



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110239/2021

Hearing held at Dundee on 17, 18, 19, 20 and 21 October 2022

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**Employment Judge McFatrige
Tribunal Member N M Richardson
Tribunal Member S Larkin**

15 **Ms I Jackson**

**Claimant
In person**

20 **Cygnnet Health Care Limited**

**Respondent
Represented by:
Mr Hughes KC,
Counsel
Instructed by:
Gregsons Solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

- 30 1. The claimant was unfairly constructively dismissed by the respondent. The respondent shall pay to the claimant a monetary award of Twenty Three Thousand One Hundred and Sixty Five Pounds (£23,165.00). The prescribed element is Nineteen Thousand Two Hundred and Seventy Three Pounds and Twenty Eight Pence (£19,273.28) and relates to the
- 35 period between 19 March 2021 and 19 March 2022. The monetary award exceeds the prescribed element by Three Thousand Eight Hundred and Ninety One Pounds and Seventy Two Pence (£3891.72).
2. The claimant's claim of disability discrimination does not succeed.
- E.T. Z4 (WR)

3. The claimant's claim of age discrimination does not succeed.
4. The claimant's claim relating to public interest disclosure does not succeed.

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REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly constructively dismissed by the respondent. She also claimed she had been unlawfully discriminated against on grounds of age and disability. She also stated that she had been "victimised after raising concerns" which the Tribunal took to be a claim of detriment for raising public interest disclosures in terms of s47B of the Employment Rights Act 1996. The respondent submitted a response in which they denied the claims. They sought further particularisation of the claims. A preliminary hearing was held for case management purposes during which the claimant set out further details of her claims. The note of this preliminary hearing dated 2 December 2021 is referred to for its terms. The claimant also provided further and better particulars of her claim in writing. These particulars were lodged in the hearing bundle at pages 82-91.
2. At the final hearing the claimant gave evidence on her own behalf. She also led evidence from Gail Anderson, a former colleague and from Nicola McIntyre the Nurse in Charge who had been outside on a break with the claimant on 10 July 2020 during the incident which began the series of events on which the claimant founded her claims. Evidence was then led on behalf of the respondent from Kerryanne Johnstone a Service Manager with the respondent who had been the claimant's Line Manager and had carried out a disciplinary investigation in respect of the incident on 10 July, Heather Smith, Deputy Operations Director with the respondent who had dealt with a grievance raised by the claimant, Kirsty Jane Dale a Regional Manager with the respondent who had chaired a disciplinary hearing in respect of the claimant, Michael William Thomson an HR Business Partner from Scotland who had supported Mr O'Neil in the investigation he carried out and had along with Heather Smith attended a meeting with the

claimant on 3 March 2021 and James O'Neil who had carried out an investigation under the respondent's Freedom to Speak Up policy. Mr O'Neil gave his evidence by video link using the Tribunal's CVP system. All other witnesses gave their evidence in person. A joint bundle of productions was lodged and on the first day of the hearing the claimant was permitted to add a further eight pages to this without objection from the respondent. The productions have been referred to by page number in the judgment below. On the basis of the evidence and the productions the Tribunal found the following essential facts relevant to the issues to be proved or agreed.

Findings in fact

3. The respondent is a member of the Cygnet Health Care Group of Companies which provides social care and health care services for service users and patients with mental health needs, learning disabilities and autism. The respondent operates several facilities within Dundee. Two of these facilities operate from a building in Americanmuir Road, Dundee. One of these known as the Wallace Hospital is on the first floor of the building and provides care to service users detained under the Mental Health Act. The Thistle care home is situated on the ground floor of the building and provides services for service users with mental health needs including learning disabilities and autism. The claimant commenced employment with the predecessor of the respondent in or about January 2014. Her employment later transferred to the respondent under TUPE. The claimant was employed initially as a Support Worker at Thistle Care Home.

4. When the claimant commenced employment she required to complete a medical questionnaire. This is standard practice with the respondent. The claimant completed the form and indicated that she had a stoma and required to change her stoma bag on a regular basis. The stoma was formed in 2013. Following this the claimant had a verbal discussion with her then Line Manager who was concerned about whether the claimant's stoma would affect her ability to carry out restraints. On occasions, support workers working with the client group in Thistle Care Home would require to carry out these physical restraints. The claimant had received

training in this. The claimant advised that she did not see any difficulty caused by her stoma. Her stoma was on the left side of her chest. When carrying out restraints she would do so in a way where only the right side of her body was exposed. Following this the claimant commenced work.
5 She did not experience any difficulties caused by her stoma in relation to having to restrain service users.

5. The claimant has experience in the care industry having worked in various posts for over 40 years. The claimant has a particular interest in the sector having had a family member with learning difficulties and autism with
10 whom she was very close. The claimant holds an SVQ Level 3 in Social Care and has completed various modules towards an SVQ Level 4. The claimant's date of birth is 2 July 1957 which means that during the period of the claim the claimant was 63 or 64 years of age.

6. Initially the claimant was employed as a Support Worker. In or about
15 February 2020 she was promoted to Senior Support Worker. A month or so after her promotion the claimant was contacted by the respondent HR department who said that they had received a complaint to the effect that the claimant should not have been promoted because she did not hold the necessary qualifications. The claimant advised HR of the qualifications
20 she held and they confirmed that these were the qualifications for the job. They did not say from whom the complaint had come. The claimant believed that other members of staff in the home resented her promotion to senior support worker.

7. The claimant worked on a rota providing care services at Thistle Care
25 Home. Generally speaking, the care home would have a registered nurse on duty at all times. The nurse would be in charge of the unit. There would also be at least one senior support worker and a number of other support workers. The unit had space for around 10 service users. Some service users had care plans which required them to be supervised or
30 observed on a one-to-one basis during all waking hours. This meant that for 12 hours a day a member of staff (either a support worker or a senior support worker) would be allocated to provide one-to-one cover to that service user. That meant that if the service user left their room the support worker required to go with them. They would usually wait outside their

room while they were in it. Other service users who did not require to be supervised on a one-to-one basis would require to be supervised on a two-to-one basis.

- 5 8. The claimant and other support workers generally worked on the basis of shifts of 12 hours 15 minutes. When on a day shift the claimant would start at 7.45 in the morning. The first 15 minutes was used as a changeover period. She would then work through until 8pm at night. The night shift would start at 7.45pm and go on until 8am.
- 10 9. When on day shift the claimant and other support workers would be supplied with meals served at the same time as the meals for the service users they were supporting. The support workers were expected to sit down beside the service users they were supporting and eat their meals with them.
- 15 10. On occasions the service users would leave the unit to go on outings where they would require to be accompanied by a support worker. Often they would go by car but sometimes the support worker would be expected to take them on the bus. On various occasions prior to March 2020 other staff would remark to the claimant when she was taking a service user out that she would not need to take petty cash because she could just use her bus pass. This was not said in a way to violate the claimant's dignity because of her age or to create an intimidating, hostile, degrading, humiliating or offensive environment for her on the basis of her age. These outings did not happen after the pandemic started in March 2020.
- 20 11. Some service users were non-verbal. Some were unsettled. If a service user got up during the middle of the meal and left then the support worker who was supervising them would require to get up and leave with them.
- 25 12. There was a recognition amongst the respondent's management and the support workers that a support worker would require the occasional break during their 12 hour shift. At one point a previous unit manager had set up a system whereby there were fixed breaks allocated to support workers. These were a 15 minute break in the morning, a 30 minute break around lunchtime and a 15 minute break in the afternoon. These breaks were allocated on a fixed daily basis so each support worker would go on
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their breaks at predetermined times. After a short time operating this system it became clear that this was unsustainable. Often, support workers would require to accompany their service users on outings and this would disrupt their availability to take their allocated break. In addition
5 other unexpected events would occur. By 2020 the system for breaks was that individual support workers would take a break as and when the opportunity arose. Generally speaking, the nurse in charge would be responsible for telling support workers and senior support workers when they could take their break. Support workers and senior support workers
10 were told that there could only be one support worker or senior support worker on a break at any one time. Students and the nurse in charge were to be regarded as supernumery and a support worker or senior support worker could be on a break at the same time as the nurse in charge but there could not be two support workers on a break at the same time.

- 15 13. As noted above the claimant had a stoma. This required to be changed several times a day. The claimant discussed with a previous manager how to deal with this. The claimant felt the only place where she could change her stoma in privacy was the staff toilet. The plan of the unit at Thistle Care Home did show one room as a designated staff room. Over
20 the years however this room had been used to store cleaning materials and chairs had been removed from this. It was no longer possible to use it as a staff room and it was not in fact used as a staff room. In addition, the staff room was covered by the CCTV system within the home and the claimant felt it would be inappropriate for her to use this room to change
25 her stoma since she would not have any privacy. The respondent did not provide a clinical waste bin in the staff toilet. They did have a bin for used sanitary towels. The claimant felt it was inappropriate to use this bin to dispose of her stoma. The sanitary towel bin was not emptied on a regular basis and she was concerned that if the stoma bag lay there for any time
30 it would smell and be unpleasant for other staff. The respondent did provide three clinical waste bins within the unit. Two of these were in service users' bedrooms. The third was in the nurse's treatment room. The nurse's treatment room was normally kept locked and the key retained by the nurse in charge since this room contained drugs.

14. There was a clinical waste bin just outside the unit and the arrangement made with the previous manager was that the claimant would be allowed to go outside and put her used stoma bag in the clinical waste bin outside.
- 5 15. This system operated during the first six years of the claimant's employment without incident. The claimant did not raise with management that this arrangement caused her any issues. The matter was not regarded by the claimant as a problem.
- 10 16. In or about June 2020 a new manager started at the home, Kerryanne Johnstone. The claimant had very little interaction with her but considered that she was not very approachable. Kerryanne Johnstone had not received any kind of handover when she took over as manager. She did not look at the claimant's personnel records. She was unaware that the claimant had a stoma and was unaware of any of the arrangements in place regarding this.
- 15 17. The claimant was on duty on 10 July. There were eight other members of staff on duty including the claimant. One was the nurse in charge Nicola McIntyre. Another was a senior support worker, another was a student. All of the rest were support workers.
- 20 18. The usual practice was for one of the senior support workers to allocate which support workers would be doing one-to-one observation of those service users who required one-to-one observation. On this occasion the other senior support worker JK had carried out the allocations. The claimant was not allocated to do any one-to-one supervisions between four and six. The claimant was a floater which meant that she went around
25 the unit assisting with whatever work needed to be done.
- 30 19. At around 4.20 the claimant had an interaction with a service user named LMC. The claimant had an extremely good relationship with this service user having cared for him over a number of years. The service user was on the list of those requiring one-to-one observation and he was meant to be being observed by senior support worker JK.
20. LMC was extremely upset and was self-harming. LMC did not communicate verbally but instead wrote messages on his telephone when

he wished to convey what he was upset about. The claimant checked his telephone and was able to reassure him using sign language which was how she communicated with him. She reassured him about a forthcoming visit from his parents. LMC was thereafter calmed down.

5 21. The respondent operated a system called "pink notes" where every interaction between a support worker and a service user required to be noted on interaction sheets which were coloured pink. The claimant looked around for the pink notes for LMC so that she could record the interaction with him however they were not there. She was aware that
10 sometimes pink notes were removed from where they should be so that support workers could write them up elsewhere in the building. The claimant was keen to record the interaction and in the absence of the pink notes she decided to record it on the supervision sheet for him. This supervision sheet was the sheet designed to have been completed by the
15 person on one-to-one supervision (JK). There was a blank space for the period between 16:00 and 18:00 and the claimant completed this stating that the service user was "unsettled at times self-harming", she then signed the note.

20 22. Shortly after this the claimant required to change her stoma bag. She changed the bag in the toilet and was then leaving the premises in order to go out and dispose of the bag in the clinical waste bin outside. This was something she had done on numerous occasions. Whilst leaving the claimant met the nurse in charge (Nicola McIntyre). Nurse McIntyre said that she was going for a break and asked the claimant if she wanted to go
25 for a break with her, the claimant agreed. She told Nicola McIntyre that she had been going out anyway. The claimant was aware that all of the service users requiring one-to-one observation were covered. She had also recently passed through the communal area and understood there were no issues. Nicola McIntyre had also followed her usual practice
30 before going for a break of going round the building and checking to make sure that there was nothing which required her presence. She also told the support workers where she was going to be (just outside the front door) in case anything happened. As the sole nurse in charge Nicola McIntyre required to be advised whenever there was any kind of incident. It was
35 not at all uncommon for her to be on a break outside having a cigarette

and for the break to be interrupted by a member of staff coming in to tell her of an incident.

23. The claimant and Nicola McIntyre went out for their break. So far as the claimant was concerned this was done entirely in accordance with the standard practice at the care home for having breaks. The person who was in charge of saying whether or not a support worker or senior support worker such as herself could take a break was the nurse in charge and not only had the nurse in charge authorised her to take the break but the nurse in charge went out there with her. Whilst outside both Nicola McIntyre and the claimant had a cigarette.

24. The respondent had a system whereby staff could alert other members of staff when a situation arose where they required assistance. Each nurse had a key fob. If the key fob alarm function was pressed this set off an alarm which was contained in the office. Unfortunately if the office door was closed it was not always possible to hear the alarm in other parts of the building.

25. In addition to this the respondent had previously introduced a pager system whereby certain members of staff such as the nurse in charge would carry a pager and could therefore be paged by other staff if a situation arose where her presence was required. Unfortunately, the pagers supplied to the care home had all ceased working some time prior to 10 July. This issue had been raised at team meetings but nothing had been done about it.

26. After the claimant and Nicola McIntyre had finished their break they went back into the care home. Once they went back in they realised that the alarm from the office was sounding. They then realised that an incident was taking place in the bedroom of another service user PS. Both the claimant and Nicola McIntyre went to the service user's room. Several support workers had PS on a floor restraint. As the claimant arrived PS managed to kick off one of the support assistants who had been trying to hold down his leg. The claimant then took over pinning down this leg. Nicola McIntyre then went and obtained a dose of tranquilliser which she then injected into PS.

27. Although the claimant was unaware of the full detail at the time, she later discovered that after she and Nicola McIntyre had gone outside JK had told the support worker who was supervising PS that she could go out for a break. As noted above, normally breaks were assigned by the nurse in charge. The only circumstances in which a senior support worker would authorise breaks would be if the nurse was unavailable such as being on medicine rounds. JK had then taken over the one-to-one supervision of PS. At that time LMC who JK had been supposed to have been supervising was in the lounge however a support worker M shouted out to JK that LMC was becoming agitated and was self-harming hitting himself. JK then left PS and went into the lounge. PS then left his room. The claimant's understanding was that PS would have become agitated if he saw that there was no-one sitting outside his room in the place where they would normally sit. PS then went in to the communal room and displayed agitated behaviour. This led to the other support workers present requiring to get him back into his room and where he remained agitated and required to be put in a floor restraint. One of the support workers activated their alarm which sounded in the office.

28. Later that day, although the claimant was at the time entirely unaware of this both JK and DM sent emails to the unit manager Kerryanne Johnstone. DM (Donna) was another support worker who was on very friendly terms with JK. The emails were lodged. DM's email was sent at 21:52 that evening and lodged (page 163). It stated

"Hi kerry
Just sending you an email regarding an incident that happened today with PS. Isabelle Jackson and Nicola mcintyre were both out for a cigarette, isabelle asked the student nurse who isn't maybo trained to look after Imca. He became very agitated hitting himself, I asked JK if he can come assist as Imca can be very violent and wasn't responding to us asking what was wrong. He was on PS but he was in his evening shower which he does by himself and brings his laundry down. PS entered lounge where we all were and tried to nip myself, we managed to redirect him to his room where he usually goes to calm. Long story short as you will see the IMS, myself, Joe, Joanie and Nicole all struggled and got hurt with PS

ending up in a floor restraint. Luckily Imca didn't escalate but whilst all this happened they were both out for a cigarette at the same time. This to me was very dangerous and luckily Imca didn't escalate or we would have been in trouble. After the event nicola or isabelle didn't offer any staff a debrief or a break and themselves went out a further 3 cigarettes. This is constant when they are on shift going on for cigarettes."

JK's email which was sent at 22:04 was lodged (page 432-433). This states

"Hi Kerry-Anne, sorry to bother you out of work but wanted to let you know while incident was fresh in my mind but tonight after tea PS went for a shower and nic went out for a cigarette when D shouted up to me for assistance as L becoming agitated I shouted to joanie to keep an eye out for P when I got to lounge I was told Heather the student nurse had been asked to watch L so isabelle and nicky could go for a cigarette only christina and danielle were mayboed and in the room was heather and beccy and service users were kyle, helen, lee, johnny, austyn and L had a little attempt to hit me as I looked at his phone as that joanie came to door with PS and he was agitated but we escorted him to his room PS quickly came out and immediately and went for staff who managed to escorted him again but he was very violent in the room and I was hit in the head several times and I believe D and nic who was back were also hit after the incident none of the staff were given a debrief I and I believe that D was not asked if they were okay I did a short debrief with them both but while I was in counting the money nicky and Isobel were out on another 3 occasions for cigarettes, morale seems to be at an all time low Kerry-Anne and I feel staff were unsafe during this incident. Thanks and apologies for late email."

29. At some point an incident report on the incident with PS was prepared in accordance with the respondent's usual incident reporting protocols. This was lodged (page 150-158).

30. Although the claimant was entirely unaware of this at the time it would appear that following receipt of the two emails Kerryanne Johnstone discussed the matter with HR and was instructed to commence a disciplinary investigation.

5 31. Kerryanne Johnstone obtained a statement from another support worker which appears to have been sent to her by email on 16 July. This was lodged (page 165). It states

10 “On Friday 10-7-20 around 17.30 when I was on my observation I saw S/U LMC becoming unsettled and agitated i asked student nurse HH why she was on LMCs obs. She replied that the SSW IJ asked her to watch him while she and staff nurse NM went out for a smoke so I proceeded to ask support worker DM to come into the lounge to try and reassure LMC she called up to SSW JK and JK came in and tried to calm him but he tried to hit Joe. SSW JK used maybo to block then S/U PS entered the lounge and attempted to grab SW DM at this point she and SSW JK escorted S/U PS to his room, myself and SW RB stayed on our obs with student nurse HH still on LMC and he was still unsettled and vocal we then saw SSW IJ and staff nurse NMC proceed up the corridor. I heard banging and S/U Ps swearing about 15 minutes later I saw both staff nurse 15 20 NMC and SSW IJ going out for a smoke and student nurse HH was still with S/U LMC until they both returned.”

32. Kerryanne Johnstone also obtained a statement from a student nurse HH. This was lodged (page 166). This stated

25 “During conversation with the student nurse HH in the presence of AB, I asked H if she had ever been asked to do observations with the service user’s, she said that she had and she was told that she was allowed to do them with J and K. I then informed H that she shouldn’t be doing them and not to do any observations going 30 forward. H then disclosed that she knew what I was referring to and that she felt ‘Bad’ that she had put ‘staff in that position’ at that point she became tearful. I then offered reassurance to her, H then went on to disclose that she had been in the corridor on the way to

the toilet when SSW IJ asked her to go on LM to go on observations, at that point NIC NMc said 'go on please we will only be 5mins whilst we go for a fag'. H obliged at this point and went and sat with LM in the lounge with SW Christina and SW Rebecca also present with the service users JG, KH, HT.

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H then went on to say that IJ and NM were 'hoovering' around the main corridor for a few minutes before going out for a cigarette. She then disclosed that previously when she has been asked to do observations NM has moved staff around so that H can do observations on KH & JG."

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Kerryanne Johnstone also viewed CCTV from the CCTV system within the unit. The CCTV was not downloaded. The CCTV was viewed by her around 21 July.

33. The claimant was due to start work at 7.45 on 22 July. As she turned up for work she was met by Kerryanne Johnstone who handed her a letter confirming she was suspended. She was not told the reason for suspension at that point. The letter of suspension was lodged (page 409). It stated that the reason for suspension was "conduct related issue relating to the safety of the service."

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34. The claimant was invited to a meeting with Kerryanne Johnstone on 24 July. The claimant's invitation to the meeting was conveyed verbally. At this meeting Cecilia Eldridge another employee of the respondent took notes.

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35. The claimant was asked about "the incidents which took place on 10 July". The claimant indicated that she had only been aware of one incident and was somewhat vague in her response. She was unaware that the other incident involving LMC was being treated as an incident since no formal incident report had been made in respect of this and the claimant had not been aware of it. She was told that the issue was that the building had been left unsafe. Kerryanne Johnstone said that LMC had been nipping staff and that this had been followed by another incident in which service user PS required restraint. The claimant indicated that she had heard a commotion and had gone in to PS's room where she had assisted in the

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restraint after one of the service users had been thrown off his leg. She said that NM the nurse had been there. Kerryanne Johnstone told her that she had viewed the CCTV and that the claimant and Nurse NM had been outside having a cigarette for 17 minutes. The claimant asked to see the
5 CCTV. She was told by Kerryanne Johnstone that this was not possible. The claimant expressed doubt that her break had been as long as 17 minutes. It was suggested to the claimant that she had told the student nurse FF to go on observation of LMC. The claimant said she had not done this. In any event the claimant said that her understanding of the
10 position from previous managers was that FF and other student nurses were allowed to do observation of certain service users who posed less risk. Kerryanne Johnstone told her that this was not the case and that student nurses were not to do observations. There was a discussion regarding pagers and Kerryanne Johnstone said that new pagers would
15 be issued. The claimant referred to her interaction with LMC at 4.20. She said that when she had left him he was calm. She confirmed that she had not been in charge of allocating people to do observations that day. At that point both she and Kerryanne Johnstone were entirely unaware that a third member of staff had also been absent from the unit having been
20 told to go on a break by JK. This was not discussed at the hearing.

36. The claimant referred to the issues she had perceived in the unit since she had been promoted in February. She indicated that she felt people had resented her promotion to Senior Support Worker. She indicated that shortly after she started she had received a telephone call from HR and
25 they were basically asking her if she had certain qualifications since they said that they had been contacted by someone complaining that she did not have the necessary qualifications for the job. The claimant had been able to confirm that she had her SVQ Level 3 which was the required qualification for the job. The claimant indicated that she felt victimised by
30 other members of staff.

37. At no point during the meeting was it clearly put to the claimant what was being alleged against her. Specifically she was not told that it was being alleged that she had taken several breaks after the incident and that the issue was that in general she was taking excessive cigarette breaks.

38. During the discussion the claimant mentioned her stoma bag and stated that the original reason she was leaving the unit at the point when she did was so as to change her stoma bag. The claimant indicated the arrangements which had been made with previous managers. Kerryanne Johnstone advised that she was unaware that the claimant had a stoma since no-one had told her since she started.
39. At the end of the meeting Kerryanne Johnstone said that she would be producing a report and discuss the matter with HR. The claimant remained suspended from duties. Following the meeting Cecilia Eldridge typed out a document from her notes. This document was lodged (page 167-170). The document is not a complete record of what was discussed at the hearing. The claimant was provided with a copy of the minute. She asked for a copy of the handwritten notes. She repeated this request in writing in an email dated 29 August 2020 sent to Heather Smith her manager. The minutes were not provided.
40. In the meantime on or about 27 July Kerryanne Johnstone produced a report which was sent to HR. The report was not shared with the claimant. A copy of the report was lodged (page 172-173). It recommended disciplinary action.
41. As of 6 August the claimant had still not heard anything from the respondent. She remained on suspension. She was aware that as a support worker registered with the SSSC the SSSC required to be formally advised if a support worker was suspended by their employer. She was anxious that she ensure that the SSSC were kept correctly informed and contacted them only to find that the respondent had not in fact advised the SSSC of her suspension. The claimant herself then advised the SSSC of her suspension. She was told to pass on any documentation she received. By around 6 August the claimant had still not heard anything further from the respondent. The claimant was extremely unhappy about the way things were being dealt with. She submitted a formal grievance to the respondent. Her main concern was that she still did not know what she was alleged to have done. She did not know why she was suspended.

42. The respondent's disciplinary procedure provides for individuals under investigation to be suspended. The relevant section is section 5.3. The disciplinary policy was lodged (page 113-121). Section 5.3 is on page 115. It states

5 "At any point before investigation or during investigation it is
believed that the matter involves serious or gross misconduct, is of
a sensitive nature or where the presence of the employee at work
may hinder the investigation, the employee may immediately be
suspended from work on full pay and contractual benefits. Any
10 decision to suspend shall be made by a senior manager and shall
be confirmed in writing. The length of suspension should be kept
as short as reasonably possible.

The employee may also be required to work in an alternative work
area or unit, subject to reasonable alternative being available. ..."

15 It is to be noted that apart from meeting with the claimant no further
investigation was carried out by Kerryanne Johnstone after 21 July was
the day before the claimant was suspended. A copy of the claimant's
grievance letter was not lodged. John Baird of the respondent's HR
department wrote to the claimant on 11 August 2020 acknowledging her
20 grievance letter and inviting her to attend a meeting on 14 August. The
meeting was to be conducted by Heather Smith Deputy Operations
Director. Heather Smith duly met with the claimant on 14 August.

43. The claimant explained to Heather Smith that in her view the incident had
occurred due to the decisions of the staff members who were on the floor.
25 It was her view that JK should not have left the observation he was doing
in order to give another support worker a break. Her understanding was
that he had done this after the claimant and NM the nurse were already
out on a break. She also considered that JK should not have left the
observation of PS to attend to whatever was happening by LMC since PS
30 required continuous one-to-one observation. The claimant also
highlighted her side of things. She complained that she did not really know
what it was that she was supposed to have done when she was not on
observation when the incident started. She had gone out for a break which
was authorised and in accordance with the then policies. In any event she

had been going out in the first place to dispose of her stoma bag which was permitted. She was also concerned that she did not know the reason for her suspension and her suspension appeared to be going on for some time. She also raised a concern that despite the fact that suspension was meant to be a confidential matter all of the staff within the unit knew she was suspended. She said that this was probably due to the fact that when rotas were produced members of staff who were suspended were shown on the rota coloured blue.

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44. The claimant was finding this distressing since she had never been suspended before during her 40-odd year career nor had she had any verbal or written warnings.

45. Ms Smith wrote to the claimant with a formal hearing outcome on 4 August. The letter was lodged (pages 175-176). She set out what she understood to be the claimant's concerns under three headings. The first heading was

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"You felt the reason for suspension was not clear and that the investigator was passive aggressive in her approach".

Ms Smith's response was:-

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"I have looked at the minutes of your investigation and spoken with the investigator and the note taker. The reason for your suspension was explained to you at the beginning of the investigation meeting. The reason for your suspension is due to excessive and prolonged breaks, leaving your shift unsafe by not ensuring that adequately trained staff were allocated to the service users. Investigations are a 'fact-finding' process that should allow for questions and answers to be given. As further clarity may be required around questions, the questions may need to be repeated or paraphrased. Both the investigator and the note taker agree the investigator was not passive aggressive and both felt the investigation process was positive. The point will not be upheld."

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46. In actual fact although Heather Smith states in her response that she had looked at the minutes of the investigation meeting she had not in fact done so. Her understanding was that since the investigation was ongoing she

would not be permitted access to these minutes. In addition, the claimant's understanding, which accorded with what is said in the note of the meeting is that the allegation against her was not "excessive and prolonged breaks" but one particular allegation that the building had been left unsafe on 10 July at 17.36pm. The claimant was also concerned that she understood that Heather Smith and Kerryanne Johnstone had worked together for a previous company before they had both joined the respondent. Heather Smith had based her response on discussions she had had with Kerryanne Johnstone and the note taker.

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10 47. The second point raised was

"You asked for clarity regarding the time of the complaint being made to the time you were suspended, you felt there was a delay between reporting and suspension."

Ms Smith's response was

15 "I can confirm that there was a time delay of approximately 7 days between the complaint being received and your suspension. This was due to initial investigations which were carried out to ensure that your suspension was necessary. This included viewing CCTV footage and interviewing staff members. The time delay was due to technical issues with the CCTV footage requiring an outside agency to fix the problem. However, I do not believe that the time delay could have been avoided due to the information needing to take place prior to a decision regarding whether suspension was required, this safeguarded everyone concerned."

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25 48. It is clear that the allegation was made on 10 July and the claimant was not suspended until the morning of 22 July. This is a period of 12 days rather than seven days as stated by Heather Smith. Given that the claimant's understanding was that the reason for suspension was so that an investigation could be carried out she was puzzled by the fact that Heather Smith was saying that the investigation had to be carried out before a decision could be made on suspending the claimant.

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49. The third point raised was

“You raised that you felt confidentiality of your suspension has been breached – a person you met in the shop knew you were suspended.”

Ms Smith’s response was

5 “This is unacceptable and as we discussed at your hearing this could be due to the Rota system using a highlighted blue colour over your name and where your shifts should be. I have escalated this for the future but would like to apologise for this oversight. Therefore, I do uphold your point and this will be addressed
10 accordingly and we will ensure this doesn’t happen in the future.
...”

Ms Smith also went on to state

“During the investigation you asked me to find out whether the incidents were recorded. I can confirm that I have reviewed the
15 paperwork and the incidents were recorded appropriately.”

In actual fact whilst the incident involving PS was recorded the incident involving LMC was not recorded.

50. On 25 August the respondent’s Kirsty Dale wrote to the claimant inviting her to a disciplinary meeting to be held on Tuesday 1 September. The letter was lodged (page 177-178). The letter stated
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“The purpose of the hearing will be to discuss the issues relating to your conduct, which we believe to be unsatisfactory when viewed in light of the Company’s policies, rules and standards. We have specific concerns in relation to the following allegations:

- 25
- leaving the building unsafe when going out for excessive cigarette breaks

Depending on the facts established at the hearing, the outcome could be disciplinary action against you.”

51. There was included with the letter a copy of the respondent’s disciplinary procedure, a copy of the typewritten notes of the investigation meeting and what were described as four witness statements, two dated 10 July 2020,
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one dated 16 July 2020 and one dated 24 July 2020. These appear to have been the statements lodged in the bundle at pages 163, 164, 165 and 166. The original email sent by JK on 10 July and lodged at page 432-433 was not included.

5 52. On 29 August the claimant wrote to Heather Smith requesting copies of the minutes of the fact-finding meeting with Kerryanne Johnstone. By this she meant the handwritten notes. Her email went on to say

“I have read the minutes I received and strongly disagree with the content as it is not a true reflection of what was said.”

10 As noted above the original handwritten notes were not provided.

15 53. The disciplinary hearing took place on 1 September. It was attended by Kirsty Dale a Service Manager with the respondent based in Lockerbie who had experience of working as a disciplinary and investigation manager for the respondent. Margaret Brooks of the respondent attended as note taker. The claimant was accompanied by Alan Drummond a union representative. At the outset of the meeting Ms Dale advised the claimant that the reason for the meeting was to “look at all of the information that has been collated where you and the staff nurse left the unit on 10 July for 17 minutes. This meeting will allow you to put your side of things over.”

20 54. In advance of the meeting Ms Dale had received the same documentation as the claimant. She also had a copy of Kerryanne Johnstone’s investigation report which had not been shared with the claimant. She did not view the CCTV. She spoke to Kerryanne Johnstone before she met with the claimant. No notes were taken of this meeting.

25 55. Ms Dale did not look at the claimant’s personnel records and was unaware of any health issues affecting the claimant. She was unaware of her stoma. Ms Dale’s understanding was that there had been two incidents when the claimant and the nurse were out of the building. Ms Dale was unaware of the arrangements for taking breaks at Thistle Care Home and
30 made no attempt to find out what the procedure was. Her general understanding was that usually the nurse in charge would be the person who would allocate breaks. She did not consider that it was relevant that

in this case the nurse in charge had authorised the break. Her understanding was that the problem was that the claimant and the nurse had been unavailable for 17 minutes. She took the figure of 17 minutes from what she had been told by Kerryanne Johnstone who said she had
5 timed it on the cctv. The claimant at no time accepted that her break had taken 17 minutes.

56. Ms Dale was unaware that the claimant had disputed the notes of the investigatory meeting and was unaware that the claimant had requested access to the CCTV. During the meeting there was a discussion about
10 what role the claimant was carrying out and the claimant confirmed that she was a floater and was not assigned to observations. Ms Dale considered that in those circumstances the claimant should not have signed the observation sheet in the way she did. The claimant explained that she had had an interaction with service user LMC and had filled in the
15 observation sheet since the pink notes were not available. Ms Dale accepted that this was what had happened but considered that this amounted to falsifying documents. The claimant at no time accepted that she had falsified documents.

57. Ms Dale raised the issue of the claimant allegedly having told the student
20 nurse to take over supervision. The claimant denied this. Ms Dale's understanding was that there had been two incidents while the claimant and nurse McIntyre were absent. She was unaware of the detail of the second incident.

58. During the hearing the claimant raised the issue of the telephone call she
25 had received from HR regarding complaints she had been given the job of Senior without holding the necessary qualifications. She also referred in general to other members of staff breaching rules such as using their own telephones to Facetime service users' families and giving their personal phone numbers out and taking pictures about activities. Ms Dale indicated
30 that she was aware in general terms of these things having happened in the past but considered that she had dealt with this matter previously whilst carrying out a previous disciplinary action some years ago. The claimant discussed the fact that a previous manager Susannah Gordon had instituted specific allocated breaks but that this had been

discontinued. Ms Dale was unaware of what the arrangement was for breaks, how frequent or how long they were supposed to be. The claimant raised the issue that the respondent's own policies provided for more than one member of staff from Thistle to leave at one time since there was a rule that if an attack alarm went off in the Wallace Hospital upstairs then members of staff from Thistle were expected to go up and help.

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59. Ms Dale noted that the dates on the various statements were spread over a few days. In her experience this was unusual since normally one tries to obtain statements as soon as possible after an incident. She confirmed to the claimant this had been noted.

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60. Ms Dale considered that it had been established that the claimant was out on a cigarette break for 17 minutes. She felt that the issue was not the break per se but the fact that the claimant had been out on a cigarette break for 17 minutes. She felt it would have been all right if the claimant had gone to the shops for 17 minutes. She considered that it was not the length of break per se but that it was the fact that an incident took place whilst the claimant was on her break. Ms Dale also considered that the claimant had falsified documents. She accepted that the claimant had not been told of this charge in advance nor had the allegation been investigated. Despite that she decided that it would be appropriate for her to give a disciplinary sanction in respect of this allegation as well. She decided that she could not make a finding that the claimant had told the student nurse to go on an observation.

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61. Ms Dale felt that if it had simply been a question of the break then it would have been appropriate to issue the claimant with a verbal warning. Given that she also wanted to deal with the issue of the claimant having falsified documents she considered that a written warning was appropriate. She wrote to the claimant on 2 September 2020 setting out her decision. This letter was lodged (page 187-188). It is dated 2 September and was sent to the claimant at her home. The claimant was extremely upset to receive this. She contacted the SSSC to advise them of the outcome. A note of this telephone conversation from the SSSC's records was lodged (page 189). The claimant was subsequently advised by telephone on

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16 September 2020 that the SSSC did not intend to take any action. They also wrote to her on 28 September 2020 confirming this.

5 62. At the same time as the proceedings were taking place in respect of the claimant the respondent also instituted disciplinary proceedings against Nurse McIntyre. Like the claimant Nurse McIntyre asked for access to the CCTV recording which the respondent appeared to be relying on. Like the claimant Nurse McIntyre was told that this was not possible. Despite renewing her request at various times she never saw the cctv recording. Initially Nurse McIntyre was dismissed by the respondent but she
10 she appealed and was reinstated following appeal. At the date of the hearing she was still employed by the respondent but on precautionary suspension which at the point of the tribunal hearing had lasted 10 weeks. This was the fourth occasion in 2 years on which she had been subject to precautionary suspension.

15 63. The claimant appealed the written warning. Her letter of appeal was lodged (page 191). She pointed out that despite the contrary being stated in the letters by Kirsty Dale she had at no time admitted taking a break of 17 minutes. She also did not admit falsifying documents. She stated that all of the facts had not been taken into account and that decisions by other
20 members of staff had led to the incident occurring. She referred to the policy over scheduled breaks. She stated that the ACAS Code of Practice stated she was legally entitled to rest breaks during her working hours. She raised the issue that when she had discussed this with Kerryanne Johnstone, Kerryanne Johnstone had responded that "we have our meal".
25 The claimant advised she had indicated that she was entitled to a break off the floor. As noted above meals were taken with the service users the support workers were observing.

30 64. Prior to her appeal being dealt with, the claimant met with Heather Smith to discuss her return to work. Heather Smith asked her if she would be prepared to go to work at Wallace Hospital rather than at Thistle Care Home. The claimant had the impression Ms Smith did not want her at Thistle Care Home. Ms Smith told the claimant they were really short of staff at Wallace hospital.. The claimant said she would rather stay at Thistle Care Home but Heather Smith again said that it would be a help if

she could go to Wallace and that it would only be a temporary move. She told the claimant that she would be helping out the company by moving to Wallace. The claimant then agreed that she would go to Wallace until the company were able to hire permanent staff to get back up to strength there. Ms Smith asked the claimant if she would go as a Senior Support Worker. The claimant said that she did not know the service users or the staff at Wallace Hospital so would rather go as a simple Support Worker. The claimant started working at Wallace House around 15 September.

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65. By letter dated 21 September 2020 the claimant was invited to an appeal hearing. The letter was lodged (page 193).

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66. The appeal hearing took place on 28 September 2020. The appeal was conducted by Carla Brown the respondent's Operations Director. A minute of this meeting was lodged (pages 195-198). The minutes were produced by Zoe Beeny of the respondent's HR department. She sent a copy of the notes to the claimant immediately after the meeting and the claimant confirmed that she was happy with the content. This email exchange was lodged (page 199).

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67. During the meeting for the first time Ms Brown put it to the claimant that in fact two support workers were absent from the unit at the time the incident with PS started in addition to the nurse in charge. She advised the claimant that, as noted above JK had told one of the other support workers to take a break. It is not known how Carla Brown came by this information and it had never been put to the claimant before. Ms Brown asked the claimant what the arrangements were regarding breaks and the claimant advised her. Ms Brown asked if the claimant was paid for breaks. The claimant said they were but referred to the need for pagers. She confirmed the pagers were not working. Ms Brown asked the claimant what legal documents the disciplinary chair was referring to when she accused the claimant of falsifying documents. The claimant explained the position regarding the observation log. She stated

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"I wasn't falsifying documents. I had to put it somewhere. It was the truth what was documented but put in the wrong place."

Ms Brown asked the claimant how she was feeling about things, the claimant responded

5 "Still upset about it. Come in and do my best for the service users. Passionate about what I do. Worked in care for around 40 years. Care about people I support. Reason I have been here so long, had about 15 managers, hard enough for staff but what about SU's."

Ms Brown asked the claimant if she had anything to add. The claimant said

10 "KAJ was taking statements from people after I was suspended. Also phoning people at home to take statements. Statements were not taken from everyone on the floor that day, only a few. KAJ has formed friendships quickly with certain people. She has never come and spoke to me about SU's. Statements should have been acquired by all staff on floor."

15 The claimant was asked if she was happy staying at Wallace and said

"Requested to come back down but happy to remain at Wallace if rota has been made up for October. Happy to stay until they get the amount of staff they need. New staff can learn from me."

20 The claimant confirmed that if it was reasonably practicable she wanted to go back to Thistle.

68. Ms Brown wrote to the claimant on 14 October providing the outcome of the disciplinary appeal. Ms Brown set out three general points. With regard to the first allegation that the claimant felt she did not receive sufficient information of the alleged misconduct until 25 August this was rejected. It stated that the claimant was given the opportunity to respond to the allegations in the investigation meeting which took place on 24 July 2020. This aspect of the appeal was not upheld. The second point was that the claimant believed that all the facts were not taken into account and that decisions taken by other members of staff had led to the incidents occurring on 10 July. She stated that she was not upholding this. She said that there were insufficient staff in the building at the time the two incidents occurred due to herself, the nurse in charge and another support

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worker all being out of the building having a cigarette break at the same time. She went on to say that she did not accept the claimant's position that the claimant had been unaware that student nurses had not to do any observations. She did not address the issue raised by the claimant which was that the claimant had been told that this was okay by a previous manager.

69. Her final point was stated as being

“You raised concern that you did not admit to taking a seventeen minute break during the disciplinary hearing but, that you had said you were unaware of taking a 17 minute break. You advised that the focus was on an excessive cigarette break.”

Ms Brown stated that the 17 minute timescale came from the CCTV system and was therefore accurate.

70. It is not known if and when Ms Brown viewed the CCTV system. The claimant was refused access to the CCTV system and had been told as far back as the investigation meeting in July that it was not possible to view the CCTV. The respondent's normal policy with CCTV is that it overwrites itself within 28 days. There is no facility for downloading images. Ms Brown went on to state that she fully acknowledged the claimant's concerns regarding the lack of a structured break system and from a lessons learned perspective whilst staff received paid breaks and provided with their meals on duty they also need to ensure all staff are given sufficient time off the floor to take fresh air etc. She also acknowledged the claimant's concerns regarding lack of facilities for staff to use whilst on a break. Ms Brown confirmed that the previous disciplinary decision would stand as would the penalty of a written warning. She confirmed there was no further right of appeal.

71. In the meantime the claimant had been working at the Wallace Hospital. The claimant was finding the experience to be extremely stressful. She had serious concerns about the safety of the service and was particularly concerned about a number of assaults on staff and peer-to-peer incidents. She raised these issues in a letter sent to her union official on 12 October 2020. This was lodged (page 201).

72. She felt that the service users in Wallace were not being treated well by the staff. She complained about one service user whose food was left for him on the floor. She complained service users were not being treated with dignity. She complained that many of the staff thought to enforce compliance from service users rather than facilitate the service users doing what they wanted to do in what was after all their own home.
73. The claimant began to suffer from depression. The events relating to her suspension and the disciplinary process preyed on her mind. She felt she had been treated unfairly and had not been listened to. Eventually, around the end of September the claimant went off sick. She was absent from 30 September 2020. She lodged her fit note (page 374). She was signed off for a further two weeks from 12 October. The reason given was "work related stress". She was having trouble sleeping. She contacted her GP. The claimant had never required to contact her GP at any time previously in relation to stress or anxiety. The claimant's GP diagnosed her as suffering from anxiety and depression. She was prescribed Mirtazapine in October 2020. The claimant remained on Mirtazapine as at the date of the hearing. She was initially started on a dosage of 15mg however this was doubled in or about June 2021. The claimant's GP produced a medical report dated 10 December 2021 which was lodged (page 344). He confirmed the diagnosis, he noted that he had been requested to comment on how long her symptoms of anxiety and low mood may persist for and stated that he was unfortunately not able to give a timescale for this as it would be influenced by a number of factors. He also said it was possible that the symptoms may improve and then recur at a later date.
74. The claimant received statutory sick pay during her absence.
75. On 26 November the claimant attended a meeting with Kerryanne Johnstone which was termed a welfare check meeting. A note of the meeting was prepared by Kerryanne Johnstone and was lodged (page 206). During the meeting the claimant indicated she was due to return to work on 7 December. She advised the respondent she was suffering from depression and had been prescribed Mirtazapine. She stated that she found working in Wallace Hospital extremely difficult and challenging and wished to return to Thistle. Kerryanne Johnstone advised that she had

now hired new staff for Thistle. She pointed out there was a lack of experienced staff in Wallace. The claimant was advised that there were no hours for her at Thistle. She was offered the opportunity to go to Lindsay House which is another unit operated by the respondent in Dundee. The claimant confirmed that she was distraught at previous events. She was unhappy about the way things were done in Wallace. She advised that the union had told her that she should be permitted to go back to Thistle. Kerryanne Johnstone again told her that she did not have a place for her. At the end of the meeting Kerryanne Johnstone's understanding was that she would speak to HR about what to do next. The claimant's understanding was that Kerryanne Johnstone very much did not want her to return to Thistle. The claimant was extremely upset by this.

76. During this meeting there was a brief discussion about whether the claimant would be returning as a senior support worker or just as a support worker. The claimant conveyed her position that she wanted to simply be a support worker. The tribunal accepted that Kerryanne Johnstone may well have said words to the effect that she agreed with her that it was probably not worth the trouble of taking on the role of senior support worker. The tribunal did not accept that this would have been said in a way such as to violate the claimant's dignity or create an offensive, intimidating, hostile degrading or offensive environment for her. She was simply noting the claimant's position and agreeing with her.

77. Following the meeting the claimant contacted HR herself. She complained that Kerryanne Johnston appeared to wish to prevent her from returning to her substantive post at Thistle Care Home. She then received a telephone call from HR to say that she could return to Thistle. The claimant returned to Thistle on or about 10 December. She returned as an ordinary Support Worker. By this time she did not want to have the additional stress of working as a Senior Support Worker.

78. On her first day back JK asked the claimant to have a conversation with her. They both went into the office and he told her that he was very sorry for what he had done but said that "if they had not got the claimant this way they would have got her some other way". The claimant cut the

conversation short. The claimant felt that she was being ignored after she returned. She felt there was a terrible atmosphere in the Home. Many people made derogatory comments towards her. On one occasion there was an incident which was reported to management where another support worker (Lauren) called her a "lazy bastard". The claimant felt upset because prior to the incident on 10 July she had had a good relationship with her colleagues. The claimant found that quite a lot of people were not speaking to her. She was concerned that one of these people was Kerryanne Johnstone. She found Kerryanne Johnstone extremely unapproachable. The claimant also had concerns about the way service users were being treated. The claimant raised the issue with her union by telephone. She also spoke to Heather Smith briefly when Heather Smith was in the unit. So far as the claimant was concerned nothing was being done about the concerns she was expressing and the atmosphere just got worse and worse. There were various incidents where the claimant felt service users were not being treated properly by staff which she raised with staff but to no avail. These included issues such as a service user not being given the appropriate bedding but simply a mattress cover still wrapped in plastic. Other service users were not given anything to wash their hands with or a towel or toilet rolls. She also was concerned about support workers speaking inappropriately to service users.

79. The claimant became sufficiently concerned about the declining standards in the unit that on 21 January 2021 she decided to contact Public Health Scotland and report the matter to them. The complaint was made anonymously by her. She complained about breaches of the Covid Regulations. A print-out from the records of Public Health Scotland was lodged (page 208-211). Following her complaint Public Health Scotland contacted the respondent to make an "out of routine" visit. They discussed various instances of breaches with the respondent's management including issues where support workers had been sent off in vehicles with members of service users' families in breach of the then Covid regulations.

80. Public Health Scotland first phoned the respondent for their comments around 3 February. At around the same time as this it would appear that various other members of staff at Thistle were also concerned about the

atmosphere within the home. The respondent have a policy called "Freedom to Speak Up". Members of staff who have issues which they do not wish to raise with their normal line management can do so using an anonymous email address where the emails are then seen by someone called a "Freedom to Speak Up Guardian". The Freedom to Speak Up Guardian can then arrange for these issues to be addressed by management. At some point prior to 2 February various members of staff had sent anonymous emails to the Freedom to Speak Up email address making complaints about the atmosphere within Thistle Care Home. The respondent's management decided to appoint a manager from outwith the Scottish region to investigate. James O'Neil a Deputy Operations Director based in the West Midlands was asked to do the investigation. He started off on 2 February by contacting Heather Smith to ask for copies of the complaints. Michael Thomson of the respondent's HR department responded the same day sending him copies of the email chains, these were lodged (page 212). He also sent details of an issue which had arisen between the claimant and Lauren, a member of staff with whom the claimant had developed a difficult relationship. Many of the concerns raised in the Freedom to Speak Up related to the claimant and complaints about her interactions with other members of staff.

81. Mr O'Neil understood initially that the nature of the investigation were allegations of bullying and harassment against the claimant. He was concerned whether there had been breaches of the bullying and harassment policy by the claimant. In terms of the initial fact finding he felt it reasonable to assume potential targeting behaviours going on by the claimant. He felt that the claimant may be influencing or causing potential altercations in front of service users. He decided to interview those he understood to be the ones who had raised the complaint. He also decided to interview some others. He did not interview everyone within the unit. He interviewed nine individuals on Zoom on or about 8 February. He then came to Scotland and interviewed a further five (including re-interviewing one he had started interviewing on Zoom) on 15 February. The claimant became aware that the interviews were taking place. She was concerned because a member of staff who was on friendly terms with her and who

had been on duty when Mr O'Neil carried out his interviews was not herself interviewed.

5 82. Mr O'Neil's view was that essentially he was carrying out a high level investigation into dysfunctionality of relationships at the Thistle Care Home which had been raised in the Freedom to Speak Up report. He was aware that the claimant was mentioned in many of these concerns but he believed he was not conducting an "HR type" investigation. His view was that if, at the end of his investigation, he decided that disciplinary proceedings might be indicated then a further disciplinary investigation would require to be carried out under the respondent's disciplinary policy. 10 He had carried out all of the interviews he wanted to do apart from the interview with the claimant by 15 February. He decided on or about 16 February that the claimant should be suspended. He sent an email to the respondent's HR Manager Michael Thomson and various others including 15 his own line manager on 16 February. This was lodged (page 222). In this he speaks of prejudice to the investigation and potential influencing by the claimant. He felt this could prejudice the investigation going forward. He considered that the behaviours alleged could be seen as a breach of the bullying and harassment policy and that individuals had been 20 targeted and also because of the possible effect on service users might breach adult support and protection legislation.

25 83. The decision to suspend having been made by Mr O'Neil it was implemented by the respondent's HR department who asked Heather Smith to contact the claimant to advise that she was suspended. On 17 February the claimant was on training and got home at 5pm. She then received a call from Heather Smith who told her that she had been suspended. The claimant asked her why she had been suspended. Heather Smith responded that it was something to do with a Freedom to Speak Up investigation. She did not tell the claimant anything more than 30 this.

84. Mr Thomson of the respondent's HR department wrote to the claimant on 17 February confirming her suspension. The letter was lodged (page 227-228). The reason for suspension was said to be

“pending an investigation into the allegations that:

- You have allegedly directed behaviours towards other colleagues which may be in breach of the company Harassment and Bullying policy.”

5 Despite the fact that the reason for the claimant’s suspension was said to be pending investigation no further investigation was in fact carried out by Mr O’Neil apart from arranging a meeting with the claimant herself which took place on 24 February. The claimant was invited to this meeting on 10 22 February. A note of the meeting was lodged as part of Mr O’Neil’s investigation report (page 313-323). No specific allegations were put to the claimant. It was suggested that there had been allegations of intimidating behaviour being displayed to staff members by the claimant, non-supportive team work within the service being displayed by the claimant with the potential impact to care and support of service users and 15 allegations of rude and detrimental comments to staff members by the claimant. The claimant confirmed that she herself had a lot of concerns. She gave the history of the matter so far as she saw it. She mentioned the incident where she had been called a “lazy bastard”. She confirmed she had raised numerous concerns with the nurse in charge and with the 20 manager. She referred to a substantial number of incidents where she felt that the behaviours of the other staff had fallen far short of what she considered to be appropriate standards. The HR member of staff sitting in, Mr Thomson, interjected on occasion to say that service users should not be discussed at the meeting. She was asked if she felt confident to 25 challenge other people’s practice and confirmed that she did. She confirmed that she was quite a direct person and agreed that sometimes if she needed to address something then she would do it but said she would do it in the nicest way possible. She spoke of there being a clique within the care home. She was asked if she could be perceived as 30 negative when she challenged inappropriate unprofessional behaviour. She said she made people aware that you can’t do that. It was put to her that her name had been mentioned alleging behaviours from herself which made other people uncomfortable and the claimant said she didn’t know about this. She did say that she had raised genuine concerns and 35 confirmed she was now on anti-depressants. She was asked if she would

now that the matter had been raised about how her comments were perceived she would address the issue. She confirmed that she would do some reflection but she felt it was maybe her general approach and tone of voice. She said was old school.

5 85. Following this meeting Mr O'Neil concluded his investigation. He decided that there were various issues regarding management within the Thistle Care Home but he would not be recommending any further disciplinary process. He produced a report for management which included notes of his interviews with the claimant and all other members of staff which was
10 lodged (page 249-323). The summary of findings is at 254-262. The outcome is summarised on page 262 and states

- “1. No previous documented concerns raised with Isobel Jackson on the grounds of bullying, harassment, negative behaviours that likely cause harm and distress.
- 15 2. The performance issues raised against Isobel Jackson by multiple parties - not raised with Isobel Jackson, potential for this to continue.
3. No identification of mediation, discussion or opportunity for Isobel Jackson to be made aware of the impact to others.
- 20 4. Isobel Jackson is unaware of her behaviour and how it affects others - known or unbeknown by Isobel Jackson, evidence is not available to strengthen a case for disciplinary action.
5. There is reasonable belief that not just Isobel Jacksons conduct is solely conducive to the illustration of poor interpersonal dynamics within the staff team, as senior shift leadership evidently refuses to manage difficult or conflict ridden issues within the service. It is further to note that previous mediation was offered and refused by Shannon. The
25 NIC at the time should have re-engaged this process to manage and mitigate such concerns. It is to note that no sanction was also delivered to Shannon as her behaviour is clearly identified as inappropriate. Upon disciplinary sanctions to Isobel Jackson would not be proportionate on the above
30 grounds - this would or may be deemed as constructive or

targeted towards Isobel Jackson as expectation of professionalism and lack of challenge has not been identified.”

His recommendations were

5 “It is with note that Isobel Jackson requires management discussion upon behaviour continuing. Upon the impact to Senior support worker JK, this needs to be addressed and such in a manner of letter of concern and unequivocal expectation that this behaviour does not continue. Upon this being raised in the future the expectation has been set and does not differ from the set actions
10 with the understanding that behaviour must change with immediate effect.

Professional mediation between Isobel Jackson, Shannon and JK must be offered to explore and resolve the impact, effect and resolution of current dynamics.”

15 The report was not shared with the claimant and appears to have only been sent to senior management.

86. The claimant was invited to a meeting on 3 March 2021. At this meeting she was told that the report had not identified that she had done anything wrong but that there were clearly issues between her and other members
20 of staff and with the manager Kerryanne Johnstone. A brief note of this meeting was prepared by the HR Manager present, Mr Thomson, and was lodged (page 325). It is a high level document and is not verbatim. It appears to be drawn on the basis that the issues to be discussed listed by Mr. O’Neil are highlighted and there is then a brief discussion at the side
25 of what is said.

87. The issue of mediation with other members of staff was discussed and the claimant agreed to this. The note refers to the issue of the letter of concern being discussed but it is unclear whether it was raised or if it was raised if the claimant fully understood what was being said. There was a
30 discussion with the claimant in relation to whether she could return to the Thistle Care Home. The claimant indicated that she was not prepared to return to the Wallace Hospital. Ms Smith and Mr Thomson indicated they felt that a return to Thistle was unrealistic. The issue of mediation with

Kerryanne Johnstone was discussed. The claimant's strong understanding was that she was not going to be permitted to return to Thistle. Heather Smith raised the possibility the claimant could move to another unit run by the respondent called Ellen Mhor. She said she would have to check to see if vacancies existed. The claimant indicated that she was not prepared to return to Wallace Hospital and that if she was made to do this she would resign. The claimant felt that she was out of options. Heather Smith advised the claimant that she felt that her threat to resign was a knee-jerk reaction and suggested that she take some time off as holiday in order to think about it. At the end of the meeting the claimant's understanding was that she was not going to be permitted to return to Thistle Care Home. She agreed that she would take some holiday in order to think about whether or not she would resign or what the other options were.

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- 15 88. During the meeting the claimant was handed a letter lifting her suspension. The letter was dated 3 March and was lodged (page 324). It simply states

"Lifting of suspension

Please accept this as confirmation of your suspension being lifted (ended) with effect (DATE). You are to resume all duties as per your terms of employment."

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It appears to be a template letter where the date field has not been completed.

89. Heather Smith contacted the claimant around a week later to see if she had made up her mind and was prepared to discuss a return to work. The claimant indicated she needed more time. Heather Smith agreed to give her a further week's holiday.

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90. On or about 9 March 2021 the claimant was in touch with the SSSC. She had had to contact them in February to advise them of her new suspension. The telephone notes prepared by the SSSC call handler was lodged (page 327). It states

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"Isabel Jackson called to update her that her suspension has been lifted now that her investigation has concluded.

IJ advised that she is not to return to the CS (Thistle) she was previously working in as it was deemed there was a massive breakdown in communication between the worker and Manager. Therefore IJ has been moved to the 'hospital' area of the service.

5 IJ advised she was calling just to let us know the outcome and initially what is happening but that she will also forward by post her written outcome and any other paperwork she receives in relation to her suspension/investigation."

91. On 19 March 2021 the claimant wrote to Heather Smith of the respondent confirming her resignation. The letter states

10 "This letter is to inform you of my decision to resign as a support worker with Cygnet with immediate effect. Please accept this as my formal notice of resignation. I have worked within thistle for seven years and never been subjected to any form of disciplinary nor have I had any issues with previous managers. However in

15 recent months I feel I have been subjected to undue/disproportionate treatment. I have been spoken to by staff in a derogatory manner, excluded and ignored, which I feel is organisational bullying and victimisation and has been ignored, and

20 allowed to continue by management. This behaviour has had a detrimental impact on my health which has led me to being on anti-depressants which I've been prescribed by my GP. Therefore I feel I have been left with no other option but to resign on the grounds of constructive dismissal and will be taking this matter to an

25 employment tribunal."

92. The claimant resigned having felt that she had completely lost her confidence in the respondent. By this time she was suffering severely from depression, she would go three or four days without eating, she didn't want to see anyone. She felt that she had been badly treated in respect

30 of both suspensions. She felt that she had no confidence in the respondent going forward. She believed that she would have a target on her back and that it would just be a matter of time before she was suspended again. The claimant's intention had been to work in Thistle up to age 66 on the hours she was doing (36 per week) and then after the

age of 66 probably reduce her hours. The claimant enjoyed her work and felt she had a good rapport with the service users.

93. Following her resignation the claimant did not feel confident enough to look for alternative work. Her confidence was gone. Her mental health situation got worse and her prescription for anti-depressants required to be increased. She felt she was a completely changed woman, she would not go out, she would not socialise and tended to stay indoors. She has not sought other work since. As at the date of the Tribunal she remained on Employment Support Allowance and is still signed off as unfit for work.

10 **Observations on the evidence**

94. Generally speaking the respondent's witnesses appeared to have very limited recollection of their involvement in matters and were unable to go much beyond the written records which had been kept. For example, Mr O'Neil in his evidence was asked by the Tribunal if he was aware that the claimant had been off with depression in October/November 2021. His answer was that if it was in the record of his interview with her then yes but that he would not have known otherwise.

95. There was a particular issue where the Tribunal had difficulty in accepting the evidence of Kerryanne Johnstone and Kirsty Dale which was in relation to CCTV evidence. The claimant was quite clear that she had asked to see the CCTV evidence at her first meeting with Kerryanne Johnstone and had been told that it was not available because the system wasn't working. It was put to the claimant in cross examination that the reason she could not see the CCTV footage at her investigation meeting was because Kerryanne Johnstone was waiting for the codes to access this. In her evidence however Kerryanne Johnstone did not support this and indeed her note at the time showed she had viewed the CCTV footage a few days before the investigation meeting with the claimant. Her position was that she had never been asked. NM who went through a disciplinary process at the same time as the claimant also said that she had asked for site of the CCTV footage and had initially been told that it was unavailable because the system wasn't working.

96. It became quite clear during Kerryanne Johnstone's evidence that she based the entirety of her decision making on having viewed the CCTV evidence. She could not give any explanation as to why the claimant had not been shown this other than saying that she had never been asked.
- 5 The Tribunal did not accept this. Kerryanne Johnstone also said that various other people had viewed the CCTV evidence including Kirsty Dale who later carried out the disciplinary. When Kirsty Dale came to give evidence however she was clear that she had not viewed the CCTV evidence but had relied on a statement from Kerryanne Johnstone. This
- 10 statement was not provided. She also said that another two people had viewed the CCTV footage namely Heather Smith and Gail Anderson. As it happened both of these witnesses had given evidence shortly before Kirsty Dale. None of them had mentioned seeing the CCTV evidence. Gail Anderson was called as a witness for the claimant and we think it is
- 15 inconceivable that she would not have mentioned seeing the CCTV evidence whilst giving her own evidence. Additionally, Heather Smith was quite clear that she had not been involved in the disciplinary process in July at all apart from the grievance process. There is absolutely no mention in the grievance process of her having viewed the CCTV. When
- 20 pressed Kirsty Dale said that the statements from these individuals were very short simply confirming that the claimant had been out of the room for 17 minutes. These statements were never produced and frankly the Tribunal did not believe Kirsty Dale's evidence. She did say that she deals with a substantial number of disciplinary processes for the respondent and
- 25 it may be that she has confused this with something else. In any event we were absolutely satisfied that the claimant had asked for sight of the CCTV footage and this had been refused. This is particularly unfortunate since the claimant's version of events clashes with what the respondent says Kerryanne Johnstone was able to ascertain from viewing the CCTV.
- 30 Given that Nicola McIntyre's disciplinary process appears to have followed exactly the same pattern our view is that it was reasonable for the claimant to be extremely aggrieved at this fact. This certainly contributed to her feeling of having been treated very unfairly.
97. The claimant was extremely critical of the written notes of the investigation
- 35 meeting. She said there was a number of things raised by her (such as

asking for CCTV) which were not recorded. Kerryanne Johnstone initially defended the notes but subsequently she also said there were things missing from this. It was her position that she had asked the claimant about various other breaks which she had taken that evening. This was when she was being challenged about the fact that in her investigation report she mentions the claimant and NM having taken various breaks later on (which led to the allegation being excessive breaks) when it was the claimant's position that the discussion had been solely about the incident on 10 July. The Tribunal's view was that it was more likely than not that the claimant's version of what had taken place at this hearing was to be relied upon. The matter was one of considerable importance to the claimant. During her evidence she made appropriate concessions but was clear about what had occurred at the meeting. The Tribunal's findings as to the factual sequence of events was supported by the evidence of all parties and the contemporary documents. The only other matter where we had some difficulty was in relation to the final meeting. The respondent's clear position was that a return to Thistle Care Home was open to the claimant but that they had pointed out to her that there would be considerable difficulties with this due to the nature of the interpersonal relationships. Both parties agreed that mediation had been discussed and that the claimant had agreed to this. Somewhat unusually the claimant's position was that she had been unaware that she was to receive a letter of concern. Both of the respondent's witnesses who gave evidence were clear that this had been mentioned albeit both were keen to minimise this as not being any kind of disciplinary measure.

98. We would have thought that if the issue had been raised at the meeting and understood to be raised as such by the claimant then the claimant would certainly have mentioned it in her evidence as being a further matter which led her to resign. As it was, our view was that by this stage the claimant was probably extremely upset and had not fully understood what was being said. The claimant's email of 9 March was sent a few days after the meeting and clearly sets out her understanding of what she was being faced with. Our view was that whilst the two members of respondent's management who were present felt that they had left open the possibility of the claimant returning to the Thistle albeit this would be difficult the

claimant's understanding of what was being said was that in practical terms she was not going to be permitted to return to Thistle.

5 99. We felt that in general terms the claimant was trying to assist the tribunal by giving truthful evidence. We found her evidence credible and mostly reliable. We felt that by the time of the final meeting of 3 March she was suffering severely from stress and depression caused by the actings of the respondent up to that point and that she may not have fully appreciated the nuance of what was being said. We found the claimant's other witnesses to be truthful, credible and reliable.

10 100. At the beginning of the hearing the respondent's representative confirmed that the respondent conceded that at the relevant time the claimant was to be regarded as meeting the definition of disability in respect of requiring a stoma. During submission he confirmed that the respondent also accepted that at the relevant time the claimant was to be regarded as
15 disabled by virtue of suffering from depression and anxiety. In each case the respondent denied knowledge or constructive knowledge of disability. The Tribunal accepted the claimant's position that she had not suffered from depression or anxiety up until the events surrounding the July incident which had then caused her to go to her GP in September. We
20 accepted that as at the date of the hearing she was still suffering from depression and anxiety and that these disabled her to the extent that she was unable to look for other work.

Issues

25 101. The claimant claimed that she was unfairly constructively dismissed. She also claimed that she had been unlawfully discriminated against on grounds of disability. The Tribunal understood her claim to be in terms of section 15 on the basis that she had been discriminated against on grounds arising from her disability. The Tribunal understood that this claim related to her requiring to take breaks because of her stoma. She also
30 complained of harassment. The claimant also claimed that she had suffered unlawful discrimination due to her age. This related to two matters, one of these being an alleged conversation with Kerryanne Johnstone where Kerryanne Johnstone discussed with her at the meeting

on 24 November whether she would be returning as a senior and was alleged to have said that “at her age why would she want to work as a senior.” The claimant also raised the matter that when prior to Covid service users were due to go out on an outing but no vehicle was available it would be suggested that she could go along with the service user on public transport so that she could use her bus pass.

102. The claimant also alleged that she had suffered a detriment as a result of making a protected disclosure. This was in relation to her disclosure to Public Health Scotland which she considered had led to her suspension.

10 **Discussion and decision**

103. The respondent’s representative made a written submission which was expanded upon orally. The claimant arranged for a friend to read out a written submission which she had prepared. Rather than seek to summarise them here they will be referred to where appropriate below. It is as well to deal with each of the claims in turn.

Constructive dismissal

104. It was the claimant’s position that she had resigned in the circumstances outlined in section 95(1)(c) of the Employment Rights Act 1996. This states that an employee is dismissed by his employer if

“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

105. The breach of contract relied upon by the claimant was a breach of the implied term of trust and confidence. The implied term of trust and confidence is taken to be imported into every contract of employment. The law relating to constructive dismissal on the basis of a breach of the implied term is set out in the case of ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35 CA***. In paragraph 14 of that judgment Lord Justice Dyson stated that the following basic propositions of law could be derived from the authorities:

“(1) The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: **Western Excavating (ECC) v Sharp 1978 IRLR 27.**

5 (2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462.** I shall refer to this as the implied term of trust and confidence.” ‘The implied term of trust and confidence’.

10 (3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see for example per Brown Wilkinson **J N Woods v WM Car Services (Peterborough) Ltd 1981 IRLR 347.** The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

15 (4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nichols said in **Malik** at page 464 the conduct relied on as constituting the breach must “impinge on the relationship in the sense that looked at objectively it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.”

20 (5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents.”

25 106. Before setting out the tribunal’s view it is probably as well to set out the parties’ respective positions regarding the last straw. The claimant’s position was that she had been improperly disciplined in September 2020. During her evidence Kirsty Dale had confirmed that the nurse in charge could give permission to leave the floor. It had always been the claimant’s position that she had permission of the Senior Staff Nurse to leave the

unit. She felt there had been a number of events over the nine months. She was suspended twice. She then had a disciplinary. She had returned to an extremely hostile work environment. She had complained to management and nothing had been done about it. The last straw was when she was told that she had no option to return to Thistle. She asked the Tribunal to accept her evidence regarding that. She said that she felt forced to make life changing decisions.

107. The respondent's position was that there was a mobility clause in the claimant's contract and that therefore asking her to move could not amount to the last straw. The respondent's position was that we should accept Kerryanne Johnstone's evidence that the claimant was properly disciplined for being out of the unit for 17 minutes and that the claimant's suspension by Mr O'Neill was justified. They said the respondent was entitled reasonably to take the view that the matter under investigation may have involved serious misconduct. The respondent's position was that Kirsty Dale was justified in dealing with the issue of the falsification of documents and that we should accept Kirsty Dale's evidence that the claimant had accepted this at the hearing. It was the respondent's position that the claimant had been treated with extreme leniency. They also referred to the evidence of the student nurse (by which we assume they mean the unsigned written statement submitted) as damaging the claimant's credibility. They noted that there was conflicting evidence as to whether the third member of staff had left the unit before or after the claimant (- in fact the Tribunal heard no evidence whatsoever that the third member of staff had left the unit before the claimant- It was put to the claimant in cross examination and denied by her) The respondent's position was that Mr O'Neil had been justified in taking the decision to suspend. They noted that there existed interpersonal problems among staff at Thistle and he laid no blame at any individual's door. A letter of concern was not a disciplinary measure. The respondent's position was that they dealt with the issues professionally and reasonably. The respondent organised a face-to-face meeting with the claimant and when the claimant's preferred option was to return to Thistle the respondent's intention was to attempt to facilitate such a return but notwithstanding this

the claimant indicated an intention to resign. The claimant was urged to reconsider and after taking annual leave she submitted her resignation.

108. The tribunal rejected the respondent's position entirely. The Tribunal's view on the evidence was that the claimant was entirely justified in her position that the respondent's course of conduct over the entire nine months was highly likely to damage trust and confidence and in fact had done so. The Tribunal's view was that the initial disciplinary procedure which was carried out by the respondent was a complete shambles from beginning to end. The Tribunal agreed with the claimant that a reasonable respondent would have appointed someone else to carry out the investigation. With the benefit of hindsight it is clear that there were serious management issues within the Thistle Care Home and these could have been identified much earlier if someone other than the manager had been asked to deal with the investigation. The claimant complained throughout of favouritism and cliques within the care home. This was supported by the two witnesses who gave evidence on her behalf. The evidence was that the two individuals who submitted the initial emails of complaint twenty minutes apart were on extremely friendly terms with each other. Nicola McIntyre's evidence to the Tribunal was that she felt they had done this in order to mask their own wrongdoing in failing to deal appropriately with service users LMC and PS. It was noteworthy that Kerryanne Johnstone had not investigated and claimed not to have known that a third member of staff was also absent from the floor at the time of the incident with PS having been told to leave by JK. It was also clear that JK who was on a one-to-one observation with PS appears to have left PS to go to the lounge to deal with LMC. Kerryanne Johnstone did not properly investigate what had occurred. She did not interview all of the people involved in the incident with PS. Her view was that the claimant had not been present in the room with PS.
109. The Tribunal considered that it was unfair for Kerryanne Johnstone to base her entire view of the incident on the CCTV and then refused to allow the claimant or her representatives access to the CCTV. The respondent's evidence regarding the CCTV was extremely unsatisfactory. The Tribunal considered it noteworthy that Nicola McIntyre indicated that she had had exactly the same problem in accessing the CCTV.

110. Having got off to a bad start the investigation of the grievance submitted by the claimant was even more cursory and inadequate. The Tribunal could not understand how Heather Smith hoped to deal with the claimant's allegation about deficiencies in the conduct of the disciplinary process without accessing the paperwork in respect of this. Heather Smith indicated her understanding was that she was not allowed to do this but had to deal solely with the grievance. Given that Heather Smith and Kerryanne Johnstone had previously worked together and had only joined the respondent fairly recently the Tribunal considered that it was perhaps unwise of the respondent to ask Heather Smith to deal with this grievance.
111. The respondent made much of the fact the claimant had not appealed the grievance outcome however the way things had been dealt with it is unsurprising that she did not have confidence that the appeal process would make things any better.
112. The disciplinary hearing proceeded to compound all of the errors which had been made to date. There was still a vagueness about what the claimant was supposed to have done. The invitation to the meeting refers to excessive cigarette breaks. This would appear to be a reference to the three lines in Kerryanne Johnstone's report which indicates that after the incident the claimant and the nurse in charge went for further breaks. We accepted the evidence of the claimant that nothing had been said to her about this at the investigatory meetings. It would also appear that Kirsty Dale was unaware of this since at the start of the disciplinary meeting she confirms that the allegation is very specifically about the one incident at 5.36pm. At the disciplinary hearing Kirsty Dale spends a fair amount of time dealing with the issue of whether or not the claimant instructed the student to go on an observation. This was not one of the allegations against the claimant. Kirsty Dale then explores with the claimant the note on the observation sheet and forms the view that this amounts to falsification of documents. The Tribunal's view was that "falsification of documents" is something which involves a deliberate intention to deceive on the part of the falsifier. Kirsty Dale appears to have a different view. Kirsty Dale's evidence was that she accepted the claimant's explanation which was that she had put the correct information down but on the wrong form but still considered that this amounted to falsification of documents.

She accepted the claimant had not specifically said that she falsified the document but nevertheless her view was that the document had been falsified. Furthermore, contrary to every accepted tenet of HR practice Kirsty Dale then goes on to deal with the allegation without troubling to refer it to HR, conduct an investigation etc.

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113. The claimant then appeals. We did not hear from the appeal manager however it is clear from the minutes of the appeal hearing that this also went off at a tangent. By this time, the respondent now appeared to believe that a third person was off the floor at the same time and this compounds the claimant's guilt since, on what basis we do not know, the appeal manager decides that this third person was told to leave before the claimant and the claimant should not have been on her break at all. We would stress that the clear evidence, not only of the claimant and her witnesses, but also of Kerryanne Johnstone, Heather Smith and Kirsty Dale was that the person who was responsible for allocating breaks was the nurse in charge not the senior support worker. Despite asking the respondent's witnesses to explain we are still at a loss as to why the claimant was disciplined for leaving with the consent of the nurse in charge to go on a break whilst no disciplinary action was taken at all, either against the support worker who was sent on a break by the senior support worker or the senior support worker.

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114. The Tribunal entirely accepted the claimant's evidence that as a result of the way she was treated the claimant for the first time in her life developed symptoms of anxiety and depression which continue to this date.

115. Following this, the claimant returns to work and agrees to help out the respondent by returning to Wallace Hospital in the first instance. The Tribunal accepted the claimant's evidence that she found the work there to be extremely uncongenial. We accept her evidence that she raised issues regarding the standard of care of service users and felt unsupported. The claimant was only there for a comparatively short period of time prior to going absent from work with stress and depression.

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116. The Tribunal accepted the claimant's evidence regarding the meeting on 24 November in general terms in that although a return to Thistle Care

Home was not ruled out the claimant was told that Thistle Care Home was fully staffed and was made to feel that she would not be welcomed back. This is to some extent supported by the written record kept by Kerryanne Johnstone and Kerryanne Johnstone's own evidence to the effect that she had told the claimant they were now fully staffed and that other units had been discussed. The Tribunal accepted the claimant's evidence that it was only after she contacted HR that she was told that she could return to Thistle. The Tribunal accepted the claimant's evidence that she returned to an extremely unpleasant work situation at Thistle Care Home. The fact that the environment was unpleasant was spoken to not only by the claimant but also by Gail Anderson, a witness for the claimant who had also worked for a long time at Thistle Care Home. Her evidence was that the respondent had taken no action about an incident involving her when she witnessed a support worker slapping a patient. Her evidence was that she had been disciplined herself over the issue but had then reported the matter to the Care Inspectorate who had upheld her claim. She also spoke of a culture in the service which was toxic of cliques, bitchiness and a couple of support workers who bullied service users where nothing was done. In addition to this the toxic culture was a constant feature of the interviews with Mr O'Neil and indeed Mr O'Neil's own report confirms this. It was clear to the Tribunal that there were serious management issues within Thistle Care Home which were not being addressed. Given that we only heard the claimant's side of things we are cautious about apportioning blame but the picture which arose was of long serving members of staff being unhappy at the way service users were being treated by newer members of staff and being upset when they raised these issues with management and nothing was done.

117. Matters had clearly reached a serious stage by January when the claimant made her report to Public Health Scotland. As noted below we did not accept the claimant's argument that this was what led to her suspension. It was interesting however that what appears to have led to her suspension was Mr O'Neil coming up to Scotland on 15 February and interviewing other staff. The picture which he seems to have taken from this is that the claimant was extremely critical of other staff and that they resented her pointing out their failures to them. He felt this was an interpersonal issue.

118. What the Tribunal could simply not understand was why, when Mr O'Neil was carrying out a high level managerial type inquiry into generalised concerns he then made the decision to suspend the claimant.
119. As noted above, Mr O'Neil had interviewed all of the witnesses he was ever going to interview apart from the claimant by the time he suspends the claimant. There would be no further investigation for the claimant to interfere with. The respondent's position is that in addition to this there were serious concerns for service users if the allegations were correct. This however does not sit well with the fact that a comparatively short time later, having only in the meantime interviewed the claimant, Mr O'Neil was happy for the claimant to return to work with no disciplinary action.
120. Once again, the claimant felt she was suspended without being given any meaningful information about why. After a time she is then invited to a further meeting. No specific allegations are put to her. She is accused in general terms of bullying and harassing other staff but given no detail. Much of the questioning seems to be very generalised "survey" type questions.
121. She is then called to a further meeting where she is told she has not done anything wrong. She is not given a copy of Mr O'Neil's report. The letter she is handed at the meeting telling her that her suspension is over is entirely inadequate. In addition to this the claimant has again the rather dismal task of contacting SSSC herself to advise of her suspension.
122. The Tribunal considered that in this case the final straw was the way the final meeting on 3 March was conducted. The Tribunal accepts that the two members of the respondent's management present probably never at any time said to the claimant that she would never be permitted to return to Thistle Care Home. What we do believe is that it was made very clear to the claimant that the respondent saw considerable difficulties in returning her to the care home. There was an expectation that the claimant would change her ways. The claimant saw this as meaning that she would require to be prepared to accept bad practice and not call it out where she saw it. The claimant's evidence to the Tribunal was that she felt she would have a target on her back. She felt that it was only a matter

of time before something happened where she would have the choice of accepting bad practice or calling it out. If she called it out then the likelihood was that she would once again face suspension and disciplinary action. Having experienced the way that the respondent dealt with disciplinary issues she had no confidence whatsoever that she would be dealt with fairly. She did not wish to return to Wallace Hospital because she was familiar with the way they worked and if anything she would find the problems even worse there. She would probably have to return to one of the other units and her concern was that she would not be supported. The Tribunal's view was that she was entirely justified in having lost confidence in the respondent and that this loss of confidence was entirely due to the way that the respondent had treated her over the previous nine months culminating in the way they dealt with the outcome of Mr. O'Neill's investigation. It was also clear that by this time the claimant was suffering from symptoms of depression and anxiety to a high degree.

123. We did not accept the respondent's position that removing the claimant from Thistle care home could not be a last straw because of the mobility clause in the claimant's contract. The case ***United Bank v Akhter 1989 IRLR 507***. Makes it clear that where there is an express mobility clause this may also be subject to implied terms that it be exercised reasonable. In this case the last straw was the entire way the meeting was conducted. The claimant was not given a proper outcome or explanation for the way she had been treated. She was entirely justified in coming to the conclusion she did that if she returned she would have a target on her back. Her resignation was caused by the conduct of the respondent.

124. As noted below the Tribunal's view was that the respondent's actions were not discriminatory in nature nor were they prompted by the disclosure to Public Health Scotland made by the claimant. The claimant was however constructively dismissed.

Age discrimination

125. With regard to the claim of age discrimination the Tribunal did not find that the claimant's evidence in relation to either of the two issues was

sufficiently cogent to enable us to make a finding that these events had taken place in the way she suggested. With regard to the first allegation the claimant said that during the meeting on 24 November Kerryanne Johnstone had said words to the effect that the claimant would not want to be a senior because of her age. In her evidence in chief the claimant confirmed that after she returned to work in Thistle after 10 December she returned as an ordinary support worker. In evidence in chief she initially said there had been no discussion about this. Subsequently when the claimant was asked to set out the basis of her age discrimination complaint she repeated what she had said in her particulars of claim however she also said when being asked about whether she had agreed to return as an ordinary support worker that in fact she had no desire herself to be a senior because of the knock which had been given to her confidence. It may well be that at some point during this meeting on 24 November there was a discussion about whether the claimant wanted to return as a senior or not. Her age may have been mentioned but given the claimant's own view was that she did not want to return as a senior the Tribunal was not prepared to accept that Ms Johnstone's comments were made in the discriminatory way alleged.

126. With regard to the second point Heather Smith made the point that during the Covid epidemic there had been no service users allowed out on outings and if it was ever suggested that she use her bus pass to take out a service user this must have been at some point prior to the end of March 2020, well over a year before the claimant submitted her claim form. Such a claim would therefore on the face of it be time barred. In any event, the Tribunal did not find that the claimant's evidence was sufficiently clear and detailed to allow us to make a finding in fact that this had ever happened. She said that it was a general remark made and did not specify any date or dates or any particular circumstance. She did not say who had made it. The Tribunal considered that the onus was on the claimant to lead evidence from which an inference of discrimination could be drawn and the claimant had entirely failed to do this in respect of the age discrimination claim.

Disability discrimination

127. Similarly, the Tribunal did not accept that the claimant had adduced sufficient facts from which an inference of disability discrimination could be drawn. The claimant's position was that she had left the unit on 10 July in order to change her stoma. She gave evidence about requiring additional breaks during the day in order to change her stoma. She gave evidence of what had been agreed with her previous manager. The Tribunal accepted that the claimant's original purpose in leaving the unit when she did was to change her stoma. The Tribunal also however accepted that if she had done that then she would have been out of the unit for around two minutes and the problem would not have arisen. We note that NM said that when she asked the claimant if she wanted to go out on a break the claimant had said that she was going out anyway which tends to suggest that what happened was that the claimant was planning to go out to dispose of her stoma bag, she then met with NM who suggested that she take a break and the claimant and NM then went out, disposed of the stoma bag on the way and then had their cigarette break. As will be noted below it is unclear what exactly the respondent meant by "excessive breaks" when they made the disciplinary allegation against the claimant but it was quite clear to the Tribunal that the one thing they were not referring to was excessive breaks to change her stoma bag.

128. The Tribunal's view was that the disability discrimination claim had essentially been added as a make-weight. We have no doubt that the claimant found the process which led to her resignation extremely distressing and hurtful. We were satisfied however that the fact that the claimant was going out to dispose of her stoma bag was not any part of the rationale for what happened thereafter.

129. There was also some limited suggestion from the claimant that she was making a claim of a failure to make reasonable adjustments on the basis that there were not enough facilities for her to change her bag in private and with dignity or to dispose of the bag in a suitable inside clinical waste facility.

130. The Tribunal's view was that this claim had not been established. The evidence was that the claimant had absolutely no difficulty with the previous arrangements which existed for changing her stoma. She accepted in evidence that she had never at any point raised with the respondent that this was an issue. The Tribunal's view was that a reasonable adjustment had in fact been made by allowing the claimant breaks to go out of the building and dispose of her bag whenever required. We did not accept that Kerryanne Johnstone had withdrawn this reasonable adjustment. We accepted Kerryanne Johnstone's evidence that she was entirely unaware of the fact the claimant had a stoma albeit our view is that she ought to have been aware. The claimant had been working with Kerryanne Johnstone for around four weeks prior to this albeit they would not both be on shift at the same time. There was no suggestion that Kerryanne Johnstone had stopped her from proceeding in the way that she had done up until then.

131. In any event, even if we are wrong in this we consider that the claim of disability discrimination based on a failure to make reasonable adjustment falls at the hurdle of the respondent's knowledge. If it is indeed the claimant's position that the arrangements in place for her changing her stoma bag were in some way insufficient and placed her at a disadvantage then the respondent were entirely unaware of this. As noted above the claimant had been managing fine with the arrangements in place for around seven years. The level of knowledge required of an employer is that an employer must know or be reasonably expected to know not only that an employee suffers from a particular disability but that this disability places the employee at a particular disadvantage in relation to a pcip because of that disability. In this case we accepted the claimant's evidence that the respondent had been made aware at the outset of her employment that she had a stoma and was disabled as a result of that. It is unfortunate that the respondent appeared to have done nothing with this information and certainly did not pass it on to Kerryanne Johnstone when she became the claimant's manager. On the other hand there was nothing to suggest that the respondent could reasonably have been expected to know that the current arrangements in place for the claimant disposing of

her stoma bag placed the claimant at any particular disadvantage. This claim of disability discrimination must therefore also fail.

Public interest disclosure

5 132. With regard to the claim based on public interest disclosure the Tribunal accepted that the claimant contacting Public Health Scotland amounted to a protected disclosure. This was not seriously challenged by the respondent. What was clear however was that there was no causal link between this and the claimant's suspension and the further investigation carried out by Mr O'Neil. It was not even put to Mr O'Neil that he was
10 aware that the claimant had made this disclosure. In any event given the timing of the first contact from Public Health Scotland which appears to post-date the claimant's colleagues submitting their Freedom to Speak Up emails the Tribunal found that there was no causal link between the two.

Remedy

15 133. With regard to remedy the claimant's preferred option was compensation. The claimant had seven full years' service as at the date of termination of her employment. She had been over the age of 41 years during the whole of her employment. She was therefore entitled to a basic award of 10.5 weeks' pay.

20 134. The claimant had lodged pay slips (page 417-428). These cover the period of the claimant's final year of employment from 1 April 2020 to 31 March 2021. For the purposes of calculating a week's pay the Tribunal requires to look at the final 13 weeks of her employment. This is the period from 18 December to 19 March. December's pay slip shows gross pay of
25 £1981.71 from which we took it that the claimant earned £831.04 for the period from 18-31 December. The claimant's pay for January was £1488, for February £1564.47 and she was paid £934.80 for the period up to 19 March.

30 135. This gives a total for the 13 weeks of £4818.31 which is equivalent to £370.64 per week. The claimant is therefore entitled to a basic award of £3891.72. With regard to the compensatory award the Tribunal accepted the claimant's evidence that she has been unfit to work since the date of

5 termination of her employment with the respondent. We consider that it is equitable to award her wage loss for the whole of this period since her health issues which have prevented her working or applying for other jobs are due to the actions of the respondent. The Tribunal was asked to make an award up to the claimant's date of retirement. The claimant calculated this sum at £42,652.20. The Tribunal's calculation of this sum was around £36,000 to which we would have added £450 for loss of statutory rights. However the maximum award which can be made is limited by the terms of section 124(1ZA)(b) of the Employment Rights Act 1996 which provides that the maximum compensatory award shall be 52 multiplied by a week's pay of the person concerned. (ie 1 years pay) This amounts to £19,273.28. The compensatory award is therefore £19,273.28. The total award is therefore £23,165 (19273.28 + 3891.72)

10 136. The claimant's evidence was that she had been on Employment Support Allowance since the date of termination of her employment. This is a prescribed benefit. The recoupment regulations therefore apply. The prescribed element is £19,273.28 and relates to the period between 19 March 2021 and 19 March 2022.

15 137. The total monetary award made is £23,165. The monetary award exceeds the prescribed element by £3891.72.

Employment Judge: I McFatridge

Date of Judgment: 16th November 2022

Date sent to parties: 21st November 2022