimant's performance otherwise.

56. The respondent confirmed in evidence that the claimant was not given copies of the letters of complaint or the witness statements at any stage of the

proceedings against him. The claimant was therefore placed in the very difficult position of having to try to answer what were vague allegations without knowing the origin of them, who had made them, or what basis there was, if any, for them.

57. The Tribunal was further concerned that the respondent's case included a contention that, although the claimant had in fact reported TY, as he should have done, he had not done so "quickly enough". It is apparent that the claimant was, in any event, being criticised for the way he had done the right thing.

58. The claimant also raised, in his letter of 29 August 2017 which was presented to the meeting on 31 August 2017, and in his appeal, his view that the staff had cold-shouldered him since the incident that he reported and had acted against him, in reaction to his reporting TY. Despite the claimant making that point once he knows the allegations against him, and on several occasions after that, the claimant's view is ignored by the respondent. There is no consideration of whether it is possible that the staff had acted in concert against the claimant. The entire focus of the investigation process, when the evidence is looked at altogether, is on what the claimant did wrong and what is said against him.

59. The Tribunal therefore considered that the respondent has sought out the negative and not conducted an impartial performance review as would be good practice. Mr Henley-Adams' role was one of information gatherer. The Tribunal did not find him to be an investigator and have rejected that description because it did not conclude that that was what he was doing. He was an information gatherer and also decision maker, and we accept the submission of Counsel for the claimant, that Mr Henley-Adams acted as judge, jury and executioner, seeking out information to serve a purpose.

60. The appeal was conducted as a review of the evidence against the claimant. As at the meeting on 31 August 2017, the appeal paid little regard to the claimant's points of appeal and carried out no checking of the substance of the allegations independently. It is to be remembered that the claimant had still been given none of the evidence against him to read or to respond to and therefore he again had no proper opportunity to answer the allegations against him in his appeal.

61. The Tribunal was also concerned that, from the appeal minutes, it is apparent that Mr Taylor often moved on in the discussion, regardless of what the claimant says, by saying "next point, next point" as if he is going through the motions of an appeal and wants to move on quickly. He displays little or no interest in what the claimant wants to say. The Tribunal therefore concluded that the appeal process failed to rectify the patent defects in the purported disciplinary process carried out on 31 August 2017.

62. The Tribunal's considered its findings in relation to detriment, that is detriments that do not form part of the dismissal process, against those detriments in the list of issues. The Tribunal considered that a number of the detriment allegations relate to matters that form part of the dismissal process.

However, items of detriment that we find proven are (a) being blanked by colleagues: there was no evidence either in the investigatory process or presented to the Tribunal, to rebut that allegation as part of the claimant's case; (b) the gathering of negative information on the claimant for the purported probationary review meeting; and (c) the fact that the staff were effectively encouraged to complain by Mr Henley-Adams. The Tribunal concluded that the claimant's protected disclosure materially influenced the employer's actions in failing to address (a) and in respect of its actions (b) and (c).

63. In light of the Tribunal's findings as to detrimental treatment above, and its conclusions about how the claimant was treated throughout the process leading to his dismissal, the Tribunal concluded that it must follow that the claimant's dismissal was because he had made the protected disclosure of reporting TY on 22 July 2017. The Tribunal concluded that the making of the protected disclosure about TY's conduct was the reason, or at least the principal reason, for the respondent embarking on a process which led to the claimant's dismissal. Given the positive comments about the claimant which formed the record of his supervision on 6 July 2017, the Tribunal agreed with the submission of Counsel for the claimant that there was a causal link between the protected act and the claimant's dismissal such that the protected disclosure was the reason or principal reason for dismissal in this case. In this regard, the Tribunal also took account of the stark contrast in treatment between the claimant, who was dismissed for vague and unsubstantiated allegations about his conduct in general, and the treatment of TY, found guilty of gross misconduct following a serious safeguarding incident, but who despite those very serious circumstances nevertheless received the significantly lesser penalty of a warning.

64. In light of the above, the claimant's claims of detriment and unfair dismissal for making a protected disclosure are well-founded and succeed.

Remedy

65. Following the giving of the liability judgment, evidence was heard on remedy.

66. The claimant tendered a witness statement and schedule of loss for consideration as to remedy and was subject to cross examination by the respondent. The respondent produced a counter-schedule of loss.

67. Both parties made submissions on remedy and in doing so, Counsel for the claimant relied on the case of **Virgo Fidelis Senior School v Boyle** [2004] IRLR 268 EAT and also produced cases on quantum awards and recommendations from Harvey, including short reports on the case of **Austin v West Sussex County Council (Havant)** (case number 3102059/2012) *(14 August 2013 unreported)* and also **ICTS (UK) Limited v TCHOULA** [2000] IRLR 643 EAT; and **Crisp v Iceland Foods Limited (Birmingham)** (case numbers 1604478/20177 and 1600000/2012) *(8 May 2012, [2012] EqLR 618].*

68. Following the hearing of submissions on remedy, the Tribunal awarded the following sums:

(1) 13 weeks' losses of earnings in the total sum of £5,932.55. This figure was arrived at based on the parties having agreed that the claimant's net weekly earnings for the period of his employment with the respondent was £456.35 per week net. The claimant was out of work loss for a period of 13 weeks in total, until he obtained alternative employment on 11 September 2017. The claimant's new employment is at a similar level of remuneration to that enjoyed when he worked for the respondent therefore there is no loss of earnings beyond 11 September 2017.

(2) The Tribunal declined to reduce the claimant's losses for any failure to mitigate, noting in particular that the claimant had only been out of work for a relatively short period and in that time had been going through an appeal process with the respondent until the end of September 2017. The claimant's case was that he had concentrated his efforts on his appeal and made submissions to the appeal that he wished to return to his job. In addition, the Tribunal accepted that the claimant was constrained by family circumstances from looking for similar work other than in his local area - he gave evidence that he had focussed, at first, on finding full-time permanent work in his locality or within a reasonable travelling distance of the family home.

(3) The Tribunal took account of the contents of the claimant's remedy statement as to injury to feelings, together with the case law provided by Counsel for the claimant. The Tribunal also noted that, in submissions on remedy, the advocate for the respondent accepted that this would be a case meriting an award within the mid-band of Vento albeit that his submissions were that the Tribunal should look to the lower end of the mid band. In the circumstances of this case and in light of evidence of the clear hurt and distress caused to the claimant, the Tribunal disagreed with this contention and made an award for injury to feelings in the middle of the mid band of Vento in the amount of £15,000. In doing so, the Tribunal also took account of the case law provided by the claimant's Counsel which, although historic, evidenced cases of awards of equivalent sums/levels taking account of inflation.

(4) Lastly, Counsel for the claimant invited the Tribunal to make an award for aggravated damages, which it did in the sum of £10,000. This award was made taking account of the very strong indications from the EAT in the case of **Virgo Fidelis Senior School v Boyle** and the comments of Judge Ansell to the effect that detriments suffered by whistle-blowers should normally be regarded by Tribunals as a very serious breach of discrimination legislation. In that case, in 2004, the Tribunal awarded £10,000 for aggravated damages, an award which was not disturbed by the EAT. Given the Tribunal's findings as to the efforts of the respondent to effectively encourage staff to complain about the claimant amounting to a campaign to find fault, and the failure to address any of the points made by the claimant in his defence or appeal, and without providing the claimant with any of the evidence gathered at the time, the Tribunal considered it just to award a similar sum in this case.

(5) The Tribunal was also invited to award an uplift for failure to follow the ACAS Code of Practice but declined to do so on the basis that the Tribunal had found the claimant to have been automatically unfairly dismissed for his protected disclosure and not for a reason falling within the Code of Practice.

69. Therefore the total compensation due to the claimant is the sum of £30,932.55. The recoupment regulations apply to the compensatory award of £5,932.55 being 13 weeks' losses of earnings, for the period from 11 September 2017 until 10 December 2017.

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Employment Judge Batten

Dated 27 November 2018

REASONS SENT TO THE PARTIES ON

30 November 2018

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FOR THE TRIBUNAL OFFICE