EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms C McGlynn	**AND**	**North East Autism Society**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **Teesside** **On: 6,7,8 and 9 February 2017**

Deliberations: **23 February 2017**

Before: **Employment Judge Shepherd** **Members:** **Ms Hunter**
Mr Denholm

Appearances

For the Claimant: **Mr Robinson-Young**
For the Respondent: **Mr Humphreys**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

The claim of detriment on the ground that the claimant has made a protected disclosure pursuant to section 47B is not well founded and is dismissed.

REASONS

1. The claimant was represented by Mr Robinson-Young and the respondent was represented by Mr Humphreys.

2. The tribunal had sight of a bundle of documents consisting of two lever arch files and, together with documents added during the course of the hearing, was numbered

up to page 708. The tribunal considered those documents to which it was referred by the parties.

3. The tribunal heard evidence from:

Cheryl McGlynn, the claimant;
Christine Dempster, Director of Education;
Christine Cave, Headteacher, Thornhill Park School;
Brian Stoker, Head of Care Services.

4. The issues were identified at a Preliminary Hearing on 26 October 2016 as follows:

"The real issues, simply and broadly expressed, are:

(a) Did the oral and written communications made by the claimant on 6th and 9th May in her reasonable belief tend to show that one of the relevant findings had occurred or may occur?
(b) If so, was the disclosure in her reasonable belief made in the public interest?
(c) Was the claimant subject to any detriments?
(d) If so was a material reason for the detriment that the claimant made a protected disclosure?
(e) If any claim is made out, to what remedy is the claimant entitled?

5. Mr Humphreys, on behalf of the respondent provided a further draft list of issues. Mr Robinson-Young indicated that he did not object to this further list but felt that it was not necessary. The issues identified by the respondent were as follows:

Issues of Liability

Issue 1

Did the Claimant make a Protected Disclosure within the meaning of s.43A ERA?
The Claimant relies on her verbal disclosure to Nicola Brown of the Respondent on Friday 6 May 2016 and her statement dated Monday 9 May: Bundle Page 155-156
In respect of each alleged disclosure:

- Did the Claimant make a disclosure of information?
- If so, was such disclosure of information, in the reasonable belief of the Claimant, made in the public interest and tended to show each or either of the categories of failure by the Respondent set out in s.43B(1)(b) and s.43B(1)(d) ERA?

Issue 2:

Did the Claimant suffer one or more detriments?

The Claimant relies on the detriments set out in paragraph 13 of the ET1: Bundle Page 17

- Subjecting the Claimant to a disciplinary procedure.
- Deliberately misrepresenting the law on protected disclosure to the Claimant in the grievance meeting chaired by Christine Cave of the Respondent, on 5 July 2016.
- Denying the Claimant access to the protection afforded by the Respondent's own whistleblowing Policy.
- The Respondent behaving towards the Claimant in a 'high handed and malicious manner'.
-

(On the Respondent's reading the second part of paragraph 13(a) and the whole of paragraph 13(b) of the ET1 provide alleged background to the disciplinary process rather than constituting separate detriments; and the allegation in the first part of paragraph 13(d) is a statement of the claim rather than a separate detriment, but this may be clarified at or prior to the Hearing).
In respect of each of the pleaded detriments:

- Are the factual grounds relied on by the Claimant correct? (In this context clearly the Claimant was subjected to a disciplinary process)
- If so, did each amount to a detriment within the meaning of s.43B ERA

Issue 3:

Causation – Did the Respondent do any of the detriments found, on the ground that the Claimant had made a protected disclosure: s.47B ERA?
In this context, it is for the Respondent to show the ground on which any act was done: s.48(2) ERA. The Respondent must prove on the balance of probabilities that the act complained of was not on the ground that the Claimant had made a protected disclosure, meaning that the protected disclosure did not materially influence (in the sense of being more than a trivial influence) the Respondent's treatment of the Claimant: ***Fecitt v NHS Manchester*** [2012] IRLR 64 per Elias LJ at [45]

Issues of Remedy

If the Claimant succeeds and the claim is made out:

- *Remedy Issue 1*: To what level of injury to feelings award is the Claimant entitled?
- *Remedy Issue 2A*: Is the Claimant entitled to an award for aggravated damages?
- *Remedy Issue 2B*: If so, to what level of aggravated damages is the Claimant entitled?

Findings of fact

6. Having considered all the evidence, both oral and documentary, the Tribunal

makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

6.1 The claimant is employed by the respondent as a Further Education Tutor at Aycliffe School. Her employment with the respondent commenced on 30 April 2015.

6.2 The respondent is a charity which provides educational and residential programmes for children within the autistic spectrum at a number of establishments in the north-east of England.

6.3 On 6 May 2016 there was an incident at the school involving a 13-year-old autistic boy (child A). This child was in the class of children taught by the claimant. Child A had become distressed with regard to the disappearance of a keyring to which he had become attached. There were a number of members of staff involved and there was a physical encounter with child A. The claimant went to look for the missing keyring and a member of staff from an adjoining college, Lee Simpson, who was present at the time asked the claimant to let him out of the locked area. Once outside Lee Simpson told the claimant that he had seen child A being roughly handled by staff members. He was concerned that the child had been dragged and his foot had been deliberately stood upon. The claimant said that she had not witnessed this rough handling. When the claimant returned to where child A and other members of staff were she saw child A expelling saliva from his mouth, some of which landed on the face of another staff member, Karen Drummond and the claimant said that she saw Karen Drummond wipe the saliva on child A's arm at which point he started to cry and scream. The claimant then took child A to a taxi in order that he could return home.

6.4 Amy Dobson, another employee, sent an email to Nicola Brown the Head Teacher on 6 May 2016 at 16:14. This referred to the incident and made references to the physical handling of child A and that it had been said that his foot had been stood on. Notifications were made in respect of four employees, Amy Dobson, Kenneth Cutmore, Karen Drummond and Stephen Jardine. These were sent to the Local Authority Designated Officer (LADO) on 9 May 2016 together with statements from seven employees including the claimant. The notification in respect of Amy Dobson was retracted on 10 May 2016 and Nicola Brown informed Sharon Lewis who was the Local Authority Officer that it had been decided not to suspend Amy Dobson in view of information gathered from further statements.

6.5 A meeting took place on 17 May 2016. This involved the police, the Local Authority and Christine Dempster, the respondent's Director of Education, Nicola Brown and HR representatives from the respondent. The police indicated that there was to be no criminal action and it was agreed that the respondent would appoint an independent investigator to provide a report.

6.6 A report was prepared by Steve Duncan of Duncan HR Limited and this was provided to the respondent on 9 June 2016 attached to an email to Chris Dempster, the respondent's Director of Education and copied to the LADO. Statements had been taken from nine employees of the respondent and the recommendation in respect of the claimant and Lee Simpson was that there were two issues:

> "1) Not engaging in the physical intervention and
> 2) witnessing unsafe behaviour and not intervening immediately."

6.7 The report recommended that the second issue was taken forward to a disciplinary hearing for a formal examination and that the evidence showed that the claimant and Lee Simpson did not intervene when they should have done so.

6.8 Ruth Bell, the head of HR at the respondent, sent an email to Steve Duncan with regard to the claimant and Lee Simpson indicating that neither of them had been invited to have the right of representation at the investigation meeting as they had been told they were both witnesses. Steve Duncan replied stating

> "I wouldn't have an issue with this – as this is a NE-as policy issue and not a legal issue – and it's likely to be a lower-level sanction (I would have thought) (i.e. not dismissal)
>
> However if you wanted to be very squeaky clean on process – you might identify another manager to interview them again (in an investigation) with accompaniment and concluded from that meeting that they should go forward to disciplinary
>
> But I'd go for the quicker option – as they both admitted that they did not engage with the restraint or stop the poor practice (that's not under dispute)"

6.9 The Duncan report contained statements from a number of witnesses, for example, Amy Dobson, Claire Bonas, Karen Drummond and Stephen Jardine, where criticisms were made of the claimant with regard to her failing to be involved and standing outside chatting rather than taking control.

6.10 On 15 June 2016 Ruth Bell wrote to the claimant indicating that she was required to attend a disciplinary hearing and that, following the investigation report, the areas of concern to the respondent were:

> "Safeguarding concerns due to you witnessing unsafe behaviour and not intervening immediately.
> Gross negligence in failing to attend or to carry out the duties of the post which resulted in a service user being placed at potential risk."

6.11 It was indicated, that as the allegations were serious and may constitute Gross Misconduct as defined in the disciplinary procedure, the potential

sanction was dismissal.

6.12 A letter, in the same terms, was also sent to Lee Simpson. Letters inviting the other employees involved to disciplinary hearings were sent. The letters were in the same terms although the wording in respect of the areas of concern was different.

6.13 On 22 June 2016 the claimant's solicitors wrote to the respondent referring to the claimant's statement in which she referred to the child having been assaulted during a restraint. It was said that this was a protected disclosure and also that the claimant was being victimised "on the ground that she made it if the Society persists in its proposed disciplinary action against her".

6.14 On 29 June 2016 the claimant raised a formal grievance stating that she had been treated detrimentally on the ground of having made a protected disclosure that child A had been assaulted on 6 May 2016 when he was dragged, had his foot stood on and spittle wiped on his right arm. The claimant referred to the detrimental treatment as threatening her with disciplinary action and accusing her of gross misconduct.

6.15 A grievance hearing took place on 5 July 2016. The claimant was told that she had not made a protected disclosure as she had not indicated that she was making such a disclosure, and had not stated from whom she was wishing to be protected. The claimant's grievance was not upheld and Christine Cave, Head Teacher from another of the respondent's institutions indicated that, in order to afford the claimant a further opportunity to understand and respond to the allegations in Steve Duncan's report, she was invited to a briefing meeting. The disciplinary hearing would then go ahead.

6.16 In the letter from Christine Cave providing the outcome of the claimant's grievance it was stated:

> "Regardless of whether this was treated as a protected disclosure or not the statement dated 6 May 2016 would have been used to inform an investigation. It is as a result of all the information gathered during the investigation that it was deemed you have a case to answer for your actions or omissions on 6 May 2016 which is why you were called to a disciplinary hearing."

6.17 On 29 July 2016 the claimant appealed against the grievance decision. She also indicated that she was not happy to attend a briefing meeting. She indicated that there were no allegations against her in Steve Duncan's report and that:

> "The so-called briefing meeting is being proposed after the allegations, described as potentially Gross Misconduct, have already been put to me. Those allegations should be withdrawn if my employer is now

uncertain that they have been properly made."

6.18 The claimant attended an appeal hearing before Bill Watson, Head of Finance, on 5 August 2016. On 23 August 2016 Bill Watson wrote the claimant providing the outcome of her appeal. Although it is stated that her appeal was upheld, it is clear that what was meant was that the original decision was upheld. Within that letter it was stated:

> "Following the hearing, and after further investigation I have come to the conclusion that the Society did not register your witness statement as a protected disclosure using the Whistle Blowing Policy, but purely as a witness statement. Furthermore, you stated in an email to Carole Heywood that when you made your report you did not recognise that you had made a protected disclosure. For clarification in Mr Duncan's investigation report, he stated that a whistle-blower had observed the incident, and you appear to believe this to be yourself, but this was referred to in an earlier disclosure made by another member of staff. Finally, after reviewing the disciplinary report it is clear that the allegations that you are required to answer as detailed in the disciplinary invite letter sent to you by Ruth Bell (Head of HR) are in no way connected to the witness statement you submitted which you refer to as a whistle blow."

6.19 The claimant obtained an Early Conciliation Certificate from ACAS on 25 August 2016 and presented a claim to the Employment Tribunal on 26 August 2016. The complaint was that she had been subjected to detriments by reason of making a protected disclosure.

6.20 On 11 October 2016 Brian Stoker, Head of Care, wrote to the claimant inviting her to a disciplinary hearing on 14 October 2016. In that letter Brian Stoker provided further details of the allegations and stated as follows:

> "As I am sure you will appreciate, the allegations against you are very serious. I must warn you that if you are found guilty of either of the allegations as set out above, such could result in your dismissal without notice or pay in lieu of notice. This is because, as you will see from the enclosed copy of the Organisation's disciplinary policy, gross negligence (i.e. a serious failure to carry out duties) which places a child at risk, or a failure to report child protection matter where there are legitimate safeguarding concerns can potentially amount to acts of gross misconduct depending on the circumstances. No decision will be made either in relation to whether you are guilty of the allegations, or any sanction (if relevant/appropriate), until I have heard from you in the hearing. You should therefore come prepared to explain your case."

6.21 The claimant objected to the short notice as, under the respondent's disciplinary procedure, she was entitled to at least five days' notice of a disciplinary hearing. Brian Stoker agreed to rearrange the disciplinary hearing which took place on 21 October 2016. The claimant attended accompanied by

Lee Simpson and Ruth Bell was there as a note-taker.

6.22 On 28 October 2016 Brian Stoker wrote to the claimant providing:

> "In summary and after much consideration, having considered all the evidence including what you told me in the disciplinary hearing you are guilty of some misjudgements but nothing so serious to amount to misconduct or gross negligence as alleged.
> It is my view that due to your level of knowledge and experience of the child in question, the actions you took (i.e. leaving the scene to accompany Lee outside, failing to report the incident regarding the spittle and not taking the lead) were understandable in the circumstances although not entirely acceptable. Although, I am confident from speaking to you that you would act differently in future and I appreciated your honesty and contribution in the hearing.
> There will be no disciplinary sanction applied; however, I will arrange for you to attend a Positive Proactive Support (PPS) refresher session in order to increase your level of confidence in relation to physical interventions."

6.23 During the Tribunal Hearing, the Tribunal heard that two of the employees who were involved in the incident in question had been dismissed.

7 There was insufficient time for the Tribunal to hear oral submissions and provide an extempore judgment and the representatives requested that the matter could be dealt with by way of written submissions without the need for oral representations. The position of the case was that the issues were straightforward and there were no complex issues of law and, in the circumstances, the Tribunal agreed to accept written submissions together with responses on any errors of law or fact and to arrange a date for the Tribunal's deliberations. The parties' representatives provided thorough and helpful submissions. These are not set out in detail but the Tribunal gave careful consideration to the submissions in reaching its conclusions.

8 **The Law**

9 **Protected Disclosure Claim**

Section 43B(1) of the Employment Rights Act 1996

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

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

(b) obligation to which he is subject;

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

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

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

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

10. Section 47B (1)

> "A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

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

Disclosure

12. In **Cavendish Munro Professional Risks Management Limited – Geduld 2010 IRLR 37** Slade J stated:

> "That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings…….the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that

"bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

13. Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

14. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

"I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

15. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

"I accept Ms Mayhew's submission that applying the **Babula** approach to section 43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the **1996 Act** by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph

> 19 above)…… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B(1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied*".*

Reasonable Belief

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

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

17. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service** EAT0925/01 and 0991/01 Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language,*

the breach of legal obligation on which the worker is relying." In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

18. The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered.

19. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

> "The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

20. In **Goode –v- Marks and Spencer plc UKEAT/0042/09** Wilkie J stated the judgment of the EAT at paragraph 38 to be:

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

Method of Disclosure

21. The claimant in this case seeks to rely upon disclosure to the respondent and section 43C of the 1996 Act provides:-

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –
>
> (a) to his employer…..".

22. It is, in some cases, appropriate to distinguish between the disclosure of information and the manner of its disclosure but in so doing the Tribunal must be aware not to dilute the protection to be afforded to whistleblowers by the statutory provisions: **Panayiotou –v- Kernaghan 2014 IRLR 500.**

> Different tests are to be applied to claims under ERA sections 103A and 47B(1). Thus for a claim under ERA section 103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERA section 47B(1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the Claimant."

23. Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

24. The following submissions made by the representatives in respect of the law have been considered by the Tribunal.

Detriment

Mr Robinson-Young provided the following submission with regard to the law in respect of detriment claims:

1) "The term detriment is not defined in the ERA but it is clear that it has a broad ambit. The term detriment has been considered in the context of discrimination law which makes it unlawful for an employer to discriminate against an employee by subjecting her to '…*any other detriment*'.

    i) In *Ministry of Defence v Jerimiah* [1980] ICR 13 CA, Brandon LJ said that detriment means simply 'putting under a disadvantage'. Brightman LJ stated that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment.

    ii) The approach adopted by the Court of Appeal in *Jerimiah*, that 'detriment should be assessed from the view point of the worker, was adopted in the later House of Lords case *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL.

    iii) The broad and subjective approach adopted in Shamoon supports the view that a threat by an employer to take action which would constitute a detriment, is in itself a detriment for the purposes of 47B, provided that the threatened worker was reasonable in regarding the threat as being to her disadvantage.

    iv) There is a clear threat of dismissal contained in the letter sent to the claimant on 16th June.

2) Guidance as to the correct approach a tribunal should adopt in detriment claims is given by Serota J in the Employment Appeal Tribunal in ***Blackbay Ventures Ltd t/a Chemistree v Gahir*** UKEAT/0449/12/JOJ, UKEAT/0450/12/JOJ, (Transcript) 30 May 2013, 27 March 2014; at paragraph 98.

(i) each disclosure should be identified by reference to date and content;

(ii) the alleged failure or likely failure to comply with a legal obligation or matter giving rise to endangerment of an individual's health and safety should be identified;

(iii) the basis on which the disclosure is said to be protected and qualifying should be addressed;

(iv) each failure or likely failure should be separately identified;

(v) if a breach of a legal obligation is asserted, then save in obvious cases, the source of the obligation should be identified and be capable of verification. It is not sufficient for the tribunal simply to lump together a number of complaints, some of which may relate to culpable failures, but others of which may simply be references to a checklist of legal requirements or may not amount to disclosure of information tending to show breaches of legal obligations;

(vi) with regard to the detriment alleged to have been suffered, the tribunal should identify the detriment and, where relevant, the date of the act or deliberate failure to act relied upon.

3) It is submitted that the burden of proof in a detriment case is close to that in a discrimination claim. Once less favourable treatment amounting to a detriment, following a protected disclosure, has been shown, the respondent must prove under s.48(2) ERA on what grounds it acted; and that the protected disclosure was no more than a trivial influence, if any, on the respondent's treatment of the claimant.

4) The court of appeal in Fecitt held at paragraph 48:

"We start by noting that in claims for discrimination, such as sex, race, or disability there is a statutory reversal of the burden of proof where the claimant has proved facts from which it could be found that an act of discrimination or harassment had been committed. In those circumstances, the employment tribunal will look to the respondent for an explanation and in the absence of an adequate explanation the employment tribunal 'must' uphold the complaint. In Oyarce v Cheshire County Council (CA) it was made clear that in victimisation claims based on discrimination, the statutory reversal of the burden of proof did not apply. However, this made relatively little difference because the principle enshrined in cases such as King v Great Britain-China Enterprises [1991] IRLR 513 achieves the same result save that the employment tribunal 'may' rather than 'must' draw inferences against the respondent. Moreover, in whistle-blowing cases the claimant does not have to prove facts from which it can be found that an act of discrimination or harassment has been committed because by virtue of s.48(2) the burden will always be on the employer, once a detriment has been established, to show the ground on which any act, or deliberate failure to act, was done."

5) I would draw a distinction between the position in an automatic unfair dismissal claim where it is unlawful only if the protected disclosure was a larger factor and the reason, or the principal reason for dismissal. In a detriment claim a significant influence is an influence which is more than trivial. (paragraph 65 Fecitt)

6) The respondent raised the case of ***Dahou v Serco*** **[2016] EWCACiv 832; [2017]IRLR 8.** This was a case considering detriments and dismissal under the ***Trade Union and Labour Relations (Consolidation) Act 1992***. The

Court of Appeal cited and approved the case of ***Yewdall v Secretary of State for Work and Pensions*** *UKEAT/0071/05 (19 July 2005, unreported).* The burden of proof is reversed once the employee has shown a prima facie case of detriment for the outlawed reason.

> *30. If the prima facie case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker. It follows, of course, that in such a case a critical element in the task of the Employment Tribunal consists in their reasoned assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors.*
>
> *31. In my judgment that was the approach which Simler J followed. She noted at paragraph 49 that at paragraph 17 the Employment Tribunal had observed in relation to Yewdall that "the EAT stated that the burden of proof" (section 146) operated in the same way as in the anti-discrimination legislation, such as section 63A of the Sex Discrimination Act 1975. The burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained.*

7) It was held that once reversed, the onus of proof on the employer under this subsection is similar to that in a whistleblowing detriment case under the ERA 1996 s 48(2); it is not akin to the stronger burden of proof provisions in discrimination law under the EqA 2010 s 136. Accordingly, if a tribunal disbelieves the employer's version of what was the purpose, it may find that s 146 was breached, but is not in law obliged to do so.

8) At paragraph 30 of ***Dahou*** Laws LJ sets out that:

If a prima facie case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore prove what were the factors operating on the mind of the decision-maker. It follows of course, that in such a case a critical element in the task of the Employment Tribunal consists in their reasoned assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors.

9) In my submission ***Dahou*** adds very little to this case but serves to highlight that the respondent in the present case:

   i) advanced no credible reason why the claimant was subjected to charges so serious that the only potential sanction was dismissal, given that it was admitted that she did not present any safeguarding risk, was not reported to LADO, or suspended, etc.,; and, furthermore,

   ii) Failed to explain why an experienced HR department member and/or a head teacher with access to the relevant policy documents

and HR advice, would deliberately misrepresent the law concerning protected disclosures and the claimant's rights with regard to them.

10) **Drawing an Inference**:

i) As in discrimination cases, in a detriment case there is often a lack of direct evidence providing a nexus between the disclosure and the detriment. Under these circumstances it may be appropriate for the Tribunal to draw inferences as to the real reasons for the respondent's actions, from its principal findings of fact.

ii) This approach has frequently been adopted by Tribunals considering claims under s.47B as it fits neatly with the stipulation in s.48(2) ERA that it is for the employer to show the ground on which it acted or failed to act.

iii) two examples, both first instance decisions:

(1) **Murrell v Everett Financial Management Ltd E.T. Case No 2301962/01** EFM Ltd failed to failed to produce any plausible explanation for its conduct and therefore it was appropriate to infer a link between the claimant's disclosure and the subsequent detrimental treatment. (n.b. the Tribunal's decision was later overturned by the E.A.T. but on other grounds);

(2) **Rowe v Halsall** E.T. Case No1804892/05; the Tribunal noted that the claimant was the only person to make protected disclosures, and she was the only person to be given a warning, despite other staff failing to take action on her request. Given the close link between the 2 events the Tribunal drew an inference the disciplinary warning flowed as a matter of causation from her disclosures.

25. Mr Humphreys provided the following submissions:

"*The Law: The Issue of Detriment*

1. Detriment is not defined in the ERA, however, it is a concept that is familiar in discrimination law. Drawing on that jurisprudence, a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. An unjustified sense of grievance cannot amount to a detriment, but it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of: ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285 per Lord Hope at [34] and [35].

2. In the same case Lord Scott held that the test must be considered from the point of view of the Claimant, thus: "…*if the victim's opinion that the*

treatment was to his or her detriment was a reasonable one to hold, that ought, in my opinion, to suffice…" **Shamoon** per Lord Scott at [105].

The Law: The Issue of Causation

3. As is clear from the statutory language, it must be shown that any detriment was caused by some act or deliberate failure to act by the employer. Further, that there is a causal connection between the act relied on and the protected disclosure, specifically that the act was '…*done on the ground that*…' the claimant had made a protected disclosure. Thus, it is not sufficient for a claimant to show that they have made a protected disclosure, and suffered a detriment as a result of an act done by the employer. The question at this stage will be what was the reason for the respondent's act or deliberate failure to act?

4. It is for a respondent to show the ground on which any act was done: s.48(2) ERA, such that the respondent must prove on the balance of probabilities that the act complained of was not on the ground that the claimant had made a protected disclosure.

5. The leading case on causation in this area is ***Fecitt v NHS Manchester*** [2012] IRLR 64, which provides that "…*s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*…" ***Fecitt*** per Elais LJ at [45]

6. This is not to be equated with the reversal of the burden of proof found in discrimination law: s.136 of the Equality Act 2010; where a tribunal must find for a claimant where an employer has failed to discharge the burden. S.48(2) is not cast in these terms. Rather, detriment will follow the approach in automatic unfair dismissal law, where if an employer fails to persuade a tribunal of its lawful reasons for dismissal, the tribunal may but not must find for the claimant. Thus, in such cases it is open to a tribunal to find that the reason for the relevant act was something which neither side had advanced: ***Dahou v Serco*** [2017] IRLR 81 per Laws LJ at [39] and [40]. The reference to s.148 in [39] is to s.148 of the Trade Union and Labour Relations (Consolidation) Act 1992 subsection (1) of which provides:

On a complaint under s.146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

7. This wording provides a striking parallel with, though of course is not precisely the same as, that in s.48(2) ERA, relevant to this case. The Tribunal is referred to the commentary in Harvey on Industrial Relations and Employment Law in this context, and in particular:

a. Division DII Detriment / 22. Remedies for Detriment / C. Remedies for Detriment – Burden of Proof; and
b. The December 2016 Bulletin; section dealing with Division DII Detriment; and

The Respondent has not provided those extracts with these submissions but would be happy to do so if requested.

8. An important aspect of causation in this context is that it is not controlled by notions of reasonableness; this is not a claim for 'ordinary' unfair dismissal. The test is a simple one of causation; the reason found for the respondent's act must, if the claim is to fail, not be a claimant's protected disclosure(s), that 'reason' must be lawful but it does not have to be 'reasonable'. "

Conclusions

26. The disclosures relied upon by the claimant were the verbal disclosure to Nicola Brown, the Head Teacher on Friday, 6 May 2016 and, also, the disclosures made in her written statement on 9 May 2016. The disclosures were in respect of the concerns raised by Lee Simpson with regard to one member of staff standing on child A's foot and staff members dragging child A when he was on the floor. Also, with regard to a member of staff rubbing saliva from the side of her face onto the arm of child A.

27. It was accepted by the respondent that the necessary criteria for these assertions to be classed as protected disclosures within the meaning of section 47B were met. However, it was contested that the claimant did not hold a belief that the disclosures were made in the public interest. The disclosures had been made as part of the normal process of following up an incident that had occurred in the school. The Head Teacher had received a report of an incident and asked the claimant to provide a statement. The claimant had agreed that it was her duty to report unsafe acts. The claimant had witnessed what she believed to be a lack of good practice but that is different from the belief that this disclosure itself is made in the public interest.

28. The Tribunal accepts that the claimant provided the information to the Head Teacher once she was asked to do so. A disclosure had been made by Amy Dobson. However, the Tribunal is satisfied that the information disclosed by the claimant were protected disclosures. The disclosures were in the public interest, the claimant thought that the health and safety of the child was being put at risk and it is clearly in the public interest that there was concern that a vulnerable child was being placed at risk when in the respondent's care.

29. In the claim presented to the Employment Tribunal the claimant set out the detriments to which she said she had been subjected as follows:

> "a) Subjecting her to a disciplinary procedure concerning allegations of gross misconduct that were not supported by findings of fact in the investigation report; and
>
> b) When she was clearly not involved in the assault on child A or complicit in any other way;

c) Deliberately misrepresenting the laws concerning protected disclosure during the course of the grievance hearing;

d) Denying her access to protection afforded by the Protected Disclosure legislation and/or the respondent's own whistleblowing policy;

e) The claimant believes the respondent has behaved towards her in a high-handed and malicious manner."

30. It was accepted by the respondent that the claimant believes she was subjected to a detriment by the decision to initiate disciplinary proceedings against her. The Tribunal is satisfied that this was a detriment.

31. With regard to the alleged detriment of deliberately misrepresenting the law, the Tribunal is satisfied that this was not deliberate, Christine Cave was not aware of the law at the time of the meeting. She accepted that she now knew that the comments made were incorrect. She was confused about the respondent's whistleblowing policy and the law. The claimant indicated that Christine Cave appeared to believe what she was telling the claimant and said that she did not think that she was lying to her. Rebecca Gilbert, HR Officer was also present at that meeting. The tribunal did not hear evidence from Rebecca Gilbert. However, the Tribunal has considered the evidence it heard and the notes of the meeting and accepts that it was not a deliberate misrepresentation.

32. It was agreed by the respondent that its whistleblowing policy was not applied to the claimant. The relevant part of the whistleblowing policy was "if you raise a genuine concern under this policy you will not be at risk of losing your job or suffering any form of retribution as a result." The Tribunal is satisfied that the implementation of the disciplinary procedure was as a result of the recommendation in the Duncan report. The fact that the whistleblowing policy was not applied was of no relevance to that decision and the implementation of the disciplinary procedure would have occurred whether or not the claimant had made a protected disclosure.

33. The Tribunal finds that the claimant did not believe that she was treated in a high-handed and malicious manner. There was clearly an error in relation to the law in respect of public interest disclosure. However, the meeting included some supportive statements made to the claimant.

34. During the course of the Tribunal hearing an additional detriment was identified. This was the short notice given for the disciplinary hearing. There was no application made to amend the claim. However, for the sake of clarity, the Tribunal has considered this additional detriment. Once the claimant had raised an objection to the short notice, Brian Stoker immediately agreed to rearrange the hearing giving the claimant further notice. The Tribunal is satisfied that there was no detriment to the claimant in this regard. The hearing went ahead and Brian Stoker found that the claimant was not guilty of misconduct and imposed no sanction.

35. The Tribunal is satisfied that the claimant was subject to a detriment with regard to the initiation of disciplinary proceedings. The Tribunal has considered the question of causation carefully. It is central to this case. The Tribunal is satisfied that the

reason for the detriment was not on the ground that the claimant had made a protected disclosure. This is also the case in respect of the other alleged detriments which the tribunal has not found to have been made out. The conduct of the meeting in respect of the claimant's grievance was as a result of confusion and misunderstandings in respect of the policy and the law. It was not because of the claimant's protected disclosure.

36. The decision to initiate disciplinary proceedings was taken by Christine Dempster. The reason why this step was taken was not because of the protected disclosure. It was clear that the action was taken as a result of the recommendation in the report provided by the independent HR investigator, Steve Duncan. That recommendation was clear. Steve Duncan stated that the claimant should have challenged the staff at the time if she saw unsafe behaviour. The evidence contained within the report showed that a number of members of staff had made allegations which led Steve Duncan to conclude that the claimant and Lee Simpson did not intervene when they should have done so. This was the reason why the claimant was taken through the disciplinary procedure.

37. The fact that the letter was set out in unfortunate terms referring to gross negligence, gross misconduct and that the only sanction referred to was that of dismissal was extremely unfortunate. Christine Dempster agreed that it was a "gross error". It was a letter sent in similar terms to those sent to the three employees who were subject to the notification to the Local Authority Designated Officer. Christine Dempster was the decision-maker but the letters were sent out by the respondent's HR department and Christine Dempster did not have sight of the letters before they were sent. The contents of the letter to the claimant were unfortunate and probably unreasonable but there was no basis to infer that the reason why the claimant was treated that way was on the ground of making the disclosure.

38. It was submitted, on behalf of the claimant, that there was nothing in the Duncan report that suggested the claimant was guilty of gross misconduct or gross negligence. It was also submitted that there was no suggestion in the report that the claimant was guilty of misconduct involving a child and that there was no credible suggestion that the claimant failed to attend to or carry out the duties of the post. There were allegations in this regard and the clear recommendation of the report was that the issue of witnessing unsafe behaviour and not intervening immediately should be taken to a disciplinary hearing for a formal examination. That was the reason for the action taken in respect of inviting the claimant to a disciplinary hearing.

39. It was submitted by Mr Robinson-Young, on behalf of the claimant, that Lee Simpson was treated in much the same way as the claimant and there was no doubt that he had made protected disclosures in his initial statement and his later interviews. The letter sent to Mr Simpson was in the same terms as the letter sent to the claimant. It was submitted that both the claimant and Mr Simpson suffered a detriment following the protected disclosure. Neither of them had been reported to LADO. It is notable that the three employees (initially four including Amy Dobson) who were reported to LADO were those who were said to have been physically involved in the treatment of child A. The concerns in respect of the claimant and Lee Simpson were included within the statements made to the Duncan investigation. The Tribunal heard that two of these employees had been dismissed, one in respect of

involvement in the physical treatment of child A and the other for breaching the terms of the suspension. The treatment of some of those involved in the incident who had not made, or been thought to have made, protected disclosures was shown to be more severe than that of the claimant.

40. The respondent was, inevitably going to carry out an investigation and consideration of disciplinary action once it had the recommendations in the Duncan report that the staff members identified in each allegation should be invited to a disciplinary meeting to answer the allegations formally. The claimant had to be investigated. The fact that the claimant made a disclosure does not render her immune from disciplinary action in these circumstances.

41. The Tribunal did not find Christine Dempster to be a witness entirely lacking credibility. She was confused at times and her denial of knowledge or involvement in the claimant's grievance appeared at odds with some documents. However, she was extremely clear with regard to her decision to initiate the disciplinary procedure and the Tribunal is satisfied that the respondent has established that the reason why this took place was on the basis of the contents and recommendations of the Duncan report.

42. The letters sent to the employees involved contained standard wording used by the respondent's HR department. It would have been sensible and appropriate for the HR officer to send a letter, in accordance with the views of Steve Duncan, taking into account that it was likely that a lower-level sanction and not dismissal would be considered in the case of the claimant. Also, it would have been appropriate to invite the claimant to an investigatory interview providing her with the right to be accompanied. However, the fact that these steps were not carried out does not show any causal link between the making of a protected disclosure and any detriment.

42. In the circumstances the claim of detriment on the ground that the claimant has made a protected disclosure pursuant to section 47B is not well founded and is dismissed.

Employment Judge Shepherd
Date 7 March 2017

Sent to the parties on:
14 March 2017

For the Tribunal:
P Trewick