Case Number: 3200985/2015

RM

EMPLOYMENT TRIBUNALS

Claimant:	**Ms Alison Hilton**
Respondent:	**Treehouse Nursery School Limited**
Heard at:	**East London Hearing Centre**
On:	**12, 14, 15 & 16 September, 16, 17 & 18 November 2016; and In Chambers on 19 January, 23 February and 6 March 2017**
Before:	**Employment Judge C Hyde**
Members:	**Ms M Long Mr L O'Callaghan**

Representation:

Claimant:	Ms R Omar, Counsel
Respondent:	Mr R Johns, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that

1. **the complaints under the Equality Act 2010 alleging:**

   (a) **race, religion and/or belief and sex direct discrimination;**
   (b) **sex, race and religion and/or belief harassment; and**
   (c) **victimisation**

   were not well founded and were dismissed.

2. **The orders for specific disclosure by the Respondent made on 16 September 2016 and sent to the parties on 28 September 2016 were hereby discharged.**

REASONS

1 Reasons are provided in writing as the above judgment was reserved. They are provided only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why they have won and/or lost. There was considerable evidence presented which it did not consider to be relevant to the issues in this case and therefore findings are not included in these reasons in relation to them. Further the reasons are set out only to the extent that the Tribunal considers it proportionate to do so.

2 All findings of fact were reached on the balance of probabilities.

Preliminaries

3 By a claim which was presented on 25 June 2015 following an early conciliation certificate issued on 27 April 2015 (first contact with ACAS also being on 27 April 2015), the Claimant presented complaints of race discrimination, religion or belief discrimination and sex discrimination to the Tribunal.

4 It was agreed that the hearing would be restricted to the determination of liability only.

Restricted Reporting Order

5 The Respondent applied at the hearing in September 2016 for a restricted reporting order. This was declined.

6 The Tribunal had regard to the potential damage to the Respondent's reputation given the nature of the allegations albeit that they did not involve any allegations of inappropriate conduct towards children or young people. However, the Tribunal having considered the authorities and the law in relation to public hearings considered that there were insufficient grounds for restricting the reporting of this matter. The Tribunal had regard to the need for open justice, and that it should only be restricted in exceptional circumstances.

7 Nonetheless, the Tribunal reminded the parties, and such members of the press as showed an interest in this case, that it was also essential that there should be fair reporting of the case including identifying where matters had been conceded or allegations withdrawn and also stating the outcome in relation to any allegations accurately and fairly. The Tribunal finally took into account that our judgment and reasons as to the outcome of these allegations would be a public document.

Evidence adduced/documents produced

8 The parties agreed a bundle of documents which the Tribunal marked [R1] at the start of the hearing. The documents were in two lever arch files and amounted to approximately 700 pages. Further documents were added to the bundle during the hearing by agreement.

9 The Claimant prepared a list of issues in relation to the grievance at the request of the Tribunal which was marked [C2] and the Respondent prepared a chronology which is marked [R4]. Further, there was a bundle of documents presented by the Respondent in relation to addressing the specific disclosure Order made during the hearing [R5]. As this Judgment has brought the proceedings to an end, the duty to disclose pursuant to our Order, and generally, also comes to an end.

10 Given that the claims alleged discrimination under the Equality Act 2010 ("the 2010 Act"), the initial burden of proof lay on the Claimant. She gave evidence first and her witness statement set out her evidence-in-chief and was marked [C1]. In addition, on her behalf the Tribunal heard evidence from her son, Mr Daniel Hilton and her friend Mr Laurie Taylor (witness statements marked respectively [C3] and [C4]).

11 The Tribunal heard from several witnesses on behalf of the Respondent. These were Ms Nadia Shabbir, Human Resources Adviser; Mr Paul Samouelle, Company Secretary and the proprietor's husband; Mrs Maria Sanchez, the proprietor and manager of the Nursery; Mr Sebastian Kornhauser who dealt with the internal disciplinary and grievance investigations; Ms Mandy Peacock who was the Head of Nursery Operations within the nursery; and Ms Fiona Satiro, Independent Employment Lawyer and HR Consultant who dealt with the grievance appeal which took place in November 2015. All the above witnesses gave evidence-in-chief by way of witness statements which were marked [R2, R3, R6, R7, R8 and R9] respectively.

Application to adduce further witness evidence

12 The Tribunal had to decide an application made on behalf of the Claimant by Ms Omar sometime after 4pm on 18 November 2016 for further witness evidence to be adduced. The Claimant indicated that her first preference would be for the witnesses to give evidence live but she would be content if the Tribunal simply accepted the witness statements which had been produced. At the time that the application was being made, the relevant witnesses were not at the Tribunal in any event.

13 The application was refused. It was also opposed by the Respondent. The Tribunal considered that it was not appropriate to accept this further evidence on grounds of lack of relevance and also failure to have obtained this evidence in good time with reasonable diligence (*Ladd v Marshall*).

14 The Claimant's case was that the first of the witnesses had been in contact during the September sitting on the last day, namely 16 September and that there had been further contact on 17 September. There was no reasonable explanation as to why that evidence was not produced sooner and the Respondent put on notice prior to the resumed hearing in November 2016. The Tribunal also took into account that this was a case in which there had been a number of delays and as set out earlier in this judgment comment had already been made by a previous Judge about the poor preparation. When the Tribunal adjourned in September 2016 detailed directions were made about further preparation and it was emphasised to the parties that it was important that the resumed hearing in November 2016 should be effective. The late production of this further evidence was not consistent with that direction having been taken on board.

15 The statements essentially went to character. To the extent that they purported to give evidence to establish propensity on the part of Mr Samouelle, this was not the case which had been put forward by the Claimant. If Mr Samouelle's activities were well known as the new witnesses sought to establish, then the Claimant would have been in a position to have given this evidence as part of her case. Her case before the appearance of these witness statements in mid-November 2016, was that the action that she complained of came out of the blue. She had not given evidence of a background of inappropriate sexual conduct by Mr Samouelle. These were therefore essentially statements which went to character and therefore it was less likely that they should be adduced belatedly.

16 The Claimant had been legally represented throughout. In the hearing in September 2016 she was represented by Counsel, with her solicitor in attendance also. Thus, either the Claimant or her solicitors had failed to act with reasonable diligence in relation to the additional evidence. It may well have been appropriate for there to have been a preliminary hearing either on the telephone or in person in order to address the issue of admissibility.

17 The history to the Claimant's application was that after the Tribunal declined to make a restricted reporting order there was press coverage of the first sitting in the local paper in September 2016. When the Tribunal resumed on 16 November 2016, the Claimant contended that she had obtained further evidence which she wished to adduce. The application was not committed to writing. She indicated that there had been communication with various members of the public via a Facebook group.

18 In short the Tribunal ordered that the application for the further evidence to be adduced would not be considered until after the Claimant had disclosed to the Respondent the communications on Facebook with the potential witnesses. The Claimant resisted this on several grounds. One of these was that it was privileged communication. The Tribunal rejected that argument on the basis that it was a private group and it did not fall within the definition of communications which are protected by privilege. None of the other objections was of any substance.

19 In the event when disclosure was provided to the Respondent, the Claimant did not provide disclosure of all the Facebook correspondence.

20 This was a further reason for refusing to allow the witness statements to be presented as the Claimant had not provided full disclosure to the Respondent about the circumstances in which these statements came into being.

21 The Tribunal also took into account the potential practical consequences of allowing this further evidence to be adduced. The Tribunal considered that if the witness statements were adduced the Respondent would have been entitled to recall virtually all their witnesses to seek to rebut the new evidence. It did not appear to the Tribunal that that was a proportionate use of its time. One of those witnesses was Ms Shabbir whose evidence had been heard in the September 2016 sitting, before she went on maternity leave. If she were to be recalled, this would in all likelihood have lead to a considerable further delay.

22 Aside from the possible delay and extension of the hearing if the evidence were adduced, the Tribunal did not consider that it was appropriate to admit this evidence in

any event, given it supported a background case which had not previously been put, and no good reason had been put forward for the Claimant having failed to pursue that case.

Closing Submissions

23 Having eventually concluded the evidence on 18 November 2016, the Tribunal made directions in standard form for the exchange of written closing submissions and replies between the respective counsel. These were initially due to be sent to the Tribunal by 12 December 2016; the Tribunal having taken into account representations from the respective counsel as to their availability when setting that date inter partes. In the event the Respondent's submissions were sent to the Tribunal on 12 December 2016 but the Respondent informed the Tribunal subsequently that they had not exchanged these with the Claimant because the Claimant had not been a position to exchange her submissions.

24 The parties had been notified that the Tribunal was due to meet in chambers on 19 and 20 January 2017. By an application dated 23 December 2016, the Claimant's counsel applied for an extension of time to 13 January 2017 to present her written closing submissions. Employment Judge Gilbert in the absence of Employment Judge Hyde granted this extension of time to the date requested. The letter from the Tribunal notifying the parties of the granting of the extension of time was dated 11 January 2017.

25 In the event however the Claimant's counsel did not send her submissions to the Tribunal by 13 January 2017. The Respondent then applied to strike out the Claimant's case and/or for the opportunity to address the Tribunal in person on 19 January 2017 given that they had not yet received the Claimant's submissions. A copy of this application was sent to the Claimant also.

26 Before the Tribunal could determine that application, the Claimant's counsel sent submissions to the Tribunal by email just after 10.00am on 17 January 2017.

27 The Respondent had informed the Tribunal that they had not disclosed their submissions to the Claimant for the reasons set out above in their application in early January 2017 and it was not apparent on the face of the email sent to the Tribunal on 17 January 2017 whether the Claimant had sent a copy of her submissions to the Respondent.

28 By an email dated 18 January 2017 and sent at 22:58 the Respondent's counsel sent to the Tribunal with copies to the Claimant's solicitor and counsel and to Mr Daniel Smith (the Respondent's solicitor) a bundle of documents including a reply to the Claimant's closing submissions, a copy of the Respondent's main submissions and a copy of the chronology which had been presented at the Tribunal hearing.

29 Thus, the highly regrettable position was reached at the commencement of the Tribunal's meeting in chambers on 19 January 2017, whereby the Tribunal had closing written submissions from counsel for the Respondent (presented as directed); from counsel for the Claimant (presented late on 17 January 2017); and from counsel for the Respondent in reply to the Claimant's late closing submission.

30 The Tribunal spent some time considering these documents and deliberating on the issues on 19 January 2017. We then determined that it was appropriate in the circumstances to adjourn part-heard until a date to be notified to the parties in order to allow an opportunity (exceptionally) to the Claimant's representative to present submissions in reply. In reaching this conclusion the Tribunal also took into account that in any event the Tribunal could no longer sit on 20 January 2017 due to other commitments; and the Tribunal had regard to the difficult history set out above in relation to the receipt of closing submissions.

31 The parties were notified accordingly and the meeting in chambers on 20 January 2017 was vacated accordingly. Written submissions in reply from the Claimant were received on 31 January 2017 by email attachment.

32 The Tribunal resumed in order to continue its deliberations in chambers on 23 February 2017 and 6 March 2017. The main closing submissions from the Respondent and submissions in reply were marked [R10] and [R11] respectively. The main submissions from the Claimant and the Claimant's submissions in reply dated 31 January 2017 were marked [C5] and [C6].

The Issues

33 Sadly at the commencement of the hearing the parties' appreciation of the issues was somewhat confused. However, having reviewed and considered with the parties the orders made by Employment Judge Ferris on 14 September 2015 during a Preliminary Hearing, the issues were clarified in the light of those orders.

34 The order of Employment Judge Ferris and reasons set out at pages 56 – 62 of the bundle formed the list of issues in this case. Employment Judge Ferris's order had made it clear (especially at page 61) that this was the effect of the discussion on 14 September 2015 and this was reconfirmed at the outset of this hearing. To that extent therefore the other documents presented at the beginning of this hearing purporting to state a different set of issues and/or any attempts to identify the issues orally at the commencement of the hearing were disregarded. The Claimant had presented a document marked [C1] which inaccurately set out the list of issues in the light of the matters referred to above. No application to amend was made.

35 At the Tribunal's direction however, the Claimant provided further clarification about one of the allegations of victimisation in a document marked [C2].

36 There was further an issue as to whether the claim was brought out of time, the claim having been presented on 25 June 2015.

37 It was apparent that the Tribunal would have to determine which of the two competing accounts of events from the Claimant and from Mr Samouelle it accepted in relation to the two central allegations.

38 The first allegation was that in or about September 2014, Mr Samouelle invited the Claimant to view a pornographic movie with him called "Religious Jewish Girls gone wild" ("the first alleged incident").

39 The Claimant's case was that the above alleged conduct constituted harassment on the grounds of:

(a) sex, the Claimant being female;

(b) religion or belief, the Claimant being Jewish; and

(c) race or racial origin, the Claimant being Jewish.

40 The Claimant also complained that the above conduct constituted direct discrimination on the grounds of sex in that it was alleged that she was subjected to unwanted sexual conduct by way of sexual advances from Mr Samouelle; and on the grounds of religion or belief, or race in that it was less favourable treatment of her on the grounds of her protected characteristic (being Jewish).

41 A further issue which the Tribunal needed to determine and which it was agreed with the parties at the beginning of the hearing in September 2016 was whether in any event the complaint in relation to the first alleged incident was out of time.

42 Employment Judge Ferris ruled that the Claimant could not make a complaint about a subsequent alleged incident of sexual harassment on or about 13 October 2014 ("the second alleged incident") as she would have required an amendment of the claim to do so, and that amendment was not granted.

43 The next set of substantive complaints for the Tribunal to determine were allegations of victimisation under the Equality Act 2010. The Claimant contended that she was subjected to detriments because the Respondent believed that she might do a protected act (in one or other of the circumstances identified in section 27(2) of the Equality Act 2010) and/or because she had actually done protected acts, namely an alleged oral reference to one or other or both of the allegations of harassment at a disciplinary investigatory meeting held by the Respondent on or about 20 October 2014, and at another disciplinary meeting held by the Respondent on or about 12 January 2015.

44 The victimisation detriments complained about by the Claimant were:

44.1 Suspension with full pay on 16 October 2014;

44.2 Continuing with the disciplinary process on and after 16 October 2014 up until the dismissal of disciplinary charges against her on 14 May 2015 (i.e. dragging out the process).

44.3 The refusal (notified to her on or about 14 June 2015) to uphold her grievances about the harassment allegations.

44.4 The failure to consider all her grievances identified in the letter dated 4 March 2015 at the conclusion of that grievance process.

45 The document marked [C2] was the clarification provided by the Claimant to the Tribunal towards the beginning of the September 2016 hearing in relation to the scope of this last victimisation detriment complaint.

46 The Claimant thereby clarified that she was alleging that the Respondent had failed to consider eight of the nine heads of the grievance set out in her email dated 4 March 2015 addressed to the Respondent (p374). The grievances listed were as follows:

46.1 Victimisation

46.2 Entrapment

46.3 Falsifying evidence and giving false evidence orally

46.4 Damage to health

46.5 Unreasonable length of time to deal with a disciplinary action

46.6 Anti-Semitism

46.7 Nazia HR, not taking an impartial view of evidence

46.8 Defamation of character

46.9 Invasion of private property.

47 In document [C2] all of the grievances apart from “Anti-Semitism” were listed as not having been dealt with.

Findings of Fact and Conclusions

48 Treehouse Nursery School Ltd was opened in 1991 and by the time of the matters that this Tribunal was concerned with, namely around 2014, it employed approximately 110 employees. At that point it was based at two nearby sites, one of which the Claimant worked at.

49 The Claimant began her work at the nursery on 18 May 2009. She apparently worked for the Respondent through to 16 October 2014 without any incident of any significance. She was employed as a Senior Nursery Practitioner. Her job was full-time (40 hours a week Monday to Friday) and she reported to the Senior Managers and the Deputy Manager. She is a woman and is an adherent of the Jewish faith. She is thus Jewish by race and religion.

50 She had about 20 years’ experience in the field of education as a teacher. This evidence was given by her friend Mr Taylor who had known her for that length of time. She may indeed have had experience as a teacher for even longer.

51 The Respondent employed about 85 women (p45).

52 The Claimant provided answers to a request for further particulars of her claim pursuant to an order of the Tribunal made on 2 September 2015. She had not up to that point set out the details of the incidents relied upon in sufficient detail. This appeared at pp.35-41. Thereafter, the Respondent provided an amended response to the further and better particulars (pp.42-48).

53 The Claimant then alleged that on dates which she remained unable to specify at all material times, she was subjected to episodes of sexual harassment. It was her case that she first reported the first incident to the Respondent in an email to the Respondent dated 4 March 2015 (p.376). She further contended that the second allegation which had occurred prior to her suspension from work on 16 October 2014, was first brought to the attention of the Respondent in writing by the Claimant providing to Ms Shabbir a written account of the incident during the first disciplinary meeting on 12 January 2015. The Respondent disputed that this documentation had been handed over to them. The notification of the details of the first incident on 4 March 2015 were agreed.

54 It was agreed however that the Claimant made a written complaint about the second incident to the Respondent during the disciplinary and grievance hearings conducted by Mr Sebastian Kornhauser, a consultant who was instructed by the Respondent to hold those hearings. As the Claimant had not previously raised the allegation about the second incident with the Respondent, Mr Kornhauser was not expecting to deal with it but he discussed the issue with the Claimant, the matter having been raised for the first time at that meeting (pp.412-459).

55 The Respondent's case was that they were completely unaware of the alleged incidents until the dates in March and May 2015 referred to above. Further the Respondent denied in any event that the incidents had taken place.

56 Against that background in relation to the allegations, it was not in dispute that the Claimant was alleged to have a mobile phone in her possession at work on 16 October 2014, and that this was said to be in breach of the Respondent's policy. As a result she was suspended by Mandy Peacock, Head of Nursery Operations and Ms Shabbir, HR Adviser for the Respondent.

57 The Claimant subsequently contended that this suspension and indeed the disciplinary offence was part of a "set up" arising from the sexual harassment incidents.

58 By order of Employment Judge Ferris Ms Hilton was unable to rely on the second incident as a substantive complaint because leave was not granted for this matter to be included in her claim. However, inevitably the Tribunal had to consider the allegation in relation to the second incident because it was relevant to the main allegations about the first incident and to the victimisation allegation.

59 The way in which the case was put by the Claimant led her to allege during the hearing that Mr Samouelle had somehow brought Ms Shabbir and possibly other members of staff into a conspiracy to set the Claimant up.

60 The Tribunal found that the immediate cause of the action under the disciplinary procedure by the Respondent on 16 October 2014 was the possession of the mobile phone by the Claimant. She did not initially dispute this; indeed she did not dispute at any point that she had her mobile phone in a part of the premises in which she was not allowed to use the phone, namely hanging in her coat in a corridor outside some of the rooms in which the children were cared for.

61 It later emerged as a result of further disclosure which was provided to her by the Respondent sometime in the spring of 2015, that after her telephone was discovered by two colleagues in that location, they took "staged" photographs of the telephone positioned half out of the Claimant's jacket or coat pocket. We were satisfied that this was done as a result of a genuine if misplaced belief that it was necessary to make such a record of the phone. The Claimant was unaware at the time that this staging had been done or that these photographs had been taken.

62 In the event these photographs were never used as part of the disciplinary action against the Claimant. The Respondent's position was that in any event they were unnecessary because on the day of the discovery of the phone, the Claimant was taken with her manager to the coat to check whether she had a phone there and she was therefore present when the manager removed the phone from her pocket on 16 October 2014. Nor did she dispute on 16 October 2014 or at any stage until after she had become aware of the photographs that the phone which was in her coat pocket was hers.

63 The Respondent accepted that two members of staff had set up a photograph of the phone apparently to create documentary proof of its connection with the Claimant's jacket. A considerable amount of cross-examination and submissions by the Claimant and indeed other parts of the way in which the case was put by her relied on this aspect as establishing a malevolent motive on the part of the Respondent. However, the Tribunal did not accept that this was the case given that the Claimant accepted contemporaneously that she had a phone with her in the coat in the location where it was found on 16 October 2014.

64 The next relevant point in relation to the phone was that the Claimant was in due course absolved of a breach of the Respondent's policies by having the phone in the location that she did. This was the outcome of Mr Kornhauser's disciplinary hearing in May 2015 (pp.461-467).

65 The Tribunal considered that there was ample evidence also that at the time the Claimant was confronted about having the phone in that part of the premises on 16 October 2014, both the managers involved and the Claimant considered it a very serious matter. As recorded in her own notes of the meeting of 16 October 2014 (pp.180-181) her response to having the mobile phone was extremely apologetic and the words used by her in describing the incident suggest that she was quite mortified at having had the mobile phone with her there. Thus, for example she wrote:

> "*I truly apologise for leaving my mobile phone in my zipped up, top left hand, deep jacket pocket which hanged in corridor on a centre coat peg between 'Aladdin' and 'clown's' rooms. Hundred percent forgotten due to human error.*
>
> *At approximately 6.25pm on Thursday 16 October, 2014, I was escorted by Mandy*

to collect my phone. Taking my phone from my zipped jacket pocket, I showed Mandy that my phone is switched off. In the back office I apologised profusely, having no knowledge that my phone was actually put securely away in my jacket's deep secure, zipped pocket. When I was asked to show them (Maria, Mandy and Nazia) my photos on my phone, I immediately responded with a detailed description of my families photos, a total of five photos. I continued to switch on my phone, willingly, and proceeded to show said photographs, in the amount of five, with precise accuracy of amount of pictures and details as previously described moments earlier.

The corridor in which my jacket is kept, was entirely quiet. I indicated to Mandy to observe, although she turned her head as if showing no concern or interest, I indicated clearly that it is a struggle to unzip my jacket pocket because of the angle, I held my jacket firmly to unzip the top pocket, as the pocket is quite long and deep. <u>That is where my phone sat, deep and secure within the jacket pocket</u>. (emphasis added)

I can guarantee that this has never happened before and would, never, ever, happen again. My only defence is that my concentration was on my family matters and because of this, my phone never crossed my mind."

66 This was an extract from the note which the Claimant said she had prepared for the disciplinary meeting on 12 January 2015 with Ms Shabbir. The Claimant then proceeded to note that as of 31 October 2014, (presumably the date on which she wrote this part of the text), she had received absolutely nothing from Human Resources by way of a note of the meeting on 16 October 2014.

67 It then appeared from the content that the Claimant subsequently added to her own note of the meeting of 16 October 2014 by the text which appeared on page 181. She referred to having received some written statements from Ms Zuneera Khan and Ms Shirley Dornelly which was sent to her on 17 December 2014. She referred to the fact that the statements revealed that these two women had taken photographs of her possessions giving an inaccurate account of the phone. This was where the issue of the "posing" of the phone in her jacket was first raised. The Claimant complained about it as an invasion of her privacy. She wanted the Respondent to ensure that images of her property had been removed from any cameras or phone cameras. Indeed, she recorded that she had had informal discussions with the Police regarding this incident and that she would raise a formal complaint if she felt any further threats to her safety.

68 The Tribunal considered that it was extremely noteworthy that there was no reference whatsoever in that account to any earlier incidents having taken place between herself and Mr Samouelle. The Tribunal also considered that the reference to potential action that the Claimant would take in relation to what she saw as a violation or invasion of her privacy in terms of taking photographs of her possessions was in stark contrast to the complete lack of any action taken in relation to the alleged sexual harassment.

69 Further, the Tribunal considered that the language used by the Claimant above indicated she also understood that the possession of the phone in the part of the premises in which she had it, raised serious issues in relation to safeguarding.

70 The notes that the Respondent took of the exchange between the Claimant and Ms Peacock on 16 October 2014 (p.182) also record that the Claimant agreed that she had a phone and that the Claimant was asked to come to the office and informed that Ms Peacock had evidence to suggest that the Claimant had her mobile phone in her jacket pocket upstairs outside the room where the children had access to it.

71 Further, Ms Peacock asked the Claimant to go upstairs and get the phone; and that Ms Peacock would like to see if she had any photos of children on her phone following the company's safeguarding policy. As her notes record, the Claimant went with Ms Peacock to retrieve the phone and the Claimant readily showed Ms Peacock the photo gallery in the phone; and as a result, Ms Peacock noted that there were no photographs of Treehouse Nursery children on the Claimant's phone. Among other things the notes record that Ms Peacock stated to the Claimant "this is a serious safeguarding matter" and the notes record that the Claimant responded "of course" and that she also considered this to be serious.

72 Further when the Claimant was then suspended she was told that this was because it was a safeguarding issue and that she would not be allowed to have any contact with any member of staff during the suspension.

73 The Tribunal therefore considered in all the circumstances that there was ample evidence to support the Respondent's case that the reason for suspending the Claimant was because they believed that the location of her mobile phone in the corridor outside two of the rooms in which the children were being looked after, raised sufficiently serious safeguarding issues to justify the suspension and the later disciplinary action. Their view of the grounds for action and the seriousness of the Claimant's actions were corroborated by the Claimant's own admissions as set out above.

74 The Tribunal disciplinary charge which the Claimant faced in relation to the phone and which Mr Kornhauser found not to be proven in due course is set out below.

75 An investigatory meeting was held with the Claimant on 20 October 2014 at which Ms Peacock and Ms Khan were present and the meeting was tape recorded. The Claimant produced her own notes of the meeting (pp.183-186). The notes taken by the Respondent were at pp.187-198. There was no difference in substance between the two sets of notes and the Respondent's were a transcription of the recording that was made. The recording by the Respondent was made with the Claimant's knowledge.

76 The Claimant was asked about some further conduct on her part which the Respondent considered required further investigation. That further conduct was unrelated to the possession of the phone. Some of these matters were not pursued any further but one or two were persisted with through to the disciplinary hearing.

77 The Claimant relied on the fact that some of these matters were not pursued and also contended that they were of such a minor nature that they indicated that the Respondent was looking for things to charge the Claimant with. The Tribunal did not see that that was an argument of any substance. On any view the mobile phone allegation remained the substantial one and the Respondent pursued that and had no reason to drop that through to disciplinary action.

78 Further, as already stated in relation to the matters which were the subject of investigation, the Respondent's witnesses gave a satisfactory explanation to the Tribunal as to why they considered it important to discuss these matters with the Claimant. One matter, for example, the spraying of tables raised a question about over use of chemicals in the rooms where the children were present. In the event the Respondent proceeded only in relation to two of the matters, namely destroying pages out of a notebook which was the nursery's property and also in relation to the Claimant walking around the room tapping the children on their heads and having no conversation with them.

79 The Tribunal considered that these were matters which the Respondent was entitled to treat seriously because they could affect the welfare of the children. The issue of the notebook was also valid because the Respondent was required to keep certain notes and records. There was no dispute that the Claimant had done these acts because they were on CCTV which recorded the activities in the rooms routinely. It was also routine for the designated managers to review the CCTV footage and to take appropriate action in relation to any matters of relevance which arose from them.

80 The Claimant remained on suspension and on 24 October 2014 she was invited by Ms Shabbir to attend a further investigation meeting by telephone on 27 October 2014. That meeting went ahead and once again was recorded by the Respondent (pp.201-203) and in due course a transcript was produced which was before the Tribunal. The Claimant also took her own notes (p.200). The managers who were present were Ms Khan (Under 2s Co-ordinator) and Ms Peacock.

81 In relation to taking pages from the notebook, the Respondent had been made aware previously that the notebook of one of the Claimant's colleagues Shirley Dornelly, had been taken. The Claimant indicated during the interview that the notebook that she was seen with on the CCTV was her own.

82 Also during the interview on 27 October 2014, Ms Peacock mentioned to the Claimant that Ms Sanchez and Ms Shabbir would be "on holiday" until Monday. This was in the context of indicating when the notes would be typed up. The Claimant questioned whether they were on holiday together and when Ms Peacock said yes, she responded "wow". Also towards the end of that meeting, Ms Peacock told the Claimant that the Respondent had been in touch with their solicitors as well to make sure that every step they took was the right step.

83 This also tended to suggest to the Tribunal that the Respondent was dealing with the matters that they had before them at face value and that they sought to conduct the proceedings in a proper manner.

84 In the event, the Claimant was sent a suspension letter dated 28 October 2014. She indicated that she did not receive it. However, the Respondent was not aware of this at the time, and had no reason to suspect that it had gone astray.

85 There was evidence that the Claimant produced evidence of having made a number of telephone calls to the Respondent between the date of her suspension and the meeting on 12 January 2015. The Tribunal accepted as accurate her telephone records which indicated attempted phone calls, with a couple of actual but very brief calls. These records were therefore consistent with the Claimant's case that she had either attempted

to call to speak to Ms Shabbir or had not been able to get through to her. In relation to these telephone calls also a good deal of questioning was directed at the Respondent's witnesses and points were made during the evidence by and on behalf of the Claimant to the effect that this was evidence that the Claimant had reported the alleged sexual harassment to Ms Shabbir. However, it appeared to the Tribunal that they did not establish this. The Claimant was suspended and would have been anxious about the consequences of that suspension. That was clear not only from her own evidence but from the notes that she produced subsequently which have been referred to above. The Tribunal considered that the most likely explanation for these telephone calls was that they were efforts to clarify the position or seek to find out if there was any progress in relation to her suspension and any possible disciplinary action.

86 The Tribunal considered that it was less likely that these telephone calls were motivated by a desire to communicate information about the alleged incidents. The Tribunal has already noted that the Claimant's own notes in which she wrote up the meetings with the Respondent in October and November 2014 and indeed the communication with her in December 2014 when she received the notes of the 16 October and other meetings (p.205) did not make any reference to the alleged incidents between herself and Mr Samouelle. Indeed, the one telephone call of any substance on 28 November 2014 was noted by her at (p.205). She said that she spoke to Aston Bird, the niece of Mr Samouelle who was a receptionist. During a three minute conversation Ms Bird told her that Ms Shabbir was on annual leave and would be back to work on 2 December 2014. The Claimant noted that she made the following points:

> *"I asked, please, please, tell Nazir three options I need answered as I've heard absolutely nothing from Nazir although I've been told that I should have been contacted by now. Aston is very good and wrote down my three concerns, as follows:*
>
> *"1/ Nazir suspended on October 16th at 6.25pm at that time she told me ITS on full pay. I'll give you a copy of my notes (Nazir looks down at her notes on her lap). In fact, Nazir hasn't written, emailed or given any information regarding the suspension.*
>
> *2/ Please ensure that they haven't forgotten to pay. Again, I've been told nothing.*
>
> *3/ The other option is, what shift would they like me to come in on Monday?*
>
> *Nazir never returned my call."*

87 The Tribunal considered once again that the Claimant's own notes confirmed that her concern was predominantly and understandably about the suspension and also about pay while suspended. Also it was noteworthy that there was absolutely no reference made to either of the alleged sexual harassment incidents.

88 On the basis of this note the Tribunal was content to accept that whilst Ms Shabbir had made arrangements for the letter of suspension to be sent to the Claimant, she did not receive it.

89 Finally the note at p.205 about the telephone conversation between the Claimant and Aston Bird on 28 November 2014 had a further entry at the bottom and that was about the fact that on Wednesday 17 December 2014, the Claimant received the notes of the meetings as from 16 October 2014. She also indicated that she would be attending a further meeting to discuss the suspension at 11am on 23 December 2014. This was a reference to the letter sent to the Claimant dated 16 December 2014 (p.211) inviting her to a disciplinary meeting on 23 December 2014 and setting out the allegations as follows:

89.1 On 16 October 2014, you were seen to have your mobile phone in your jacket pocket hanging outside the room which is in breach of the company's code of conduct.

89.2 On 14 October 2014, you destroyed pages out of a notebook which is the property of the nursery.

89.3 On 14 October 2014, you walked around the room tapping children on their head and having no conversation with them which is in breach of the company's code of conduct and safeguarding policy in addition to a breach of the safeguarding and welfare requirements of the early years foundation stage curriculum.

The Respondent's letter continued that the company considered that these allegations were potential acts of gross misconduct and that if she was found to have committed any acts of gross misconduct she may be dismissed without notice or pay in lieu of notice.

90 The letter enclosed the supporting evidence in relation to the allegations, namely the notes of the investigation meetings with the Claimant on 20 and 27 October 2014; CCTV recording dated 14 October 2014; suspension meeting notes with the Claimant on 16 October 2014; witness statement from Shirley Dornelly dated 22 November 2014; witness statement from Zuneera Khan dated 21 October 2014; minutes from investigation meeting with Shirley Dornelly dated 6 November 2014; company's mobile phone and camera policy; company's safeguarding policy; company's disciplinary procedures; and company's code of conduct.

91 The Claimant produced a set of notes entitled "additional notes" for the Tribunal hearing which she contended she had handed in to the meeting on 12 January 2015 which was the eventual date of the disciplinary hearing. The notes were not dated (p.206) but this was the document in which the Claimant described the second alleged sexual harassment incident only. She made no reference whatsoever to the first alleged sexual harassment incident which it was always her case had happened a couple of weeks earlier. She also in her note indicated that she had wanted to discuss this matter with HR and that she would have preferred to have dealt with it at the time but that each time she called the Respondent she was informed that she would be called back but this had not happened. She also included in the note the statement "as a result of this incident and the tampering with my personal possessions (coat and phones) I no longer feel safe on nursery grounds".

92 The Tribunal considered that this was a change of position from the earlier note cited above in which the Claimant said that she was calling the Respondent to ascertain among other matters whether she could return to duty. The Tribunal considered that it

was significant that the only thing that appeared to have changed in the intervening period was the invitation by the Respondent to the Claimant to a disciplinary hearing.

93 In the same note (p.206) which was undated the Claimant however referred to the policies and procedures regarding mobile phones and her contention that this should have been updated and as this had not been done it would be impossible to breach an agreement that did not exist at the time.

94 The Tribunal did not consider that the Claimant gave any adequate explanation for the failure to mention or describe the first alleged incident also at this time.

95 It was not in dispute that there were lockers provided in which staff were expected to keep their mobile phones. The Claimant's case during the internal proceedings and subsequently was that she had misplaced her locker key and had reported this matter to the Respondent but they had failed to provide her with an alternative means of securing her personal possessions.

96 Also to the extent that it was said by the Claimant to be sinister that the Respondent reviewed the CCTV footage for 16 October 2014, this was explicable by the fact that Ms Dornelly had lost her notebook and it was a book in which she recorded minutes of her meetings with the nursery's Operations Director Ms Peacock and therefore she considered that it was appropriate to look at the CCTV to see if this gave her any clue as to where it might be. It was while viewing the CCTV that she noticed that the Claimant did not have a bag on her and then also she noted that the Claimant did not ever go into the staff room where the lockers were kept and that made her wonder where the Claimant left her phone. This led to Ms Khan and Ms Peacock going upstairs and finding her jacket hanging outside the Clown's and Aladdin rooms. This was where the Claimant also was taken to when she went to check the phone in her coat in the company of Ms Peacock.

97 As to the disciplinary charge in relation to the mobile phone, the relevant section of the code of conduct which was contained in the employee handbook at internal page 30 (p.95 of the bundle) provided in relation to personal mobile phones:

> "You must switch off your personal mobile phone while at work. Emergency calls may be taken for you on the nursery school phone at your manager's discretion. You must keep your mobile phone in the lockers provided during working hours. You may use your mobile phone in the locker room on your breaks provided that you do not disturb or disrupt your colleagues. Under no circumstances are you permitted to use your mobile phone to take pictures of any person or child associated with the nursery school.
>
> Should an employee fail to follow this policy this may result in disciplinary action being taken."

98 The Tribunal noted that this was the provision referred to as part of the disciplinary letter inviting the Claimant to a disciplinary hearing. In due course however when Mr Kornhauser dealt with the case he appears to have relied on and taken into account the other documentation which was provided to the Claimant about the use of mobile phones. One of these was the policy document headed "The use of mobile phones and

other technology". This stated:

> "In support of our safeguarding procedures, Treehouse Nursery School does not allow the use of personal mobile phones, iPads or any other form of technical equipment on the Nursery premises. We believe our staff should be completely attentive during their hours of working, to ensure all children in the nursery receive good quality care and education. <u>Therefore, all staff, students and agency staff must ensure that mobile phones are stored in your locker provided by the nursery</u>, in a situation where you do not hold a locker you will need to place it away from children after seeking your manager's authorisation. Personal mobile phones are not to be used during working hours and can only be used during break times and away from the children and off the nursery site. Staff must turn off their mobile phones whilst at work. Staff are not permitted to take photographs or recordings of a child on their own devices and only use those provided by the nursery.
>
> If Treehouse Nursery School staff are seen using mobile phones on the nursery premises, the company will take disciplinary action against the employee which may result in staff being dismissed."

99 Mr Kornhauser and to a certain extent the Claimant, relied on these provisions to support the contention that it was the use of the mobile phones which could lead to serious disciplinary action as opposed to the keeping of the mobile phone in an inappropriate location.

100 The Respondent also had a Cameras and Recording Devices policy. It is not necessary to refer to that in this case (p.139).

101 Mr Kornhauser rejected the contention that the Claimant was seen to have her mobile phone in her jacket pocket hanging outside the room on 16 October 2014 as a breach of the company's code of conduct. He based his decision on the fact that he did not consider that the photographs conclusively proved that the mobile phone belonged to Alison Hilton. The Tribunal considered that in addressing the issue this way he fell into error. The Tribunal considered that there was ample evidence before him as set out in the extracts of the minutes kept by the Respondent and the notes that the Claimant herself had used at the time which confirmed that she had a mobile phone in her coat or jacket, albeit it may not have been the telephone that was depicted in the photographs.

102 Further, it appeared to the Tribunal that Mr Kornhauser applied the wrong standard of proof when he concluded "nor have the company established beyond reasonable doubt that the telephone was the property of Ms Alison Hilton". In civil proceedings, including internal employment disciplinary proceedings, the burden on the Respondent to establish anything is no higher than the balance of probabilities. He also noted that Ms Hilton had "not indicated that the blue mobile telephone in question was (or still is) her property". He concluded however in relation to this allegation that he rejected the allegation on the ground that there was no evidence to show that the phone was in use.

103 The Tribunal did not consider that the Respondent had ever asserted that the telephone was in use. As set out above, the Respondent satisfied itself in the presence of the Claimant that no photographs had been taken of the children at the nursery.

Thereafter it was clear that they still considered that there were serious issues in relation to the Claimant leaving the phone where she did. This is confirmed also by the extracts set out above of the Respondent's policy as to the way in which a mobile phone should be kept on the premises i.e. in the lockers and away from the rooms used by the children. He also relied on the extract from the company's handbook at page 30 as set out above. He did not however refer to the other extracts of the company handbook and the other policy documents which this Tribunal has referred to above which made it clear that there were general safeguarding concerns about a member of staff having a mobile phone other than in the locker. The Tribunal considered that the Claimant's contemporaneous note about the discussion with her by Ms Peacock on 16 October 2014 made it absolutely clear that she owned the phone that was produced and that she was admitting to the Respondent that she had a phone on the premises not kept in a locker.

104 The Tribunal also noted as Mr Kornhauser did, that the Claimant was somewhat evasive about her case in relation to accepting that she had a phone on the premises on 16 October 2014 in her coat outside the Clown's and Aladdin rooms. Her intention appeared to be to obfuscate matters by concentrating on the issue of the photographs with the posed phone and coat. Indeed, a good deal of time was taken up on the Claimant's part wishing to clarify exactly what, if any, disciplinary action was taken against the two members of staff who had posed the phone for the photograph.

105 The original disciplinary meeting which was scheduled for 23 December 2014 was postponed at the Claimant's request which she set out in an email dated 22 December 2014 (pp.213 and 215). The Respondent agreed to the postponement and Ms Shabbir sent a further invitation letter to the Claimant by email on 24 December 2014 setting the hearing date for 12 January 2015. At this point Ms Shabbir was due to conduct the disciplinary hearing herself.

106 Once again the Tribunal noted that there was no reference in those emails which were exchanged between the Claimant and Ms Shabbir to any issue relating to the alleged sexual harassment incidents. Indeed, by an email sent by the Claimant from the email address of "Alex Taylor" on 5 January 2015 the Claimant told Ms Shabbir that she had had the benefit of legal advice and before the meeting she would be grateful for clarification of the basis on which the Respondent had taken disciplinary steps against her "*in circumstances where I have never been issued with, or signed, a written statement of particulars of employment outlining any such disciplinary procedures. You will, no doubt, be aware that the above is in serious breach of the Employment Rights Act 1996 (most notably s.3).*" She then indicated that she would be grateful for a response no later than by the close of business on 7 January 2015 so that she could prepare for any meeting.

107 Once again and especially given that the Claimant was indicating that she had obtained legal advice, if the incidents alleged had occurred, it was surprising that there was absolutely no reference to either of them.

108 Before the meeting on 12 January there was further email correspondence between the Claimant and the Respondent in which for example the Claimant sought a copy of the employee handbook "that was in existence at the time of the alleged offence on October 16th 2014". She also sought other documents. These included a copy of her contract of employment.

109 Ms Shabbir, among other things, sent highlighted clauses of the policy and procedure documents referred to. In particular, she referred to page 30 of the employee handbook as being relevant to the allegations the Claimant was facing. There were approximately half a dozen emails exchanged between 5 and 9 January 2015 between the Claimant and Ms Shabbir about matters such as documentation and other preparation for the disciplinary hearing.

110 The meeting took place on 12 January 2015 as anticipated. Ms Shabbir chaired it and was supported by Ms Bird, Recruitment Assistant/Receptionist. The Claimant was present and was accompanied by her friend Mr Laurie Taylor. He described himself as a business man. As before, the meeting was tape recorded and the Tribunal had the benefit of the transcript of the meeting during the Tribunal hearing.

111 The transcript confirmed that there was no reference during the meeting to either of the alleged incidents of sexual harassment. The Claimant's case was that she handed over the note referred to above as "additional notes" as part of a set of papers which she gave to Ms Shabbir at the meeting. The Respondent disputed this and the Tribunal found that it had not happened.

112 Immediately after the meeting the Claimant sent an email to the Respondent from Mr Taylor's email address on 12 January 2015 at 2.55pm. She commenced the email by thanking Ms Shabbir for allowing Mr Taylor to speak on her behalf at the meeting. She then addressed the issue of the telephone and the photograph of the telephone. Among other matters she stated "the picture is not dated or timed and therefore cannot be admitted into evidence". She again put forward the propositions that in general terms evidence had been tampered with; that the Respondent should take the blame for the Claimant not having a locker key; and also that she was taking legal advice as to whether she could take action in the courts against Treehouse and the two members of staff involved for invasion of privacy and theft. This email was at page 254. She stated that the picture was of another coat and phone altogether.

113 Once again, the Tribunal noted that even if it were the case that the photographs depicted a phone that did not belong to the Claimant, on 16 October 2014 the Claimant had gone to a coat hanging outside the Clown and Aladdin rooms and had removed from that coat a phone which she insisted would only have pictures of family members and which in the event she showed to Ms Peacock as having only such photographs. The Tribunal considered that that was conclusive evidence that she had her telephone outside the Clown and Aladdin rooms on 16 October 2014 in her jacket. The fact that two members of staff had tried to take a photograph and posed the phone or a phone was immaterial in the light of the other circumstances.

114 Further she continued in the email that "*the accusations of the phone and the notepad are made by the same person* [a reference to a work colleague]. *The phone accusation is blatantly a contrived set up and their statements are at best unsafe. Therefore the accusations regarding the notepad can also be taken with the same mistrust*".

115 The Tribunal noted once again that whilst the Claimant was putting forward the prospects of legal action in relation to theft and invasion of privacy and was alleging a set up there was absolutely no reference in this email to the sexual harassment allegations

and the theory subsequently expounded at the Tribunal hearing that it was Mr Samouelle who lay behind the setting up of the photographs of the phone.

116 The Tribunal considered that the Claimant failed totally to establish that the circumstances of her having her phone on the premises between the two children's rooms was a matter which was attributable in any way to Mr Samouelle. The Tribunal struggled to understand how he could have known that she would have her phone on her on that date. Given the overwhelming evidence referred to above that she did indeed have her phone there, unless she suggested that Mr Samouelle had somehow instructed her to bring it to the office which she did not, then the Tribunal considered that her theory was clearly not credible.

117 In this context, it was also noteworthy that in the Claimant's original account in her own notes, she described the reason why she took a phone to work and the reason she gave was completely unrelated to Mr Samouelle.

118 In the emails exchanged between 5 and 9 January 2015 in the run up to the disciplinary meeting, the Claimant apparently with the help of Mr Taylor asked Ms Shabbir for clarification of the reason for the disciplinary process and disputed having received a written statement of particulars of employment. Ms Shabbir then sent a copy of the contract of employment to the Claimant then the Claimant emailed Ms Shabbir asking for a copy of the employee handbook. The Claimant then sent an email drafted by Mr Taylor to Ms Shabbir querying omitted pages and attachments. The Claimant then sent a further email discussing in detail the reason for the suspension and the phone incidents.

119 On the balance of probabilities, the omission by the Claimant from this correspondence of any reference to the sexual harassment allegations was also inconsistent with the incidents having taken place.

120 In relation to the notes of the second alleged incident which the Claimant alleged in the Tribunal hearing that she handed to Ms Shabbir during the disciplinary hearing on 12 January 2015, the Tribunal contrasted the lack of follow-up about this alleged disclosure from the Claimant to the Respondent and contrasted it with the email already referred to above which was sent by the Claimant to the Respondent shortly after the meeting on 12 January 2015 raising a number of matters relating to mobile phone allegation against the Claimant.

121 The Tribunal also contrasted the Respondent's response to being notified of the first sexual harassment incident which was contained in an email sent on 4 March 2015. There was no dispute that they responded extremely promptly, writing to the Claimant on 6 March 2015 informing her that outside investigators would deal with the grievance.

122 Because of the allegations that the Claimant made during the disciplinary hearing and in the email referred to above the Respondent continued the investigation by conducting interviews with various members of staff. These took place between 14 January and 5 February 2015.

123 On 5 February 2015, the Respondent wrote to the Claimant inviting her to attend a reconvened disciplinary hearing on 17 February 2015. On 10 February 2015, the

Claimant sent an email to Ms Shabbir asking for a transcript of the earlier meeting and to postpone the forthcoming meeting (p.317). She then wrote again on 13 February asking for a further postponement of the reconvened meeting (p.320). The request by email dated 10 February 2015 referred to an appointment with her GP on 17 February. The second request was sent because the Claimant had not yet heard back from Ms Shabbir about the request to postpone although Ms Shabbir had been in contact about the transcript of the earlier meeting. In the event Ms Shabbir sent a letter dated 13 February 2015 to the Claimant rescheduling the meeting to 18 February 2015 instead of 17 February 2015. This meeting was then postponed following a request by the Claimant on the basis that Mr Taylor would not be available to accompany her between 18 and 25 February 2015. Ms Shabbir readily agreed to the postponement and notified the Claimant of this by attachment to an email dated 19 February 2015.

124 Once again, the Tribunal noted that in this email correspondence (p.322a) there was no hint of any additional matter such as the issues of the sexual harassment incidents averted to in any way by the Claimant. Indeed, she referred to a difficulty in getting through to Ms Shabbir on 17 February 2015 because the switchboard was busy but sent an email from her iPhone to Ms Shabbir to seek confirmation about the receipt of her last email. It was against this background that the Tribunal rejected the Claimant's contentions that one of the reasons why she had not informed the Respondent sooner about the alleged incidents was because of difficulty in contacting the Respondent to inform them in the time after they allegedly occurred sometime in very late September to 16 October 2014. There was no practical obstacle to the Claimant writing a letter or sending an email to Ms Shabbir.

125 Further, the Tribunal noted that the Respondent did not quibble about the Claimant's request to be accompanied by Mr Taylor who was neither a workplace colleague nor a trade union representative. This was noted in the letter to the Claimant dated 19 February 2015 (p.326). Ms Shabbir confirmed that the Claimant could be accompanied by Mr Taylor before the Claimant sent the email to Ms Shabbir dated 22 February 2015 indicating that her GP had recommended that she should not attend alone. The Tribunal considers that this approach to the disciplinary matters was indicative of an employer who took their role seriously and sought to maintain a fair process.

126 There was further correspondence between the Claimant and Ms Shabbir. And in the event a further date of 27 February was once again postponed to 3 March 2015. Once again in the correspondence the Tribunal saw absolutely no indication from the Respondent of any expressions of frustration or irritation which one sometimes sees from an employer at the need to reschedule the meetings. This Respondent simply did their best at the time to accommodate dates that the Claimant and her representative or her companion could make.

127 The penultimate paragraph of the letter inviting the Claimant to the rescheduled disciplinary meeting dated 27 February 2015 (p.337) informed the Claimant that at the reconvened hearing she could explain any questions or issues that she wished to raise in relation to Shirley, Zuneera and Mandy's actions and that Ms Shabbir would consider any questions or issues that she may have and would adjourn the hearing for these to be investigated if necessary.

128 The second disciplinary meeting took place on 3 March 2015 and once again it

was tape recorded and the Claimant was accompanied by Mr Taylor. The transcript of the meeting was 25 pages long. The Claimant made no reference whatsoever to either of the alleged sexual harassment incidents during either half of this meeting.

129 All the further enquiries the Respondent conducted were tape recorded and the transcripts of these meetings were also available for the Tribunal. After the meeting with the Claimant, Ms Shabbir had meetings with Ms Peacock and Shirley Dornelly. These were exploring the issues the Claimant had raised about the coat and the posed photograph. She also had a meeting with Zuneera Khan. She then had a further meeting with the Claimant which started just after midday and the transcript of that part of the meeting was some six pages long. Considerable detail was gone into about the phone and the coat and whether it was zipped or unzipped etc. At the conclusion of the meeting Ms Shabbir indicated that she would send the notes of the meetings to the Claimant.

130 In the wake of that meeting by email (pp374 - 376) sent at 00:36 on 4 March 2015 to another recipient and copied to the Claimant, which she then forwarded to Ms Shabbir, Mr Taylor, Mr Hilton and Mr Ivan Hilton on 4 March 2015 at 11am, the Claimant lodged a grievance. In that document, as well as repeating a number of the points had already been made about the lack of credibility of Shirley and Zuneera and about the photographs and that there was entrapment and falsifying of evidence, as set out above, she also for the first time as point six of nine stated:

"*Sexual harassment …*

I was invited by Paul to view a pornographic film entitled 'Religious Jewish Girls Gone Wild' on the nursery computer in the office. I found this to be totally inappropriate and of an Anti-Semitic nature. When asked what Maria would say? Paul replied "she knows I watch them"."

131 There was no dispute that this was meant to be a reference to the first alleged incident of sexual harassment although there was an issue as set out below about the information given to the Respondent by the Claimant about the date on which this incident occurred so that the Respondent was in a position to conduct adequate enquiries into it. Notably there was absolutely no mention of there having been another incident and specifically of the second alleged incident of harassment prior to the Claimant's suspension on 16 October 2014.

132 The Tribunal accepted that there were numerous occasions on which the Claimant sought to make telephone contact with the Respondent between the suspension and the meeting in January 2015, but we considered that the likelihood was that that was in order to chase up the suspension and the reasons for her suspension. The Tribunal noted that there was a complete absence of any attempt to email Ms Shabbir even if this was just to indicate to her that she needed to talk to her urgently or about a sensitive or confidential matter.

133 In the same vein, the Tribunal considered it was unlikely that the Claimant would have prepared a written statement about the second alleged harassment incident and taken it with her to the meeting on 12 January 2015 and simply handed it over in a bundle of other documents to Ms Shabbir without identifying what she had passed on. Even if that were the case because the Claimant did not want to raise such a delicate issue face

to face, it was also unlikely that she would have made no reference to it or chased up any action about it thereafter. In all those circumstances the Tribunal considered that it was highly unlikely that she had indeed passed those papers to Ms Shabbir as alleged on 12 January 2015.

134 A further point which undermines the Claimant's credibility very seriously is why, on her account, she only raised with the Respondent on 4 March 2015 the incident which she alleged occurred first in time back in September/October 2014. This was not plausible given that it was also her case that she had prepared some documents in which she set out the second alleged incident which on her case happened shortly before the suspension in October 2014; and in which she had not made any reference to the first incident. She gave no credible explanation as to why she did not refer to the first incident also in the January 2015 meeting. If the first incident had occurred, it would have been highly material context to the second incident which she said she was providing a written account about to Ms Shabbir. It appeared to the Tribunal that these were all matters which pointed to the unlikelihood of these episodes having occurred, and to the unlikelihood of the Claimant having handed over documents describing the second alleged incident at the meeting on 12 January 2015.

135 By a letter dated 6 March 2015, Ms Shabbir wrote to the Claimant to inform her that outside investigators would be brought in to deal with the grievance (p.382). Mr Kornhauser who was the outside investigator the Respondent had instructed, then wrote to the Claimant to confirm that he had been asked to investigate the matter (p.383).

136 One of the issues concerned whether Mr Kornhauser was truly independent. The Tribunal reminded itself that in the usual case of an investigation into a work-related matter, the employer would have another senior manager within the organisation investigate the allegations. The Respondent correctly determined that because in her grievance the Claimant had made criticisms of Ms Shabbir and her conduct of the process, it was appropriate to bring in someone from outside to investigate.

137 The Claimant contended that because Mr Kornhauser had worked for the Respondent previously and had been paid for this work by the Respondent he did not constitute an independent investigator. Ms Shabbir told the Claimant in the letter of 13 March that Mr Kornhauser had worked for the Respondent before. The Tribunal took into account the circumstances already described and the content of Mr Kornhauser's report and the fact that he dismissed all disciplinary charges against the Claimant. Even if he had not done work and been paid for it by the Respondent previously, it would have been the Respondent who would have been required to pay the fees of any independent or outside investigator. The argument could therefore always be made that simply because the Respondent is paying for the services of an external investigator, they are not independent. Those circumstances did not, of themselves, suggest that Mr Kornhauser could not properly carry out the tasks.

138 The main issue for the Tribunal was whether there was any evidence in terms of the way in which Mr Kornhauser carried out his investigations and/or the decisions that he reached which would tend to the conclusion that he was not an appropriate or sufficiently independent person to have conducted the investigations. The Tribunal concluded that there was not.

139 As the Respondent's member of staff with responsibility for Human Resources, Ms Shabbir decided that all the grievance points as described at page 374 etc apart from the sexual harassment allegation related to the disciplinary matters. The Tribunal considered that her reasoning was valid. She explained (p.386) to the Claimant that Mr Kornhauser would deal with both the disciplinary issues and the grievances, with all the points apart from the sexual harassment allegation being considered as part of the disciplinary process.

140 At around this time the Claimant consulted solicitors about her employment. This was relevant to the exercise of the discretion to extend time under section 123 of the Equality Act 2010 (just and equitable). It weighed against the exercise of the discretion in the Claimant's favour.

141 By the letter already referred to from Mr Kornhauser of 6 March 2015, he gave the Claimant the date of 25 March 2015 for an investigatory meeting.

142 By letter dated 9 April 2015, the Claimant was invited to a reconvened disciplinary and grievance meeting on 15 April 2015 (p.381). It was subsequently rescheduled for 22 April, 29 April and then 5 May 2015. That meeting was rescheduled to 8 May 2015.

143 In the meantime, the Respondent had made a LADO referral in relation to the allegation against Mr Samouelle. This was done on 9 March 2015. No action was taken by the local authority in relation to the issue.

144 As set out above ACAS was contacted on 27 April 2015 and the Conciliation Certificate was also issued on that date.

145 The combined grievance and disciplinary hearing took place in front of Mr Kornhauser on 8 May 2015. One of the issues which arose was that when the Claimant attended for the meeting she could see that Mr Samouelle's car was parked outside the building. The Tribunal considered that the Respondent failed to give sufficient thought to the issue of the Claimant's access to the building for the meeting in such a way which would have avoided Mr Samouelle being there when the Claimant arrived. The Claimant should not have needed to but she quite properly made representations to the Respondent in terms of ensuring that Mr Samouelle was out of the building before she entered. The Respondent arranged for this to take place and the meeting proceeded.

146 It was also at the meeting of 8 May 2015 that the Claimant referred to the second incident. Her account of this as set out at paragraph 56 of her witness statement was unclear. She also said that she gave documents about this to the Respondent on 12 January 2015, yet as set out above, there was no subsequent reference to these documents in all the correspondence between the Claimant and the Respondent up to this meeting. Once again there was a marked contrast with the Claimant's quite proper but assertive and prompt objection on 8 May 2015 to evidence of Mr Samouelle's presence in the building before she entered for her meeting.

147 The Tribunal found that the first undisputed reference to the Claimant having presented documents to the Respondent in relation to the second allegation was the refence to the "additional notes" (p.206) during the grievance meeting on 8 May (p.414)

Once Mr Kornhauser was made aware of this further allegation he then proceeded to investigate the two allegations. The Tribunal has referred to the allegations against Mr Samouelle as allegations of sexual harassment. That is shorthand. It was clear that there was also an allegation of anti-Semitism (race/religion) being made.

148 The Tribunal considered that considerable discrepancies emerged when the Claimant was questioned by Mr Kornhauser. In particular she was very vague about the timing of the first incident. Further she did not give an adequate explanation to Mr Kornhauser or indeed to the Tribunal as to the reason for the delay in raising this issue even if, contrary to the Tribunal's finding, one accepted that she had raised it in January 2015. The Tribunal has already referred to many reasons why this was not credible. The failure on the Claimant's part to refer to having done this until the meeting in May 2015 was a further reason why the Tribunal did not accept that she had given them to Ms Shabbir on the balance of probabilities.

149 Mr Kornhauser then proceeded to deal first with the grievance alleging sexual harassment (both incidents). He discussed both matters with the Claimant, albeit he was only aware of the second on that date. That almost certainly explained why the majority of the discussion was about the first incident. This was the issue which Mr Kornhauser was expecting to discuss with the Claimant.

150 In terms of the information that was available to Mr Kornhauser relating to the disciplinary charges, the Claimant agreed with Mr Kornhauser that she had her phone with her at work (p.437). In contrast to the way the Claimant later put her case, during the meeting with Mr Kornhauser on 8 May she attributed ulterior motives in relation to the photographs of the telephone to her co-workers disliking her, not to Mr Samouelle's actions or ill-will towards her in relation to any sort of victimisation.

151 The discussion between Mr Kornhauser and the Claimant also confirmed to the Tribunal that she was aware that the Respondent's expectation was that mobile phones should be kept in a locker within the premises (p.438). Further it was not in dispute that the Claimant had not used the phone unlawfully or contrary to policy. However, that did not undermine the Tribunal's finding that the basis for the Respondent investigating the matter was because they believed there had been a breach of the code of conduct. They had a reasonable basis for being concerned about the Claimant's possession of the phone at that location.

152 Similarly, during the meeting with Mr Kornhauser the Claimant confirmed that it was her phone that she and Mandy Peacock retrieved from the corridor on 16 October 2014 (p.439).

153 Mr Kornhauser discussed with the Claimant the other disciplinary issues as well (p.444).

154 Mr Kornhauser wrote to the Claimant in a letter dated 14 May 2015 (p.461) informing her of the outcome. He gave a very full explanation of the outcome of the disciplinary proceedings which was to discontinue all action (pp.461-467). On the last page he set out in two short paragraphs the summary of his decision. Having noted that he found no evidence to support any of the company's allegations he stated that his recommendation was that the disciplinary proceedings against the Claimant "be withdrawn

by the company forthwith". The Claimant argued that these words indicated that Mr Kornhauser believed that the disciplinary charges should never have been brought in the first place. The Tribunal did not consider that this was a reasonable conclusion to draw in the circumstances. In his oral evidence, Mr Kornhauser did not agree with the proposition that his use of the expression that the proceedings should be withdrawn against the Claimant indicated that he thought that the proceedings should never have been brought.

155 The Tribunal found that Mr Kornhauser used language in a somewhat idiosyncratic manner. Further the fact that disciplinary charges are not proven is very far from indicating that they should not have been brought in the first place. The Tribunal has already made findings above that there were rationale grounds for the Respondent to have investigated the various disciplinary matters.

156 Mr Kornhauser did not notify the Claimant of the outcome of his investigation into the sexual harassment allegations made by her when he informed her of the outcome of the disciplinary investigation. To the extent that there was concern on the Claimant's part about this the Tribunal considered that this was well-founded. However, the Tribunal considered that the explanation was that Mr Kornhauser believed that his conclusions relating to the disciplinary charges should be communicated to the Claimant as soon as possible.

157 By email sent on 15 May 2015 (p.468) Mr Kornhauser informed the Claimant that he was continuing his investigations into the grievances. Indeed that email records that Mr Kornhauser appreciated that the Claimant's suspension had been going on for some considerable time and therefore he had arranged for the decision on the disciplinary matters to be sent to her by courier. At the time, in an email sent on 17 May 2015, the Claimant expressed her thanks to Mr Sebastian for this. The Tribunal considered that it was clear that his decision to notify the Claimant of the outcome of the disciplinary matters was well intentioned and intended to remove from the Claimant any concerns about facing disciplinary charges in her job.

158 The Respondent then confirmed to the Claimant that her suspension had been lifted due to the outcome of the disciplinary investigation (p.470) and the issue of the Claimant returning to work started to be discussed.

159 By a letter dated 20 May 2015 (p.473) the Respondent confirmed to the Claimant that they accepted the findings of Mr Kornhauser's investigation and that all proceedings associated with the disciplinary investigation had been discontinued. In response, the Claimant questioned the proposal of a return to work interview which at that point was scheduled for 22 May 2015, while the outcome of the grievances was still unclear (p.474). Mr Kornhauser confirmed to the Claimant and Ms Shabbir that he would be resuming his investigation of the grievance the following week. This was done by an email sent at 8:54pm on 21 May 2015.

160 Mr Kornhauser then held various meetings from 26 May 2015 as part of the investigation into the Claimant's grievance against Mr Samouelle. He held meetings with Ms Shabbir, with Mr Samouelle, with Ms Sanchez, and with Mandy Peacock.

161 He then notified the Claimant of the outcome of the grievance investigation (p.488)

in a letter dated 11 June 2015.

162 As with the disciplinary outcome notification, the grievance outcome letter was set out in some considerable detail and ran to some 13 pages. Mr Kornhauser did not uphold the grievances. He rejected the Claimant's account of sexual harassment by Mr Samouelle. The Claimant presented a letter of appeal against this outcome (p.510-513).

163 The appeal raised a number of points. Among these was a request to see CCTV footage. The Tribunal did not consider that this was a realistic request as the Claimant herself stated that this was normally deleted after 30 days. The request was made a number of months after the alleged incident was said to have occurred.

164 She further made the point that there was no female present during the grievance meeting. The Claimant had not indicated prior to the hearing that she would prefer someone female to be present, albeit she was aware of the person who was going to be carrying out the investigation. She also chose to bring her son to the meeting and did not seek a female companion. The Tribunal considered that once this point was raised in the appeal the Respondent reacted constructively by arranging for a female independent person to deal with the appeal, Ms Fiona Satiro.

165 Ms Satiro described herself as providing employment law and HR consulting services. Her curriculum vitae indicated that she was a senior employment solicitor who had been non-practising since May 2012 with 17 years' post qualification experience. She was also a Chartered member of the Chartered Institute of Personnel and Development. Her experience included in private practice as a solicitor advising numerous employers and individuals going through both disciplinary and grievance processes. She had also apparently conducted both disciplinary and grievance investigations on behalf of employer clients and had been the decision-maker on occasion.

166 Ms Satiro's report was amended on 6 January 2016 in relation to appendices 13 and 14. The original report was dated 17 December 2015 (pp. 610a-f). There were 14 appendices. Appendices 13 was the printout of the email received by Laurie Taylor (the Claimant's friend) on 17 February 2015 and Appendix 14 (p610qq) was the risk assessment sheet for 1-5 September 2014. She did not uphold the appeal. The appeal meeting took place on 20 November 2015 and Ms Satiro was assisted at the meeting by Ms Shabbir. The Claimant had previously notified the nursery via her solicitors that she would not be attending the meeting. Ms Satiro therefore assessed the appeal by reviewing all the documentation and also identified a number of questions that she wished to be answered. She therefore adjourned the appeal hearing to obtain responses to the questions.

167 The Tribunal considered that on the face of Ms Satiro's CV she was amply qualified to deal with the appeal.

168 The Claimant was sick from 8 July 2015 to 3 September 2015 and submitted doctors' fit notes. Subsequently she submitted further fit notes to cover the period up to November 2015. This was the main reason why the grievance appeal was delayed. During the delay, Ms Satiro was stood down and then the Respondent contacted her again in November 2015 (p.541) in order to take matters forward.

169 In the event, the Claimant did not participate in the appeal.

170 Based on Ms Satiro's investigation a risk assessment form (App 14 referred to above) came to light. They were relevant because they might have helped confirm the Claimant's account about the duties she was engaged in when the first alleged incident occurred. The information on the forms did not confirm that the Claimant did any of the relevant duties which would have helped to corroborate her allegations against Mr Samouelle. There were also a number of forms available to the Tribunal (pp.175a-177) covering a wider time frame.

171 The picture which emerged from all the risk assessment forms which were in evidence was that in the week commencing 29 September 2014 in relation to the pre-school room which seemed to be the most relevant room, the entries did not corroborate the Claimant's case. During the hearing, the Claimant challenged for the first time the authenticity of the signatures on the forms indicating that other staff were responsible for the duties which she said she had undertaken on the relevant day.

172 The Tribunal rejected that challenge in all the circumstances. There was no expert evidence and no request for an adjournment in order to obtain such expert evidence about the signatures. In all the circumstances the Tribunal considered that on the balance of probabilities there was no basis for finding that the signatures on the assessment forms were other than authentic and the Tribunal therefore considered that the forms did not support the Claimant's account.

173 The further investigations and enquiries made by Ms Satiro when considering the appeal were set out at paragraph 14 of her witness statement in these proceedings (R9). These included obtaining further information from Mr Samouelle and Mr Kornhauser about specific aspects of the investigation. She also requested information from the Respondent as to Mr Samouelle's access to the Respondent's computer systems in relation to the Claimant's allegation that he had had invited her to watch an anti-Semitic and pornographic video on a nursery computer.

174 When the Respondent made further enquiries as part of the appeal of the IT company that dealt with the Respondent about whether Mr Samouelle could log in to the computer network, they obtained confirmation that Mr Samouelle did not have access to the data on the server (p.610jj) by an email dated 26 November 2015. After the Claimant became aware of this information, she changed her case in relation to the initial allegation about being invited to watch the film on the office computer.

175 The Tribunal accepted on the balance of probabilities that the information contained in that email dated 26 November 2015 was accurate.

176 The evidence from the Respondent's IT consulting company Fortrix as to Mr Samouelle's access to the data on the computer was also confirmed by notification to the Respondent on 23 June 2014 that a web content filter had been implemented i.e. before any of the alleged incidents had taken place. Mr Gonsalves, the Director of the company informed Ms Shabbir that the filter had been implemented to prevent unsuitable material being accessed on the internet. Among the categories of material that were blocked were all categories which were relevant for child protection issues, such as material involving sex and eight other categories.

177 Ms Satiro asked the Respondent to make enquiries about the records of risk assessments in the relevant timeframe she asked for the timeframe from 1 September to 16 October 2014 to be checked. These checks were carried out by Ms Shabbir who notified Ms Satiro in an email dated 4 December 2015 (p.610gg) of the outcome of her enquiries. She told Ms Satiro that there were no records that indicated that the Claimant had carried out risk assessments for the garden.

178 Whilst none of this evidence was conclusive it all tended to support the Respondent's case and to undermine the Claimant's case about the likelihood of Mr Samouelle having invited the Claimant to watch pornographic material on the nursery's computer.

179 The Tribunal did not find the Claimant's account credible in relation to the alleged incidents and particularly about reporting the alleged incident during the meeting of 12 January 2015. Further, the Tribunal considered that it was unlikely that if she was someone who, as she protested on numerous occasions, was very concerned about the well-being of the children, she would simply have brushed the first incident aside and failed to act on it given that it potentially also posed a safeguarding risk to the children. On the Claimant's case, she did not report this incident to the Respondent until the grievance email was sent on 4 March 2015.

180 Finally, for the avoidance of doubt in finding that the primary facts had not been established the Tribunal took into account that the burden of proving those primary facts lay on the Claimant.

Conclusions

181 In the light of the above findings the Tribunal reviewed the issues in the case. The Claimant alleged both harassment and direct discrimination by reason of the protected characteristics of race, religion or belief or sex in relation to the first incident. However, on the balance of probabilities the Tribunal could not find that the primary facts alleged by the Claimant in relation to the incidents were established. Apart from the findings of fact set out above in relation to the reporting of these episodes, the Tribunal also accepted the Respondent's submissions as to the considerable discrepancies in the Claimant's various accounts of the incidents.

182 Further, in any event, the Tribunal had to determine whether we had the jurisdiction in any event to determine the complaints about the first alleged incident.

183 The Claimant's case at the Tribunal hearing was that she was unclear about when the first alleged incident occurred. In the Claimant's Counsel's closing submissions at para 4, she stated that the first alleged incident occurred in the week commencing 29 September 2014. The last working day for the Claimant in that week would have been 3 October 2014. The three months' primary statutory time limit would therefore have expired on 2 January 2015. The claim form was presented on 25 June 2015 and the early conciliation ("EC") process was initiated and concluded on 27 April 2015. As the EC process took place after the expiry of the primary time limit, it cannot operate to extend time. The complaint about the first alleged incident, as a discrete act, was therefore out of time on its face.

184 The next question was whether the first alleged incident was continuous with later acts of discrimination which were in time.

185 The next set of allegations were of victimisation. The Claimant relied on protected acts which were alleged to have taken place first on 20 October 2014 at the investigation meeting and second on 12 January 2015 – the disclosure of the "additional notes", an account of the second alleged incident.

186 The Claimant gave no evidence either in her witness statement or any account in her claim form of the protected act which was said to have occurred on 20 October 2014. She produced her own notes of the 20 October 2014 meeting (pp.183-186) and this was also dealt with in paragraph 9 of the Claimant's closing submissions. Further, the Respondent produced a transcript of the same meeting (pp187 – 198), which had been recorded with the Claimant's knowledge.

187 The notes of the meeting on 20 October 2014 did not support the allegation that a protected act had been done on that date. There was no reference to a protected act, namely an oral reference to one or other or both of the allegations of harassment during that meeting.

188 In paragraph 9 of the Claimant's closing submissions in which Ms Omar addressed the events of 20 October 2014, there was similarly no reference to any protected act having been done by the Claimant. Indeed in the full merits hearing, the Claimant actually only sought to rely in practice on a protected act having occurred in the meeting of 12 January 2015 by way of her disclosure of the "additional notes".

189 In those circumstances the Tribunal found on the balance of probabilities that the Claimant had not done a protected act on 20 October 2014.

190 In relation to the protected act which was said to have occurred on 12 January 2015, the Tribunal has rejected that also on the facts. As no protected act was established, the victimisation complaint was bound to fail.

191 Moreover, in any event two of the detriments complained of, namely the suspension on full pay and the continuing of the disciplinary process on and after 16 October 2014 either occurred or commenced before the first alleged protected act on 20 October 2014. It followed inevitably from those circumstances that the suspension was not caused by the alleged protected act as, even on the Claimant's case, it pre-dated the protected act. The disciplinary process similarly was commenced before the date of the alleged protected act. It could not be an act of victimisation therefore. The Claimant's case was that the disciplinary charges were dragged out. The Tribunal has made findings above about the chronology which do not support the contention that the Respondent was responsible for the delay or undue delay in progressing the disciplinary charges. Thus, even if the Claimant had been able to establish a valid protected act as of 20 October 2014, the Tribunal was satisfied that there were perfectly good administrative reasons for the delay. Also, part of the reason for the delay in concluding the disciplinary charges was because of the need to investigate the grievances.

192 In summary, therefore the victimisation complaints were not well-founded and

were dismissed.

193 The failure of the victimisation complaint also had an effect in terms of the Tribunal's jurisdiction to determine the complaints about the first alleged incident. Even if the Tribunal had found the primary facts in favour of the Claimant, that allegation would have been brought out of time. There would have been no subsequent act of discrimination with which that incident was continuing.

194 The Claimant had no good grounds (para 52 of [C6], submissions in reply) for arguing that it was just and equitable to extend time under section 123 of the Equality Act 2010. The allegations of direct discrimination and/or harassment therefore were not well-founded and were dismissed.

Employment Judge C Hyde

27 June 2017