THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs J Smith	**AND**	**Crown Care V Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 19-22 June 2017**

Before: **Employment Judge A M Buchanan (sitting alone)**

Appearances

For the Claimant: **Mr A Tinnion of Counsel**
For the Respondent: **Mr D Bunting of Counsel**

JUDGMENT

It is the judgment of the Tribunal that the claim of automatic unfair dismissal by reason of having made a protected disclosure contrary to section 103A Employment Rights Act 1996 fails and is dismissed.

REASONS

Preliminary matters

1. By claim form filed on 1 February 2017 the claimant brought to the Tribunal a claim of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 ("the 1996 Act") arising out of her dismissal by the respondent on 10 October 2016. The claimant relied on an early conciliation certificate on which Day A was shown as 9 December 2016 and Day B as 9 January 2017.

2. By a response filed on 2 March 2017 the respondent denied liability to the claimant and asserted the claimant was dismissed (page 26) for "some other substantive (*sic*)

reason" namely the irretrievable breakdown of her relationship with her Line Manager Donna Dove. Within the response the respondent requested further particulars of claim from the claimant and these were provided on 28 March 2017.

3. On 30 March 2017 this matter came before Regional Employment Judge Reed when case management orders were made and in particular the claimant was ordered to provide further information to the respondent and to the Tribunal in relation to the alleged protected disclosures on which she sought to rely. Those further particulars (pages 31-33) were provided on 20 April 2017.

4. On 17 May 2017 the respondent filed an amended response to the claim (pages 34-40). On 13 June 2017 the claimant made an application to amend the claim form namely the sixth paragraph of page 7 of the claim form (page 7) by deleting reference to the CQC and substituting reference to the Northumberland Clinical Commissioning Group. It was directed that that application should be dealt with at the start of the final hearing.

5. The matter came before me on 19-22 June 2017. The application to amend referred to above was made at the start of the hearing. There was objection from the respondent. I heard submissions from counsel. I considered the leading authority on amendment namely **Selkent Bus Company Limited –v- Moore 1996 ICR 836**. I balanced the prejudice and hardship of allowing or refusing the amendment and, having done so, determined that the balance lay in allowing the amendment. I announced that decision orally. The fourth day of the hearing concluded in the afternoon and I decided to reserve judgment given the detailed matters which I needed to review in order to reach a decision in this case. Accordingly this judgment is issued with full written reasons in accordance with rule 62(2) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. I explained to the parties that in light of my then forthcoming commitments, it would be some weeks before I could finalise this Judgment. I issue this Judgment with full reasons only after having carried out my full review of all matters raised.

Witnesses

6. In the course of the hearing I heard from the following witnesses:-

Claimant

6.1 Jan Smith – the claimant.

6.2 Jenny Nelson – a former colleague of the claimant when employed by the respondent and who herself worked with the respondent from January 2016 until her resignation in January 2017.

6.3 Anne Fitzsimmons – who was a colleague of the claimant and who worked with the respondent from September 2016 until her resignation on 30 November 2016.

Respondent

6.4 Denise Ann Stephenson ("DS") – a managing director of the respondent.

6.5 Deborah Tweedy ("DT") – who gave HR advice to the respondent relevant to the claimant's dismissal.

6.6 Michael Ladhar ("ML") – one of the owners of the respondent company.

Documents

7. I had before me a bundle of documents which originally comprised 149 pages but as the hearing progressed additional pages were added and ultimately contained 187 pages. Any reference in this Judgment to a page number is a reference to the corresponding page within the agreed bundle.

8. Issues

Factual issues

8.1 There were various factual issues for me to determine in this matter and I do so in the findings of fact which follow.

Legal issues

8.2 The legal issues were identified as follows:-

In respect of each of the seven alleged protected disclosures:-

1. What did the claimant disclose, to whom and when? Did anything disclosed amount to information?

2. If so, was the disclosure a qualifying disclosure? Did the claimant have a subjective belief that the disclosure was in the public interest and that it tended to show that one or more of the circumstances in section 43B(1)(a)-(f) of the 1996 Act was made out? Which paragraph of section 43B(1) is relied on in relation to each such disclosure?

3. If so, in relation to each subjective belief, was that belief objectively reasonable?

4. If the disclosure is a qualifying disclosure, did it become a protected disclosure by reference to one or more of sections 43C-43H inclusive of the 1996 Act?

5. The following were said to amount to protected disclosures:-

5.1 In late August 2016 or within days of Donna Dove ("DD") taking up her new role, a verbal disclosure by the claimant to Steven Massey ("SM") that DD was not a qualified Nurse and that the claimant was the only member of staff with a nursing qualification;

5.2 Within a few days of DD being interviewed in July 2016, verbal disclosure by the claimant to Denise Stephenson ("DS") that DD was not a qualified Nurse;

5.3 On 26 August 2016 verbal disclosure by the claimant to DS that under DD's management two Nurses had been asked to work a 24 hour shift and that, at least on one occasion, there were no Nurses present at the home;

5.4 In early September 2016 verbal disclosure by the claimant to Biddy Cheetham ("BC") that two Nurses (Steve Hubble and Sue Purves) had been asked to work 24/21 hour shifts by DD and that Steve Hubble had been threatened with cancellation of his nursing registration if he did not comply and that on one occasion the Home had been without a trained nurse overnight;

5.5 In August/September 2016, a verbal disclosure by the claimant to DD that there were concerns around the standard of care being provided to residents, that clinical decisions were made by DD when she was not qualified to do so and that the staff had difficulty working with and discussing matters with DD;

5.6 On 14 September 2016 to Fiona Kane of the Northumberland Contract Commissioning Group ("NCCG") verbal disclosure by the claimant about concerns over the health and safety of residents at the Home;

5.7 On various dates to DD verbal disclosures by the claimant in respect of clinical assessments made by DD when she was not authorised so to do and in particular regarding her decision to move a resident with cardiac failure from the medical floor to the residential floor of the Home;

5.8 In relation to disclosure 5.6 above there were the following additional issues:-

5.8.1 Did the claimant reasonably believe the information disclosed and any allegation made was substantially true?
5.8.2 Was the disclosure made for personal gain?
5.8.3 Was it reasonable in all the circumstances for the disclosure to be made paying attention to the matters set out in section 43G(3) of the 1996 Act?
5.8.4 Had the claimant previously made a disclosure of substantially the same information to her employer – section 43G(2)(c) of the 1996 Act (that being the only provision of section 43G(2) being relied on by the claimant)

5.9 It was confirmed at the outset that the claimant did not seek to rely on the provisions of section 43H to establish a protected disclosure.

6. On whom does the burden lie to prove the reason for dismissal? If the claimant, can the claimant show that the principal reason for her dismissal was one or more of the protected disclosures? Is it sufficient that the respondent erroneously believed that the claimant had made a protected disclosure to the Care Quality Commission ("CQC") to found liability for the respondent under section 103A of the 1996 Act?If the burden of proof lies on the respondent, has the respondent proved its stated reason for dismissal being the irretrievable breakdown in the relationship between the claimant and DD which it labelled as" some other substantial reason".

7. If the claimant was unfairly dismissed, what remedy does the claimant seek?

8. Has the claimant taken reasonable steps to mitigate her loss? If not, had the claimant taken reasonable steps to find employment, when within the period since dismissal would the claimant have obtained employment and at what rate?

9. Should there be any award for future loss? Was the decision for the claimant to surrender her registration with the Nursing and Midwifery Council reasonable? What effect does that have (if any) on any compensation to be awarded?

10. Given that the claimant resigned on 2 September 2016 and had to be persuaded to remain employed on 16 September 2016, would her employment have continued after the date of dismissal in any event? If so, for how long?

11. Were any protected disclosures made by the claimant made in good faith? If not, is it just and equitable to reduce any award to the claimant by no more than 25%?

Findings of fact

9. Having considered carefully the written evidence and the cross examination of the various witnesses and having considered the way in which that evidence was given and having considered the documents to which I was referred, I make the following findings of fact on the balance of probabilities:-

9.1 The claimant was born on 28 September 1963. The claimant is a very experienced nurse having worked within a hospice and as a Community Staff Nurse and a District Nursing Sister. Amongst many other qualifications, the claimant holds two B.Sc. degrees in nursing.

9.2 The respondent company is a family run established operator and developer of care homes for the elderly which owns approximately 17 such homes. The respondent acquired the site of what became the Royal Hampton Care Home ("the Home") in 2011 and the Home opened for business in February 2016.

9.3 The respondent company has a Code of Conduct and Disciplinary Procedures (pages 46a-46i) but at no time was the claimant ever subject to such procedures.

9.4 The claimant began work for the respondent on 4 January 2016 after a successful interview in September 2015. The claimant was employed as Deputy Manager of the Home. The Home provided both residential care and also nursing care to those residents in need of such care including residents suffering from dementia and other mental impairments. The claimant was employed from 4 January 2016 until her dismissal on 10 October 2016. The claimant had relatives living in the Home and thus was a customer/user of the respondent as well as being an employee.

9.5 The claimant had a written contract of employment (pages 60-70) which provided that the claimant had to work a probationary period for six months and continued (page 63):-

"*Your employment may be terminated by the company during or at the end of the probationary period upon providing you with one week's notice and without reference to*

the disciplinary and grievance procedures. The probationary period may be extended by the Company for the better assessment of your performance".

The claimant completed her probation period in early July 2016 and the period was not extended. No issues were ever raised in relation to the quality of the claimant's work which was accepted by all parties as outstanding.

9.6 On taking up her post, the claimant first she worked with the Annette Denson who was the first manager of the Home and she did so without difficulty. The Home was newly built with excellent facilities and the claimant shared the aim of the manager to make the Home "like no other". In June 2016 Annette Denson resigned due to ill health and for a period of some weeks the claimant acted up as manager until a temporary manager was appointed namely Shiva Sheikholeslami ("SS") with whom the claimant also enjoyed a good working relationship.

9.7 On 21 July 2016 (page 71) the claimant sent an e-mail to ML supporting SS and seeking to persuade ML to retain SS as Manager at a time when her temporary appointment was coming to an end. By that time a new permanent manager of the Home - DD- had been appointed and was due to start work at the Home on 23 July 2016 and did so. SS then ceased to work at the Home.

9.8 On 1 August 2016 or thereabouts Steven Massey ("SM") was appointed a managing director by the respondent company and took on responsibility for the respondent's homes in the North East of England including the Home. SM worked closely with DS who became a managing director of the respondent with responsibility for the homes in Yorkshire and elsewhere.

9.9 DD took up her duties on 23 July 2016 and at a staff meeting in early August 2016 she introduced herself as the new Manager of the Home and took over from the claimant the preparation of the staff rotas. DD made changes to those rotas and in particular the level of staff assigned to each shift without any consultation with the claimant or the then existing staff. DD made regular use of agency staff to cover gaps in the rota and the residents of the Home began to complain that they did not like so many new faces appearing in the Home. The Home was newly opened and it had capacity for 73 residents across residential and nursing beds but at all material times – given that the Home was newly opened - the residents numbered no more than 20.

9.10 During the early part of August 2016 the claimant had a conversation with SM during the course of which the claimant advised SM that DD was not a qualified Nurse and that she (the claimant) was the only member of the senior team within the Home with a nursing qualification in a care home with residents with specific and complex medical needs on the nursing floor. By this time the relationship between the claimant and DD had become strained and already within the Home, concerns were being expressed by staff and residents alike about the management style of DD. DD had overruled the claimant's nursing assessment in respect of at least one patient and the claimant objected to that, given that DD was not a qualified Nurse.

9.11 In August 2016 and at a point in time prior to the conversation with SM referred to above, the claimant had a conversation with DS during which she made similar complaints which she was later to make to SM as referred to in paragraph 9.10 above.

9.12 On 8 August 2016 the claimant made a request (page 72) for holiday between 22 September 2016 and 10 October 2016 which was granted by DD.

9.13 In the middle of August 2016 a male resident of the Home, who had previously been looked after on the nursing floor, returned from hospital to the Home. DD overruled the claimant's opinion of the needs of this resident and determined that he should be placed on the residential floor. At that time the witness Jenny Nelson ("JN") raised her concerns about this resident with DS but was told that the matter was not anything to do with her and that she should mind her own business. In late August and into early September 2016 JN contacted the CQC on three occasions to raise her concerns about staff shortages and patient care. She had been told by the claimant that she was entitled to go to the CQC for advice if that is what she felt she needed to do.

9.14 On 26 August 2016 the claimant telephoned DS and generally raised her concerns about the management of DD and in particular concerns expressed by two members of staff who were disgruntled at the way in which DD was managing the Home. The claimant was vague in her recollection of this conversation whereas DS was clearer. On balance I prefer the evidence of DS as to what was said in this conversation as she had every reason to recall what was said to her given her circumstances at the time. Subsequent to that conversation the claimant sent to DS a text message (page 73/74) which included the names of the staff who had expressed concerns and the message included the following:-

"*Thank you for listening to the concerns I spoke to you about on Friday evening with regards to the disgruntled staff at Royal Hampton. We spoke about the staff that have issues with our new manager and … this situation needs to be dealt with asap … I appreciate just how sensitive this is for both you and …*".

9.15 DS responded to that message within just over one hour confirming that she would pass the information on to her colleague Biddy Cheetham who it had been agreed in the conversation on 26 August 2016 would visit the Home informally to seek to understand the concerns that the staff had which had been referred to by the claimant. It was also confirmed by DS that she would raise the matters with ML.

9.16 On 2 September 2016 the claimant sent to DS a letter (addressed to DD) seeking to resign from her position as Deputy Manager and to be considered for a Registered Nurse post which was then available within the Home. The letter seeking to step down (pages 76-77) contains:

"*Unfortunately my post has got me frustrated. It does not allow me to provide the holistic care and passion that I am trained to do as a Senior Nursing Sister. I am finding myself multitasking on a daily basis unable to find the time to converse with our residents and my care team which I promised I would do. The staff feel devalued many of them are seeking alternative positions due to frustration and as deputy manager all I can do is offer them support, advice and guidance … Hopefully I can remain within Royal Hampton for a period of two days as a staff nurse and provide the support that I feel is required to enhance the pastoral support to the care team involved in continuity of care for your residents*".

9.17 The letter seeking a different appointment was sent to DS who forwarded it to SM who arranged a meeting with the claimant shortly after receiving the letter and persuaded her to continue in the role as Deputy Manager. It was made plain to the claimant that she was an important part of the management of the Home and SM (who was himself only recently in post) persuaded the claimant to stay on the basis that he would resolve the issues about which she was concerned. The claimant agreed to do so.

9.18 In accordance with what DS had agreed with the claimant, Biddy Cheetham ("BC") visited the Home in early September 2016. During the course of a meeting with the claimant, the claimant advised BC that a nurse Steve Hubble had been asked to work a 9 hour shift at the end of another 9 hour shift and that when he had refused to do so he had been threatened with cancellation of his nursing registration by DD if he did not comply with her request. In addition she reported that the nurse Sue Purves had been asked to work a 21 hour shift and had refused to do so and she reported also that on one occasion the Home had been left without a trained nurse overnight.

9.19 At various times in August and September 2016 the claimant had verbal discussions with DD at which times she expressed her opinion to DD that there were concerns around the standard of care being provided to residents and that clinical decisions were being made by DD which she was not qualified to make given that she was no longer a registered nurse. Conversations took place between the claimant and DD such as might be expected between a manager and her deputy – albeit that the relationship between them was failing.

9.20 On 14 September 2016 a meeting took place on the third floor of the Home between the claimant and DD and SM. This was an attempt by SM to find a way forward for the claimant and DD to work together. The meeting was not successful and when DD made a comment to the effect that the claimant was not too busy to prevent her going outside for a cigarette, the claimant took great offence and walked out of the meeting and went home.

9.21 Having done so, the claimant sent a message to DS telling her that she (the claimant) had walked out and this prompted a reply by text message from DS to the claimant. In that message (page 78 onwards) DS stated that she was:-

"....*flabbergasted as I had no idea about any of this. You are such a cornerstone for Royal Hampton I can't imagine it without you in the thick of things. Ive taken the liberty to copy the text to Michael as he should know about this – if he is not already informed and I have not heard anything back so far … All I can say at the moment is I am very deeply saddened to know you have felt the need to walk away – keeping your dignity in tact would be second nature to you as you are a true lady through and through! …In the meantime please know you have been very valued and hugely respected by those who have had the honour of working with you...We have been a good team for the short time we had the privilege to work closely together..*".

The whole tenor of the message was an attempt by DS to dissuade the claimant from resigning her employment.

9.22 On 14 September 2016 the claimant telephoned Fiona Kane of the NCCG. She did this because Fiona Kane had visited the Home and had left her card with the claimant when leaving. The claimant telephoned her and made it known that the claimant considered there were unsafe staffing levels at the Home which was compromising the care of residents and DD was making clinical decisions which were putting residents at risk. I do not accept that the claimant raised any other matters namely that staff felt unable to speak to or challenge DD or that the matters had been raised with managing directors but no action taken. I reach that conclusion because those matters were not alleged by the claimant until they were added in at the second attempt to particularise her claim. Had those matters been of such significance the claimant would have dealt with them initially and therefore I am not satisfied that the claimant raised those additional matters with NCCG.

9.23 At various times throughout August and September 2016, the claimant notified DD that any assessment of a resident for nursing or clinical needs should be made by a medically qualified professional such as herself and not by DD who was not qualified so to do. She also expressed her opinion to DD that her decision to move a resident with cardiac failure from the nursing floor to the residential floor was wrong and that her (the claimant's) assessment of that resident was that he should remain on the nursing floor.

9.24 On 16 September 2016 the claimant met SM privately at Dobbie's Garden Centre quite close to the Home at his request. A further discussion took place about the difficulties of her relationship with DD and the management of the Home generally. SM persuaded the claimant to remain in post to give him more time to resolve matters and she agreed to do so.

9.25 On 17 September 2016 at 21:50 the claimant sent an e-mail to SM and DS which she asked to be forwarded by them to ML. In it she referred to the difficult situation at the Home in respect of loss of staff, the amount of agency cover, "*the abundance of residents, family members and staff whistle-blowing*", the non existence of managerial liaison, the dictatorial style of DD, the lack of a team approach and the perception of bullying by DD. The claimant confirmed that she had agreed to return to work on 19 September and confirmed that she had expressed her concerns of the poor managerial/communication skills of DD and confirmed that she had arranged to meet DD to discuss these matters. The claimant did return to work on Monday 19 September 2016.

9.26 On Monday, 19 September 2016 the CQC made an unannounced inspection visit at the Home. The claimant (and all staff) were seen by the inspectors and the claimant expressed her concerns to them. That same day Judith Brady (a relative of a resident at the Home) sent an e-mail (page 83) to DS in which she expressed the view that the claimant "*is the one who has been trying to hold things together*". The message was critical of the Manager DD.

9.27 At the end of the day on 19 September 2016 the CQC gave feedback to SM and others in respect of what they had found as a result of their inspection. I accept that serious concerns were raised and that concerns were expressed about the working relationship between the claimant and DD which had been unearthed by the inspectors of the CQC. As a result a decision was taken by SM and ML to ask DT to investigate the situation within the Home. This instruction was given on 20 September 2016 and at

12:12pm DT wrote to DS and SM to confirm her instructions (pages 86-88). The matters of which she was advised were set out by her in the following terms:-

"*Denise advised of a huge problem within Ponteland Home. Jan the deputy is not working well with Donna, the new manager. Contracts have rang to advise that they have had previous problems with Donna and are completely behind Jan in her views ie they do not feel that she is the right person for the role. It is alleged Jan has incited staff to complain to CQC and Contracts in droves. It is further alleged Jan is inciting the relatives to make complaints as well. Jan has both friends and relatives in the home and is working closely with Annette. Jan also socialises with the staff outside of working – thereby not adhering to the boundaries preferred by CQC/Contracts ie relationships between management/staff and relationships between staff and residents. It is alleged Jan does not feel money should be an issue and has no understanding of the needs of the business. Finances attached for reference*".

The e-mail ends (page 87):-
"*The important point here is to ascertain whether or not there is any truth behind the allegations against both Donna and her ability to manage as well as the alleged bullying and also to ascertain whether there is any truth behind the allegation that Jan is actively encouraging staff to complain without foundation*".

9.28 Later that same day 19 September 2016, SM wrote to DT and DS to confirm the result of a visit to the Home that day by BC when she had met staff "*to gauge the situation within the Home*". In that e-mail SM recommended that both DD and the claimant were to be advised that an investigation into their behaviours was to begin and that the investigation would be dealt with independently by DT and that the respondent would then decide on its next step.

9.29 On 21 September 2016 SM prepared an e-mail for ML in advance of a meeting ML was to have with NCCG that day. That meeting was taken by ML because of the serious situation in which the respondent found itself in relation to the Home and he was going to address with NCCG the concerns which they were also raising. In the course of that e-mail (pages 89-90) SM set out for ML the various matters which NCCG wished to be clarified and at the end of that e-mail at paragraphs (i) and (j) he wrote as follows:-

"*(i) Donna's management style, this is the greatest concern we have. It does not fit our plans and is too confrontational. There is no doubt she can be a good manager but she is not dealing with the issues at RH as we would expect. I am therefore working on a possible exit strategy which would allow Donna to be redeployed if possible.*

(j) Jan's issues. Again is a major issue and concerns for us as there is no doubt she is a problem that we also need to address. Again I am working on an exit strategy for her to put into place on her return from annual leave. In both cases I believe they both need to go".

9.30 On 22 September 2016 the claimant left the Home for her period of annual leave. On 22 September 2016 BC sent an e-mail to DT and to SM in which she updated them in relation to her conversations with the staff at the Home on that day and earlier and in relation to the claimant she wrote (page 92):-

"*Jan admitted that the relationship is broken and cannot see a way forward. Jan told me that she is aware that the head of the local WI has contacted David Ladhar regarding visiting the Home. Jan had given her confidential information concerning the Home and Donna*".

In this email the reference to a broken relationship was that between the claimant and DD, David Ladhar is the father of ML.

9.31 On Friday, 23 September 2016 the CQC made its second unannounced visit to the Home. On that same day DT began to interview staff at the Home and interviewed several people including DD (pages 98-100). DD made various allegations against the claimant in her statement namely that the claimant was working against her and that the claimant crossed boundaries with staff and that the claimant was unprofessional and not confidential. DT interviewed a range of staff at the Home on that day some of whom were supportive of the claimant and some of DD. The claimant was away on leave from 22 September 2016 and so was at no time interviewed by DT.

9.32 At the end of the inspection on 23 September 2016 CQC gave feedback to SM who subsequently wrote to DT to report what had been said. He wrote (page 109) that the CQC were concerned:-
"*that the staff dynamics were not working and that in their eyes the relationship at management level has broken down. I discussed the options we were considering and they would support whatever outcome we have. Whatever we do we are going to get an "inadequate" rating with CQC in that area of their report which is bad! We need to send out the strongest possible signal to all that we have acted quickly and positively to address the issues. Michael met with Northumberland.....on Thursday who have concerns over the management style of DD (from previous history) and they recognise the same "trends" they saw before. Whilst this in itself does not mean we have to act on their concerns we do need to note them.....*".

9.33 On 26 September 2016 the CQC returned by arrangement to complete its inspection at the Home. On 26 September 2016 SM was written to by his legal advisors (page 111) in which it was suggested that mediation between the claimant and DD might resolve the matter to which SM replied:-
"*I fear we are already beyond mediation as neither will agree a way ahead. It is my recommendation that we look to remove both from the equation and recruit a new manager and deputy*". (Page 111).

9.34 On 26 September 2016 DT continued her interviewing of staff and saw three further members of staff on that day and prepared file notes which she forwarded to the respondent.

9.35 On 27 September 2016 a discussion took place in relation to the situation between the senior managers. ML and DS were together in a motor car and parked up to have a conversation by telephone with SM who was in his office and with DT and the partner at the solicitors firm where she worked who were together in their own office. The conversation lasted some 20 minutes and the result of the conversation was that a decision was taken that the employment of both the claimant and DD was to be terminated on the basis that their relationship had broken down irretrievably and that that impacted negatively on staff relations and staff morale.

9.36 On 28 September 2016 at around 10:00am SM met with DD and he dismissed her. His subsequent e-mail reporting the matter reads (page 120c):-

"*I have met with Donna this morning and dismissed her as per our discussions yesterday*. *Meeting lasted 30 seconds as she refused to talk it through and she refused to take the letter (which has now been posted) but she did hand over important issues to Shiva*".

9.37 The letter of dismissal handed to DD on that day (pages 120a-120b) makes it plain that the reason for the dismissal was:- "*an irretrievable relationship with your deputy Jan. This has impacted negatively on staff relations and on staff morale*".

9.38 As soon as DD had been dismissed SS was appointed as Interim Manager (for the second time) whilst a new Manager and Deputy were recruited. There was an issue raised as to the date of dismissal of DD. The respondent had in its pleadings stated the date as 5 October 2016. I accept that that was an error. I accept the documents produced to me as giving the clearest evidence that DD was dismissed on 28 September 2016.

9.39 In anticipation of the claimant returning from holiday BC (who was acting on behalf of SM who was himself away on holiday) asked for advice as to how to invite the claimant to a meeting on Monday, 10 October 2016 on her return to work. She was advised that she should ask the claimant to attend a "*back to work review*" and a letter to that effect was sent to the claimant (page 122) on 7 October 2016.

9.40 On 10 October 2016 the claimant returned to work and had that back to work review meeting with BC. At that meeting BC handed to the claimant her letter of dismissal (pages 123-124) which is set out in exactly the same terms as that written to DD and giving the same reason for dismissal. The claimant was extremely upset by the dismissal and left the Home.

9.41 On 10 October 2016 a meeting with staff then took place at which DS advised the staff that they were not to contact the claimant and, that if they had any concerns about the running of the Home, they should raise them with senior managers and not the CQC and that, if management found that these instructions were disobeyed, disciplinary action would follow.

9.42 The report which was ultimately issued by the CQC in relation to the Home identified six breaches of the Health and Social Care Act 2008 and categorised the Home as "*requires improvement"* in relation to matters it considered save in relation to the question of leadership of the Home which was categorised as "*inadequate*". On any reading the inspection of the Home was poor and caused the respondent concern. The Home was inspected again on 11 May 2017 and the resulting report shows a rating of "*good*" in relation to all aspects inspected.

10 **Submissions – the respondent**

10.1 On behalf of the respondent Mr Bunting made written submissions extending to some 27 pages (149 paragraphs). In addition Mr Bunting referred to the appropriate

statutory provisions of the 1996 Act and an extract from the Industrial Relations Act 1971. In addition reference was made to the decision in the **Royal Mail Group Limited –v- Jhuti UKEAT/0020/16/RN** and the decision in **Abernethy –v- Mott, Hay and Anderson [1974] IRLR 213**.

10.2 I have considered the written submissions thoroughly. I do not propose to fully summarise the submissions which are held on the Tribunal file.

10.3 It was submitted that for section 103A to take effect the claimant must have actually made protected disclosures as opposed to being suspected of making disclosures. Detailed written submissions were made in respect of each alleged protected disclosure which I have noted and taken account of in reaching my conclusions in relation to those matters.

10.4 Detailed written submissions were made in respect of causation. It was noted that DD had made the CQC aware of the substance of alleged disclosure number 3 and thus it was illogical that the respondent would dismiss the claimant for disclosing something it was already aware of and which the CQC was already aware of. In any event the first three alleged disclosures predated the two attempts made by SM to dissuade the claimant from resigning her employment on 3 September and 14 September 2016 and if the respondent had sought to punish the claimant for making those disclosures (if that is what they be), then it would surely not have sought to dissuade her. In respect of alleged disclosures to DD, there is no evidence that DD made the respondent aware of what was disclosed to her and DD was dismissed as well as the claimant. In respect of what may have been disclosed to NCCG, the respondent was not aware of this in any event. The suggestion by the claimant that she was dismissed because SM had a mistaken belief that she had made disclosures to the CQC cannot succeed because she had made no such disclosure.

10.5 It was noted that there was no direct evidence of why the respondent dismissed and thus the claimant must rely on inference. Appropriate inferences can be drawn from the lack of explanation for unreasonable conduct on the part of the respondent. As the claimant had less than two years' service at dismissal, the burden to prove the reason for dismissal rests with her. The Tribunal must consider what was the true reason for the dismissal? What reason operated in the employer's mind at the time of dismissal? It was submitted that before determining if the principal reason for a dismissal was a protected disclosure, the Tribunal must objectively determine whether or not there was a protected disclosure. It must then determine whether that disclosure or disclosures caused the dismissal. It appears that it is only alleged disclosure 6 (to NCCG) which the respondent became aware of after it twice tried to persuade the claimant to remain in its employment. No inference should be drawn from the respondent's failure through DT to interview the claimant because the claimant was on leave when those interviews were taking place. There is no evidence that the respondent acted against any other of its employees who it knew had made complaints to the CQC. The letter of 7 October 2016 to the claimant does not assist – the reasons to mislead the claimant in that letter are clear. The fact the claimant may have encouraged staff to report to the CQC is not the making of a protected disclosure by the claimant. Even if the respondent reacted to deal with the claimant in response to the unannounced visit by the CQC on 19 September 2016 and two further days that does not mean the principal reason for dismissal was whistleblowing.

10.6 Mr Bunting made oral submissions in which he referred to various matters in the chronology produced by Mr Tinnion to which he took issue and I have resolved those matters in the findings of fact above.

10.7 In addition Mr Bunting referred to the decision **Jhuti** and submitted that this authority did not assist the claimant as in that case it was accepted that a protected disclosure had been made and in this case there was no question that the dismissing officer (ML) had been tricked by any other officer of the respondent into acting as he did.

10.8 Mr Bunting submitted that it was not correct that it would amount to an automatically unfair dismissal if the claimant was dismissed by SM in the mistaken belief that she had made a protected disclosure. A comparison was made between the provisions of section 103A of the 1996 Act and section 27 of the Equality 2010 Act and it was submitted that if the position was as the claimant submitted it to be, then that would open a minefield of difficulties for the operation of section 103A.

10.9 It was submitted that in relation to the burden of proof given that the claimant had less than two years service, the burden to prove the reason for dismissal lay at all times with her and the submissions made by the claimant to the contrary were disagreed with.

11. **Submissions - the claimant**

11.1 On behalf of the claimant, Mr Tinnion produced written submissions extending to 9 pages (51 paragraphs) and made reference to **Kuzel –v- Roche Products Limited [2008] EWCA Civ 380**, **Jhuti** above, **GM Packaging (UK) Limited –v- Haslem UKEAT/0259/13/LA**.

11.2 I have considered the written submissions which are held on the Tribunal file with care. I do not propose to summarise those submissions in detail as they are held of the Tr0bunal file.

11.3 Reference was made to **Abernethy** and the well-known words of Cairns LJ: *"A reason for the dismissal is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee".* It was submitted that a dismissal would be unfair if the person who dismissed (A) knew an employee (B) had made a protected disclosure or believed B had made a protected disclosure and that knowledge or belief caused A to dismiss B. It was further submitted that beliefs unlike facts could be false or mistaken. Thus if A erroneously believed that B had made a protected disclosure and dismissed B by reason of that belief, the dismissal would be automatically unfair pursuant to section 103A of the 1996 Act.

11.4 It was further submitted that the decision in **Kuzel** informed the burden of proof in this matter. Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason for dismissal? If yes, has the respondent proved its reason for dismissal? If not, has the respondent disproved the section 103A reason and if not, the dismissal is for the section 103A reason. It was submitted that the Tribunal could draw an adverse inference from the absence of a witness – in this case SM. Reference was made to **Benham Limited –v- Kythira**

Investments Limited 2003 EWCA 1794 paras 25-26. Reference was also made to **Jhuti**.

11.5 It was submitted that the claimant had shown that there was a real issue as to the reason for dismissal. The factors in support of that proposition were listed and commented on in detail. Particular note was made of paragraph i of the email from SM of 21 September 2016 (page 89).

11.6 It was submitted that the decision to dismiss the claimant was reached by SM before ML had any involvement in the matter on 22 September 2016. It was submitted that it was the reason for dismissal of SM and not those of ML which were crucial to the dismissal in this case. It was submitted that adverse inferences could be drawn by the failure to call SM as a witness. It was further submitted that it could be inferred that if he had been called he would have stated that he dismissed because he believed the claimant had made protected disclosures to the CQC and was thus responsible for the unannounced inspection by the CQC which began on 19 September 2016. It was submitted that the reason for dismissal was not because SM perceived an irretrievable breakdown in the relationship between the claimant and DD as the letter of dismissal stated. The factors to support that submission were set out in detail.

11.7 It was submitted that the likely probability was that SM dismissed the claimant because he believed that the claimant had made a protected disclosure to the CQC which had resulted in the inspection on 19 September 2016. Something had clearly happened between 16 September 2016 when SM sought to persuade the claimant to stay on and 21 September 2016 when he had decided the claimant had to go: that something was the unannounced inspection on 19 September 2016. Whilst SM did not know for sure who had blown the whistle to the CQC, by 21 September 2016 he had all the information he needed to point the finger at the claimant.

11.8 It was submitted that the claimant made all the protected disclosures relied on.

11.9 In oral submissions it was said that an inference could be drawn by the absence from the proceedings of SM as a witness. He had a wealth of germane evidence to give and had not given it. His absence was inexplicable and if he was unwilling the respondent could have applied for a witness order.

11.10 It was submitted that the burden of proof lay not on the claimant but should be approached in accordance with the steps set out in **Kuzel –v- Roche** and reference was made to **Harvey** on industrial relations in that regard.

11.11 It was said again in oral submissions that it was within section 103A for the dismissal to be automatically unfair if SM had dismissed the claimant in the mistaken belief that she had made a protected disclosure to the CQC as it was submitted it was clear he did. The definition of the reason for dismissal in **Abernethy** speaks not only of facts but of beliefs of an employer and if it is accepted that SM made the decision to dismiss with that belief (albeit a mistaken belief) that will be sufficient to bring the matter within section 103A of the 1996 Act.

11.12 Detailed submissions were made in relation to the seven disclosures alleged and submissions were also made in respect of remedy.

12 **The law**

Protected Disclosure Dismissal Claim - Section 103A of the 1996 Act

12.1 I have reminded myself of the detailed provisions set out in Part IVA of the 1996 Act in relation to protected disclosures.

12.2 In particular I have reminded myself of the provisions of section 43B (1) of the 1996 Act which read:-

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, (is made in the public interest and) tends to show one or more of the following -

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

(b) that a person has failed, is failing or is likely to fail to comply with any legal 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 an 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 the preceding paragraphs has been or is likely to be deliberately concealed".

12.3 The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

12.4 I have reminded myself of the decision in **Cavendish Munro Professional Risks Management Limited - Geduld 2010 IRLR 37 ("Cavendish Munroe")** and the guidance from Slade J to the effect that there is a distinction to be drawn between "information" being provided and an "allegation" being made. The latter will not qualify as a disclosure for the purposes of section 43(B)(1). I note the distinction between these two concepts has been diluted somewhat by the decision in **Kilraine -v- London Borough of Wandsworth 2016 IRLR** 422 and I must be careful not to be too easily seduced into asking whether the alleged disclosure was one or the other given that they are often intertwined. I remind myself that simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. I note that a communication - whether written or oral - which conveys facts and makes an allegation can amount to a qualifying disclosure.

I have reminded myself of the decision of the EAT in **Goode –v- Marks and Spencer plc UKEAT/0042/09** wherein Wilkie J stated the judgment of the EAT at paragraph 38 to be:

"…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Reasonable Belief

12.5 In **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula**, Wall LJ said:-

"... I agree with the EAT in Darnton that a belief may be reasonably held and yet be wrong... if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong - nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute... An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".
I remind myself that the requirement for a disclosure to be in good faith is no longer a liability issue but something to be considered when assessing any remedy which might be due.

12.6 I have reminded myself that any disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service ("Fincham")** EAT0925/01 and 0991/01 Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying."* In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act. I have noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect *"I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered and so did fall within the provisions of section 43B(1)d of the 1996 Act. I have noted that in this matter the claimant relies on section 43B(1)(d) in respect of rendering each piece of information said to have been disclosed a qualifying disclosure.

Automatic unfair dismissal

12.7 I remind myself of the provisions of section 103A of the 1996 Act which read:-

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

12.8 I note the decision in **Kuzel v Roche Products Limited [2007] IRLR 309** where the following guidance (in a case where the claimant had sufficient service to advance a claim of ordinary unfair dismissal) is given by Judge Peter Clark in respect of the burden of proof:-

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

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

The Employment Tribunal 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 Employment Tribunal that the reason was what he asserted it was it is open to the Employment Tribunal to find that the reason was what the employee asserted it was. But it is not correct as a matter of law or of logic that the Tribunal must find that if the reason was not that asserted by the employer then it must be that asserted by the employee. That may often be the outcome in practice but it is not necessarily so".

12.9 I note that the decision in **Kuzel** went on appeal to the Court of Appeal (**2008 EWCA Civ 380)** where the Court approved the guidance given in the EAT which I have set out above. I note that Mummery LJ said at the end of paragraph 30 that "*it is not at any stage for the employee (with qualifying service) to prove the section 103A reason".* I note in particular the words in parentheses. I also note the contents of paragraph 46 of the Judgment of Mummery LJ where he comments that in cases of unfair dismissal there should not be any problem about where the burden of proof lies and that the danger is in cases such as these that something so complicated will emerge that the sound exercise of common sense by Tribunals will be inhibited. At paragraph 55 there is a comment referring back to the earlier Court of Appeal decision in **Maund –v- Penwith District Council 1984 ICR 143** that it is only a small number of cases which will in practice turn on the burden of proof. I note that where an employee (like the claimant) lacks sufficient service with her employer to advance a claim of so called ordinary unfair dismissal (presently not less than two years as set out in section 108 of the 1996 Act) then the provisions set out in section 98 of the 1996 Act as to where the burden of

proving the reason for dismissal lies do not apply for the so called automatically unfair reasons for dismissal are not referred to in section 98 but in their own discrete and following sections of the 1996 Act. In this case I am concerned with section 103A of the 1996 Act where there is no reference to where the burden of proving the reason for dismissal falls. It is thus necessary for the claimant to show that the Tribunal has jurisdiction to entertain the claim and this she does by proving the reason for her dismissal. I have noted the decision in **Smith –v- Hayle Town Council 1978 ICR 996** referred to by Mr Bunting and I have referred to Harvey on Industrial Relations section D paragraph 808 which reads:

""*The only exception to this, as the Maund case recognised, is where the employee does not have sufficient qualifying period to claim unfair dismissal. In such a case the employee has to establish that the tribunal has jurisdiction to hear the claim. This can only be done if the employee can show that the reason for dismissal is one of those automatically unfair reasons where no qualifying period is required. Accordingly where a reason had to be established to confer jurisdiction on the tribunal, the onus is on the employee".*

12.10 I remind myself that once a qualifying disclosure is established, it is necessary to consider whether it has become a protected disclosure by reference to sections 43C-43H of the 1996 Act. It is not in dispute in this case that the claimant made the alleged disclosures to her employer and that the provisions of section 43C of the 1996 Act are engaged in all but the alleged disclosure number 6. I have reminded myself of the provisions of section 43G of the 1996 Act on which the claimant relies in respect of alleged protected disclosure number 6.

12.11 I remind myself that there is no requirement of reasonableness pursuant to section 98(4) of the 1996 Act in relation to this claim. If the reason for dismissal is that the claimant made a protected disclosure, then the dismissal is unfair without further enquiry.

12.12 I have reminded myself of the decision in **Benham Limited** and the guidance there contained in respect of the drawing of inferences by Simon Brown LJ:

"*Rather than myself having to trawl through the line of cases explaining just when adverse inferences can properly be drawn from a party's failure to give evidence, I am in the fortunate position of being able to draw on Brooke LJ's leading judgment in this court in Wisniewski -v- Central Manchester Health Authority ([1987] PIQR P324..... the principles Brooke LJ derived from those cases are:*
(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible

explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

Conclusions

13.1 I have taken time to give this matter detailed attention given the number of disclosures which were alleged and the clear importance of the matter to the parties.

13.2 It is necessary that I deal with the two legal questions raised in this case before going on to deal with my detailed conclusions on the facts. The first question is where the burden of proof lies in relation to a claim of automatic unfair dismissal when the claimant lacks qualifying service (presently two years) to advance a claim of ordinary unfair dismissal. In this regard I reject the submission of Mr Tinnion that **Kuzel** sets out the appropriate test. I am satisfied that **Kuzel** was a case in which the claimant did qualify to bring a claim of ordinary unfair dismissal and had done so. It seems to me that the ratio of that decision is clear and deals clearly with the burden of proof in a case where the claimant does have the ability to advance a claim of ordinary unfair dismissal and where the jurisdiction of the Tribunal therefore is clear. I conclude that where the Tribunal does not have jurisdiction to consider a claim of ordinary unfair dismissal for want of qualifying service as required by section 108 of the 1996 Act, then the burden lies on the claimant to establish the jurisdiction of the Tribunal to consider the claim and she does that by bearing and discharging the burden to prove on the balance of probabilities the reason for her dismissal and that (in the circumstances of this case) it is a reason falling within section 103A of the 1996 Act. I am supported in this conclusion by my reference to **Harvey** section D (paragraph 808) above which sets out what I have long understood to be the law on this point.

13.3 In fact cases of unfair dismissal do not often fall to be determined on the technicalities of where the burden of proof lies. Usually the reason for dismissal can be ascertained without much difficulty once all the evidence has been received and reviewed and I conclude that this is such a case.

13.4 The second interesting point raised by Mr Tinnion relates to whether a dismissal can be automatically unfair if the dismissing officer (or someone influencing the dismissing officer as in **Jhuti**) erroneously believes that the employee has made a protected disclosure – in this case to the CQC. I have considered the statutory provisions to which I was referred. Section 103A of the 1996 Act is brief. A dismissal is unfair if the reason for the dismissal is that "*the employee **made** a protected disclosure*" (my emphasis). This provision is contrasted with section 27 of the Equality Act 2010 which deals with victimisation under the discrimination provisions in respect of protected characteristics. Liability arises from the carrying out of a protected act (as defined) and there being a detriment inflicted on a claimant because "*(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act".*

13.5 Under the 2010 Act there can clearly be liability if B suffers a disadvantage of some kind because A believes (even incorrectly) that B has performed a protected act – the situation of a belief on the part of the discriminator is specifically referred to. That is to be contrasted with section 103A of the 1996 Act where that situation is not specifically referred to.

13.6 I prefer the submissions made to me on this point by Mr Bunting at paragraphs 76 and 77 of his written submissions. In effect it is not a prerequisite of a claim under section 27 of the 2010 Act for a protected act to have been carried out – a belief is sufficient. However, it is a prerequisite for a claim under section 103A for a protected disclosure to have been made and it is for the Tribunal to objectively determine whether or not there has been one or more protected disclosures by the claimant and if so, whether that/those disclosure(s) caused the dismissal. The theoretical disclosure on which the claimant relies (namely a disclosure to the CQC) did not occur and it cannot therefore have caused her dismissal. I am satisfied that a belief held by a dismissing officer that the claimant made a protected disclosure which she did not make is not caught by the provisions of section 103A of the 1996 Act.

13.7 The claimant does not seek to argue that she made any disclosure to the CQC – that argument fell away when an amendment was made in respect of alleged disclosure number 6 at the outset of the hearing. Thus if SM held a belief that she had made a disclosure to the CQC he was, on the claimant's own case, mistaken. I am satisfied that a mistaken belief that a protected disclosure had been made cannot found liability under section 103A of the 1996 Act. If such a belief is the reason for dismissal, then in a claim of ordinary unfair dismissal advanced pursuant to section 98 of the 1996 Act, the respondent could well be in difficulty: however there is, and can be, no such claim in this matter because the claimant lacks qualifying service under section 108 of the 1996 Act.

13.8 With those matters dealt with, I turn to deal with the alleged protected disclosures in this case and then the question of whether any protected disclosure established was the reason or principal reason for dismissal. Because of my conclusion set out below as to the reason for dismissal in this matter and that it was not tainted in any way by the making of disclosures (protected or otherwise), I propose to deal with the seven alleged disclosures relatively briefly.

Disclosure 1: Paragraph 8.2 (5.1) above

13.9 I am satisfied that the claimant made the disclosure alleged in late August 2016 to SM. The finding of fact at paragraph 9.10 refers. I am satisfied that information was disclosed namely that DD was not a qualified nurse and that the claimant was the only member of the senior team of staff with a nursing qualification. I am satisfied that the claimant subjectively believed that the lack of a nursing qualification in the manager of the Home potentially endangered the health and safety of the residents of the Home and on an objective assessment I am satisfied that there were reasonable grounds for that belief. I am satisfied that the claimant believed that the disclosure was in the public interest given that it affected the health and safety of residents in a residential care home and I am satisfied objectively that there were reasonable grounds for that belief. The disclosure was made to the respondent in the form of SM and I therefore conclude that it was a protected disclosure. It was made in August 2016 before SM dissuaded the claimant from the path of resignation.

Disclosure 2: Paragraph 8.2 (5.2) above

13.10 I am satisfied that there was a disclosure of information when the claimant expressed to DS in August 2016 that DD was not a qualified Nurse and that that was a disclosure of information. I am also satisfied that the claimant reported to DS at or

around the same time her concerns about two nurses being required to work excessively long shifts. The findings of fact at paragraph 9.11 above refer. I am satisfied that the claimant subjectively believed that these disclosures tended to show that the health or safety of residents was endangered and I am satisfied on an objective analysis that that belief was reasonably held. I am also satisfied that the claimant subjectively believed that it was in the public interest to disclose those matters given that the matters disclosed related to members of the public who were residents in the Home and that it was objectively reasonable to hold that belief. The disclosure was made to DS who for these purposes represented the respondent and thus the disclosure became a protected disclosure.

Disclosure 3: Paragraph 8.2 (5.3) above

13.11 I am satisfied that on 26 August 2016 the claimant in a conversation with DS referred to her general concerns about disgruntled staff. I am not satisfied on the evidence that the claimant did more than that. I reach this conclusion by looking at the text message which the claimant sent subsequent to her conversation (paragraph 9.14 of the findings of fact) in which she refers to nothing more than staff being disgruntled and setting out a list of names. I do not accept that the claimant's recollection of that conversation is to be relied on and I prefer the evidence of DS that nothing other than general allegations were made at this time. I conclude that information was not conveyed in that conversation but rather general expressions of discontent and voicing of concerns which did not amount to a disclosure of information. Accordingly this alleged disclosure is not made out and falls away.

Disclosure 4: Paragraph 8.2 (5.4) above

13.12 I am satisfied that in early September 2016 the claimant did raise detailed concerns with BC at the time she visited the Home. The findings of fact at paragraph 9.18 above refer. I accept the evidence of the claimant that she did refer BC particularly to the case of Steve Hubble and Sue Purves. I am satisfied that this amounted to information and that the claimant subjectively believed that those matters engaged the health and safety of residents and were in the public interest. I am satisfied that those were objectively reasonable beliefs. The claimant disclosed the matters to the respondent in the form of BC and therefore the disclosure becomes a protected disclosure by the operation of section 43C of the 1996 Act.

Disclosure 5: Paragraph 8.2 (5.5) above

13.13 I am satisfied that the claimant raised issues with DD throughout the time that they were seeking to work together. However, the evidence given by the claimant in relation to the conversations she had with DD was vague and specific times and dates of the conversations was not given. I do not accept that in her many conversations with DD the claimant did any more than express her concerns and objections to the practices which she saw DD adopting in the Home and with which she did not agree. I conclude that the conversations between the claimant and DD were what might be expected between manager and deputy manager but I am not satisfied on the evidence that the claimant disclosed information to DD such as to provide the basis of a protected disclosure within section 43B(1) of the 1996 Act. I am supported in this conclusion by the fact that it was only at the second attempt at re-pleading that the claimant provided

greater detail of the matters relied on and even then the matters referred to were the claimant's perceptions of how she saw DD was not carrying out her duties as the claimant thought she should. I have no doubt that the claimant had a poor opinion of the abilities of DD and expressed those opinions but that is not the same as disclosing information to provide the foundation for a protected disclosure within the 1996 Act. Therefore I conclude that the claimant did not make any disclosure of information to DD to support the alleged disclosure number five which therefore falls away.

Disclosure 6: Paragraph 8.2 (5.6 and 5.8) above

13.14 In relation to this alleged disclosure, I am satisfied that the claimant telephoned Fiona Kane of NCCG on 14 September 2016 and made complaints in relation to unsafe staffing levels at the Home and the fact that DD was making clinical decisions which were putting residents at risk. I am not satisfied that she gave any other information to Fiona Kane particularly in relation to the inability of staff to speak to or challenge DD or that matters had been raised with the respondent and not dealt with. Those last two matters only appeared late in pleadings and had they been of such importance I conclude that they would have been raised by the claimant earlier than they were. The finding of fact at paragraph 9.22 refers.

13.15 In relation to the information I am satisfied was disclosed, I accept that the claimant held a subjective belief that such matters were likely to endanger the health or safety of the residents in the Home and that it was in the public interest for her to make those disclosures. I am satisfied that those beliefs were objectively reasonable beliefs.

13.16 I have considered the additional matters required to be considered pursuant to section 43G of the 1996 Act. I am satisfied that the claimant subjectively believed that the information she disclosed was true and I assess that belief objectively as reasonable. I am satisfied that the claimant did not make the disclosure to NCCG for personal gain – there is not the slightest suggestion that that was the case.

13.17 However, I am not satisfied that the claimant had made disclosures of substantially the same information previously to her employer. The disclosures which I accept had taken place (numbers one two and four) had related to the lack of nursing status of DD and concerns about two nurses being asked to work excessively long shifts. I am not satisfied that there had been any disclosure to the respondent about the clinical decisions being made by DD and thus, given that that was a substantial part of the disclosure to Fiona Kane, there had not been a disclosure to the respondent of substantially the same information.

13.18 Even if I am wrong in that, I am not satisfied that it was reasonable in all the circumstances for the claimant to make this disclosure to NCCG taking account of the factors I am required to consider set out in section 43G(3) of the 1996 Act. I am satisfied that the claimant disclosed to an appropriate body, that the failures alleged were serious and that the failures were continuing or likely so to do. However, I am satisfied that the claimant had a duty of confidentiality to the respondent set out at clause 2.3.9 of the respondent's code of conduct (page 46b) and the provisions of her own contract of employment (page 69) and that in making her disclosure to NCCG she was acting in breach of that duty. I am not satisfied that in making any disclosure to the respondent the claimant had complied with any procedure authorised by the respondent for the

making of disclosures. I was referred to the Whistleblowing Policy of the respondent (pages 185-187) and it is clear that the claimant never sought to use the procedure set out in that policy. The claimant did not make a report to head office as envisaged by paragraph 3 of the Whistleblowing policy and there was no fact finding meeting as envisaged by paragraph 4 of that same policy. In addition it is clear that the claimant at no time raised the matters she disclosed to NCCG in written form either as a grievance or otherwise. A senior manager (such as the claimant) can be expected to raise matters with her employer formally (if an informal raising of such matters has not produced results, as I accept was the case here) before taking matters to an external body and this she had not done. The claimant had not sought to invoke the Whistleblowing Policy of the respondent. I do not consider it was reasonable of the claimant so to report to NCCG without at least invoking the Whistleblowing Policy and expressing her concerns to her employer in writing and thus making plain the seriousness of the situation as she saw it.

13.19 The conditions around making disclosures outside the workplace are strict and in this case I conclude that the claimant had not complied with all those conditions in making the disclosure she did to NCCG and thus that disclosure was not a protected disclosure.

Disclosure 7: Paragraph 8.2 (5.7) above.

13.20 This allegation is very similar to matters alleged at disclosure 5 above. I am not satisfied on the evidence that there was any disclosure of information to DD. The claimant's evidence in respect of these matters was insufficient to sustain a disclosure of information. I do not know what was said to DD if anything or when it was said. As in relation to alleged disclosure 5 above, I do not accept that in her many conversations with DD the claimant did any more than express her concerns and objections to the practices which she saw DD adopting in the Home and with which she did not agree. Again I conclude that the conversations between the claimant and DD were what might be expected between manager and deputy manager but I am not satisfied on the evidence that the claimant disclosed information to DD such as to provide the basis of a protected disclosure within section 43B(1) of the 1996 Act.

13.21 Therefore I am satisfied that the claimant made three protected disclosures in this matter namely disclosures to SM to DS and to BC. Given that is my conclusion, I move on to consider whether the claimant was dismissed by reason of having made one or more of those protected disclosures.

The reason for the dismissal of the claimant

13.22 I am satisfied that the claimant made protected disclosures and in those circumstances I have to consider whether the reason for the dismissal of the claimant was that she had made those protected disclosures. I note the protected disclosures were made in August 2016 to SM and DS and in early September 2016 to BC.

13.23 I accept the submission of Mr Tinnion that there is a considerable amount in this case which should cause me to consider very carefully what led the respondent to dismiss. Without seeking to rehearse all the matters referred to by Mr Tinnion, I note the following matters in particular:

(a) the fact that SM has not given evidence to the Tribunal;
(b) the fact that there was no adequate explanation for the absence of Mr Massey;
(c) that the e-mail written by SM on 21 September 2016 (page 89) speaks of the claimant being the problem and the fact that she would have to go;
(d) that the only thing that had happened subsequent to 16 September 2016 (when SM sought successfully to dissuade the claimant from resigning) and 21 September (when SM wrote the email at page 89) was that SM had become aware of the unannounced inspection from the CQC on 19 September 2016 and the resulting feedback on the findings arising from that inspection.

13.23 I have considered who it was who made the decision to dismiss the claimant. I am not satisfied that the decision was made by SM. I had the opportunity to hear evidence from ML and DS and to assess that evidence. I found both witnesses credible. I accept their evidence as to the contents of the conversation which took place on 27 September 2016 by conference call between ML, DS, SM, DT and a solicitor. I accept that that discussion resulted in a decision that the employment of the claimant and that of DD was to be terminated. I found ML to be a compelling witness and accept that the decision to dismiss was effectively taken by him – albeit after a detailed discussion with his managers and his advisors. I accept that SM was a relatively newly appointed managing director and that no decision to dismiss a manager or deputy manager could have been taken without the agreement and approval of ML. In this case I am satisfied that the actual decision to dismiss was taken by ML after a detailed discussion by conference call on 27 September 2016. I accept the evidence of ML to the effect that the claimant would have been interviewed by DT had she (the claimant) not been absent on holiday and that the failure to interview the claimant is not indicative of a decision to dismiss her taken earlier than 27 September 2016. I accept the evidence of ML to the effect that none of the managers involved in the discussion on 27 September 2016 thought the claimant had made disclosures to the CQC, or the NCCA for that matter, and that the reason for dismissal was all about the relationship between DD and the claimant and the fact that the apparent breakdown in that relationship was at the heart of the difficulties being faced by the Home and which by 27 September 2016 had reached a critical level.

13.24 Further I accept that other members of staff were actually known to have reported matters about the Home to the CQC and that no action was taken against those employees: I accept that one of those employees was a Janice Candish.

13.25 I accept that ML had been made aware of the problems at the Home by direct contact from the CQC and the NCCA in mid-September 2016 and that that contact had led to ML arranging to see those authorities on 21 September 2016 and in readiness for that meeting SM prepared a briefing note for ML.

13.26 I accept the evidence of DS to the effect that in the conversation on 27 September 2016, it was agreed that swift and urgent action was required because of the concerns raised by the CQC arising out of their unannounced inspections on 19 and 23 September 2016. I accept that it was agreed that the atmosphere in the Home needed to be settled as a matter of urgency for the good of the residents and the staff and indeed the respondent. I accept that it was agreed that it was not possible to say where the blame lay between the claimant and DD as there were two parties to the breakdown

in the relationship which was so central to the smooth operation of the Home. I accept that it was agreed that in those circumstance both the claimant and DD should face dismissal and indeed both did.

13.27 I have considered the case advanced by the claimant to the effect that SM took the decision to dismiss because of his conclusion that the claimant had made disclosures to the CQC. I do not accept either that SM made the decision to dismiss or that a mistaken belief by him as to the claimant's disclosures can found liability for the respondent in this case. However, in case that it wrong I have considered matters from the standpoint of SM so far as I can do so. Given that he was not called in evidence, I have looked at the history of the matter as it appears from the contemporaneous documents which were before me and which are instructive.

13.28 I accept that a protected disclosure was made to SM by the claimant in August 2016. The matter disclosed related to the fact that DD was not a qualified nurse and this was something known to SM already. Subsequent to that disclosure, SM twice persuaded the claimant not to resign her employment and thus it is unlikely that that disclosure motivated SM against the claimant. It is clear that SM was aware of the difficulties with the relationship between the claimant and DD in August 2016 not least because the claimant had expressed them directly to SM and also because the claimant's concerns raised with DS towards the end of August 2016 (paragraphs 9.14 and 9.15 above) were shared with SM. The claimant then resigned by letter dated 2 September 2016 and SM persuaded her to withdraw that resignation on the basis that he would resolve the issues she was raising. There was then the meeting on 14 September 2016 when SM saw first-hand the difficulties between the claimant and DD and witnessed the claimant walk out of work. That was followed by a meeting between SM and the claimant on 16 September 2016 (paragraph 9.24 above) when the claimant was again persuaded not to resign and to return to work – which she did on the following Monday 19 September 2016 but not before expressing herself in a forthright manner in an email of 17 September 2016 (paragraph 9.25 above).

13.29 On 19 September 2016 the CQC made its first unannounced inspection of the Home and at the end of that day fedback to SM its serious concerns about the management of the Home and the poor relationship between the claimant and DD. That feedback resulted in a decision to ask DT to undertake her investigation which was commissioned the next day and which was directed towards the behaviour of both the claimant and DD as the email of 20 September 2016 makes plain (paragraph 9.27 refers). In his email to ML on 21 September 2016 (paragraph 9.29 above), SM speaks for the first time of an "exit strategy" for both the claimant and DD. What had happened in those few short days posed Mr Tinnion to make SM move from persuading the claimant not to resign to working on an exit strategy? The answer is plain namely the unannounced inspection on 19 September 2016 from the CQC and the resulting feedback about the relationship between the claimant and DD and its deleterious effect on the smooth running of the Home. That situation was further confirmed on 23 September 2016 by further feedback that the Home would receive an "inadequate" grade for management "which is bad" as SM commented. Little wonder that an exit strategy was being worked on after that – whether that meant exit from the Home or exit from the business. That position is further confirmed by SM's reply to DT on the same day when he states that DD and the claimant are "already beyond mediation" (paragraph 9.33). Against that background evidenced as it is in contemporaneous

documents, the conversation takes place on 27 September 2016 by conference call to which I have already referred and in which a decision is taken by ML that both DD and the claimant should face dismissal. Seen in that context, that decision is plausible and entirely credible and that in my judgment was the reason the claimant was dismissed – namely the breakdown of her relationship with DD which was having such a damaging effect on the operation of the Home and thereby on the respondent. Seen from that perspective, the decision to dismiss is entirely understandable. I conclude the reason for dismissal set out in the letters of dismissal sent to DD and the claimant was the reason for dismissal and that the making of the protected disclosures by the claimant was nothing whatever to do with her dismissal let alone was it the principal reason for her dismissal.

13.30 In reaching this conclusion I have considered whether I should draw adverse inferences from the absence of SM before the Tribunal and the many other factors referred to by Mr Tinnion. However, I conclude that it is not appropriate for me to do so given the clear reason for the dismissal which emerges from an objective examination of the evidence as I have set out above.

13.31 I reach my conclusion on the reason for dismissal without having to become involved in the niceties of where the burden of proof lies – the answer is obvious. However, I confirm my conclusion that the burden lies with the claimant and she has not proved the reason for dismissal is as she asserts it to be. Whilst I do not accept that a mistaken belief by SM could have given rise to liability for the respondent in this matter, that point is not of importance as again, I reiterate the reason for dismissal emerges clearly from the evidence and any mistaken belief by SM as to what the claimant had or had not disclosed to the CQC was not the reason for dismissal in any event.

13.32 Accordingly it follows that the claimant was not dismissed by reason of having made protected disclosures and therefore the claim of automatic unfair dismissal pursuant to section 103A of the 1996 Act is not well-founded and is dismissed.

Final matters

I would add two things:-

14.1 The claimant was dealt with by the respondent in a thoroughly unreasonable and thus unfair way. The claimant was a senior nurse and an employee occupying a senior position within the respondent company and yet she found herself dismissed in a shocking, not to say brutal, fashion and one which understandably upset her very greatly. It is fortunate for the respondent that the claimant did not have the qualifying service to advance an ordinary unfair dismissal claim for, procedurally at least, that claim was bound to have succeeded. What was to stop the respondent treating the claimant in a reasonable way giving the claimant the full explanation of the reason for dismissal she deserved and without misleading her as to the reason for the meeting she had with BC on 10 October 2016 - as she was by the letter on 7 October 2016? As it is, the respondent has had to defend an automatic unfair dismissal claim and it seems to me it only has itself to blame for the time and expense and inconvenience which this matter will have involved. With proper and reasonable explanations to the claimant, this claim might well have been avoided altogether.

14.2 If the claimant had succeeded in her claim I would have had very serious reservations about the amount of compensation to be awarded. I am not satisfied that the claimant was justified in surrendering her registration with the Nursing and Midwifery Council as she did after her dismissal or in refusing a job which she was offered shortly after her dismissal. The evidence that the claimant sought to rely on to explain those decisions was not compelling and I would not have been satisfied that the claimant would have received anything other than compensation for a relatively short period of loss.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28 August 2017

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JUDGMENT SENT TO THE PARTIES ON

29 August 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL