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EMPLOYMENT TRIBUNALS

Claimant: **Mr Ibrar Hussain**

Respondent: **Little Rainbow Nursery Limited**

Heard at: **East London Hearing Centre**

On: **16, 17, 22 August 2018 (& later on written submissions)**

Before: **Employment Judge Brook (Sitting alone)**

Representation

Claimant: Mrs Faryaal Hussain – Claimant's wife

Respondent: Mr Tom Perry – Counsel

JUDGMENT

1. **The Claimant made a protected disclosure to OFSTED on 10th August 2017 within the meaning of Section 43 of the Employment Rights Act 1996;**

2. **The Claimant was not automatically unfairly dismissed by reason of making the said protected disclosure. The Respondent's director, Mrs Neela Bibi, had already determined on 22nd October 2017 to dismiss the Claimant before she knew the Claimant had made this protected disclosure. Mrs Bibi was entitled to so determine by reason of the Claimant's conduct in accessing her computer and emailing some of the contents he found therein to his wife. In so doing the Claimant irrevocably breached the relationship of trust and confidence;**

3. **The Claimant was not subjected to detriments as a result of making this protected disclosure. In particular any verbal abuse he might have experienced from other members of his family was not as a result of the**

disclosure but by reason of the deteriorated relationship between the Claimant, his wife, and Mrs Bibi, the latter being the Claimant's sister;

4. The Claimant's employment commenced on 23rd November 2015 and was terminated by letter dated 20th November 2017. By reason of Sections 86 and 97(2) Employment Rights Act 1996 the Claimant had sufficient service to bring his claim in unfair dismissal;

5. The Claimant was unfairly dismissed within the meaning of the Employment Rights Act 1996 by reason of the Respondent's failure to follow a proper procedure. The Claimant contributed to his dismissal by accessing the computer of Mrs Bibi, photographing information found therein and sending those images to his wife by email. The degree of contributory fault is 100%;

6. The Respondent elected to commence disciplinary proceedings against the Claimant. Had a proper procedure been followed then the Claimant would have remained in the Respondent's employ for no more than a further three weeks at which time he would have been lawfully dismissed in any event. The Respondent is to pay the Claimant a sum equivalent to his gross wages for three working weeks, such payment to be made forthwith with appropriate statutory deductions.

REASONS

1. This matter came before the Tribunal on 16th August 2018 listed for a one day full merits Hearing. It has had a troubled procedural history. The Claimant was represented by his wife, Mrs Faryaal Hussain, and the Respondent by Mr Perry of Counsel. It became apparent that one day was insufficient to hear the case and, rather than the matter going part heard a situation that neither Party thought satisfactory, inquiries were made and it proved possible to continue the Hearing on 17 and 22 August with subsequent written submissions.

The Issues

2. The Issues for the Tribunal to determine were identified by Employment Judge Russell at the case management hearing on 18 May 2018, the summary of which was sent to the Parties on 22 May 2018. The Claimant did not attend that hearing and, in a subsequent hearing on 28th June 2018, the Claimant was ordered to pay the Respondent's costs of that earlier hearing. At the later hearing the Respondent's application that the Claims be struck out was dismissed. No useful purpose would be served by rehearsing the details of those hearings in this Judgement and suffice it to say that paragraph 10 of her case summary of 18 May hearing Judge Russell recorded the following as the Issues for the Tribunal to determine at the full merits hearing:

> *"10. Having regard to the list of issues drafted by the Claimant and the amendments proposed by the Respondent, I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:*

Public interest disclosure claim/s

10.1 Was the Claimant's complaint of July 2017 to Mrs Bibi a protected act for the purposes of the section 43A Employment Rights Act 1996? Specifically:

10.1.1 Did he disclosure information?

10.1.2 Did he reasonably believe such disclosure to be in the public interest?

10.1.3 Did the Claimant reasonably believe that the information tended to show that the health and safety of any individual has been, is being or is likely to be endangered?

10.2 If the Claimant relies upon any complaint to OFSTED on 10 August 2017:

10.2.1 Did he disclose information?

10.2.2 Did he reasonably believe such disclosure to be in the public interest?

10.2.3 Did the Claimant reasonably believe that the information tended to show that the health and safety of any individual has been, is being or is likely to be endangered?

10.2.4 Was it made to a prescribed person?

10.3 Was the making of any protected disclosure the principal reason for the dismissal on 20 November 2017? The Respondent states that it was not aware at the time of initiating the disciplinary procedure that the Claimant had made the disclosure

Unfair dismissal

10.4 If the reason or principal reason for dismissal was not a protected disclosure, does the Claimant have two years' continuous service to bring a claim under section 98 Employment Rights Act 1996?

10.5 If so, what was the reason for dismissal? The Respondent relies upon conduct, alternatively some other substantial reason. It appears that the Claimant avers that there was no genuine or reasonable belief in misconduct.

10.6 Was dismissal fair in all the circumstances of the case, s.98 (4) ERA? The Claimant says that the Respondent failed to carry out

a reasonable investigation, e.g. by failing to check CCTV evidence or notify the police.

Unauthorised Deduction from Wages

10.7 *Did the Respondent fail to pay the Claimant sums contractually due to him as wages from 22 October 2017?”* **[Note: By the time of the Final Hearing this claim had fallen away].**

The Law

3. I am indebted to Mr Perry for his comprehensive and accurate recital of the relevant statutory and case law set out in his subsequent written Submissions. There being no useful purpose in doing otherwise to a large extent I have adopted that recital of the law in this Judgment.

Protected disclosures

4. A "protected disclosure" is defined in section 43A ERA as (a) a "qualifying disclosure", as defined in section 43B ERA, (b) which is made in accordance with any of sections 43C to 43H of the ERA’.

5. The burden of proving that these two conditions are satisfied is on a claimant employee: *Western Union Payment Services UK Ltd v Anastasiou* (UKEAT/0135/13, 21 February 2014, unreported) at [44] to [45].

6. A "qualifying disclosure" is defined by section 43B ERA. Insofar as relevant, this states that:

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

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

…

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

7. In considering whether a protected disclosure has been made, the following propositions are relevant:

a. “The employee must disclose information;

b. The employee must have a subjective belief that the information tends to show that the wrongdoing has occurred;

c. That subjective belief may be mistaken but must in any event be objectively "reasonable";

d. The employee must have a reasonable belief that the disclosure *"is made in the public interest".*

8. As to the disclosure of information this can be part of making an allegation. Allegations are not mutually exclusive from the disclosure of information. However, words that are too general and devoid of factual content tending to show a factor listed in section 43B(1) will not amount to a disclosure of information (although words that would otherwise fall short can be boosted by context) per the Court of Appeal's decision in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ. 1436.

9. The disclosure must identify the legal obligation or other matter which it is said the communication tends to show, at least unless it is obvious: *Fincham v HM Prison Service* [2002] UKEAT 0925/01/1912 paragraph 33.

10. There is an initial burden on the Claimant to show on a balance of probabilities that: (a) there was in fact and law a legal or other relevant obligation on the employer or other relevant person; and (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject: *Boulding v Land Securities Trillium (Media Services) Ltd* UKEAT/0023/06 (3 May 2006, unreported), per Judge McMullen.

11. A claimant must reasonably believe that the disclosures tend to show the species of misconduct relied on. He does not have to show that the belief is factually correct: *Babula v. London Borough of Waltham Forest* [2007] EWCA Civ. 174 at [75] and [81].

12. Further, an employee must have a reasonable belief that the information disclosed tends to show, at the very least, that a person "is likely" to fail to comply with any legal obligation. In *Kraus v Penna plc* [2004] IRLR 260, the EAT held that the word 'likely' requires [24] "... more than a possibility, or a risk, that an employer (or 'other person') might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time of disclosure, tend to show that it is more probable than not that the employer will fail to comply with the relevant legal obligation.

13. As to the public interest element, the question for consideration is not whether the disclosure is per se in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest. Whether the worker's subjective belief is a reasonable belief is to be assessed objectively: *Chesterton Global Ltd v Nurmohamed* (2015) UKEAT/0335/14; [2017] EWCA Civ. 979.

14. Section 43L ERA provides that it does not matter for these purposes if the recipient is already aware of the information disclosed.

Good Faith/Motive

15. In relation to the question of whether a disclosure was in good faith or for some ulterior motive (which is no longer a requirement for a protected disclosure but still relevant as to remedy and an issue in this case), in *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97 Auld LJ held that:

> *"56...they [Employment Tribunals] should only find that a disclosure was not made in good faith when they are of the view that the dominant or predominant purpose of making it was for some ulterior motive, not that purpose..."*

Detriment

16. Section 47B(1) ERA provides as follows:

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

17. A detriment is something that would or might make a reasonable worker take the view they had been disadvantaged in the circumstances in which they worked as a result of making the disclosure. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate a physical or economic consequence per *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 paras 34 and 35 per Lord Hope. The issue is essentially one of causation.

18. Section 48(2) ERA provides that on a complaint to a Tribunal by a person that he has been subjected to a detriment contrary to section 47B ERA:

> *"It is for the employer to show the ground on which any act or deliberate failure to act was done"*

19. The causation test is set out in *Fecitt v NHS Manchester* [2011] ICR 476 and requires that the protected act materially influence (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower.

20. *Bolton School v Evans* [2006] EWCA Civ. 1653 confirms that an act of detriment or dismissal will not be because of an act of protected disclosure if the reason for the treatment relates to how an individual acquired the information underlying the protected disclosure rather than the act of disclosure itself:

> *"An employee cannot be entitled to break into his employer's filing cabinet in the hope of finding papers which will demonstrate some relevant wrongdoing … He is liable to be disciplined for such conduct, that is so whether he turns up such papers or not."*

Automatically unfair dismissal

21. Section 103A ERA states that:

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

22. For employees with at least two years' service *Kuzel v Roche Products Ltd* [2008] ICR 799 per Mummery LJ, held that the burden of proof is on the employer to demonstrate the reason for the employee's dismissal ([56] - [57]). However, he also held that if the Tribunal rejects the explanation put forward by the employer it is not bound to find the employee was dismissed for a reason advanced by the employee.

23. However, in circumstances where the employee has less than two years' service, it is for the employee to prove the reason for dismissal *Maund v Penwith District Council* [1983] EWCA Civ. J1102-2.

24. For a Claimant to succeed the protected disclosure must be the sole or principal reason for the employee's dismissal. It is not sufficient if, for example, a protected disclosure only had a "material influence" on the decision (unlike the position under section 47B): *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ. 658, Underhill LJ at [43].

25. The reason or principal reason for the dismissal means the employer's reason and the employer should only be attributed with the knowledge or the state of mind of the person who was deputed to carry out the employer's functions: per *Orr v Milton Keynes Council* [2011] EWCA Civ. 62, [2011] as applied in *Royal Mail Group Ltd v Jhuti* [2017] EWCA Civ. 1632.

Ordinary Unfair Dismissal - Length of Service

26. To acquire protection against unfair dismissal an employee needs two years' service. This runs from the date of commencement of employment until the effective date of termination. Section 97(2) ERA provides that an employee's effective date of termination will be extended by the period of statutory minimum notice on dismissal under section 86 ERA.

27. Under section 86 ERA, the relevant period for employees with less than two years' service is one week. However, this is subject to the requirement of section 86(6) ERA that either party may treat a contract as terminable without notice by reason of the conduct of the other party.

28. In *Lancaster & Duke Limited v Wileman* UKEAT/0256/17/LA Judge Eady QC held that an employee lawfully dismissed with no notice (i.e. guilty of gross misconduct) would not have their effective date of termination extended by the length of statutory minimum notice. This requires a finding by the Tribunal that the Claimant was guilty of gross misconduct.

Ordinary Unfair Dismissal

29. If a Tribunal finds that a Claimant had two years' service then the employer must show whether the reason for the dismissal was for a potentially fair reason within

section 98 ERA and the Tribunal must decide if the Claimant was fairly dismissed in all the circumstances of the case pursuant to Section 98(4) ERA.

30. The reason for a dismissal was described by Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213 as *"a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

31. In relation to a ground of conduct, in order for the dismissal to be fair under section 98 of the Employment Rights Act 1996, the Tribunal will have in mind the familiar *Burchell* test for misconduct dismissals (*British Home Stores v Burchell* [1978] IRLR 379). In essence, for the dismissal to be fair, three matters need to be satisfied, which are as follows:

a. Did the Respondent have a genuine belief in the Claimant's guilt?

b. Were there reasonable grounds on which to base that belief?

c. Had the Respondent carried out as much investigation as was reasonable in the circumstances?

32. For an investigation to be reasonable the relevant test does not require employers to carry out a forensic examination akin to a criminal investigation, but to take up reasonable lines of enquiry (Court of Appeal: *Taylor v OCS Group Ltd* [2006] IRLR 613 per Smith LJ at paragraph 48).

33. Finally, in construing Section 98(4) ERA is that it is not for the Tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. It is not for the Tribunal to re-hear the disciplinary case and make findings upon it. Rather it is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even if the Tribunal might have acted differently (i.e. the "range of reasonable responses test") - see *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, as approved by the Court of Appeal in *HSBC v Madden* [2000] ICR 1283.

34. Furthermore, the range of reasonable responses test applies equally to the question of reasonableness in respect of the investigation – see *Sainsbury Supermarket Ltd v Hitt* [2003] IRLR 23 (CA) per Mummery LJ at paragraph 30.

35. In relation to some other substantial reason, in a suitable case the employer may rely upon the breakdown in trust and confidence as a substantial reason justifying the dismissal. In most cases it must be the act of the employee himself which leads to that breakdown, not the act of a third party. An employer could not reasonably dismiss an employee on this ground because his wife has been convicted of an offence of dishonesty (*Wadley v Eager Electrical Ltd* [1986] IRLR 93, EAT). However, the EAT was inclined to accept that if the wife's conduct had led to a loss of confidence in the employee by the customers, this was capable of constituting 'some other substantial reason'. It may be that the employer can rely on the *fact* of the breakdown (especially if it is having poisonous results on working relationships) as the reason for dismissal rather than concentrating on that employee's personal responsibility for it.

36. The Court of Appeal in *Perkin v St George's Healthcare NHS Trust* [2005] EWCA Civ. 1174, [2005] IRLR 934 held that although 'personality' could not of itself

amount to a misconduct reason for dismissal it could manifest itself in such a way as to amount to a fair reason for dismissal. The Court of Appeal considered that where a personality clash had led to a breakdown in the functioning of the employer's operation that could amount to some other substantial reason for the dismissal for the purposes of ERA 1996. However, it is important to note the Court of Appeal also stressed that it is still for the employer to prove the facts necessary to show that this was the case.

Contributory Fault

37. In *Steen v ASP Packaging Ltd* [2014] ICR 56 (Langstaff P presiding) the EAT stated that, when considering contributory fault, a Tribunal should address the following (paras 11-16):

a. what conduct is said to give rise to possible contributory fault;

b. whether that conduct is blameworthy (being a matter of fact for the Tribunal to establish based on what the employee actually did or failed to do);

c. did that conduct cause or contribute to the dismissal to any extent; and (if so)

d. to what extent (if at all) is it just and equitable to reduce compensation.

38. There is no need to address these matters at any greater length than is necessary to convey the essential reasoning. A particular percentage reduction is not susceptible to precise calculation (per Langstaff J in Steen para 24).

39. The meaning of blameworthy conduct was addressed by the Court of Appeal in *Nelson v British Broadcasting Corporation* (No 2) [1979] IRLR 346 (para 44 per Brandon LJ):

> *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."*

40. The EAT emphasised in Steen the fact that the focus must be on what the employee did, not what the employer did. The employee's conduct must be examined in order to determine the extent to which it has caused or contributed to the dismissal and not to its unfairness. If, for example, the dismissal is unfair merely because of some procedural defect for which the employee cannot be held responsible, his conduct can still be taken into account when assessing the compensation to which he

is entitled (e.g. Jamieson v Aberdeen County Council [1975] IRLR 348, Court of Sessions).

41. *Graves v Arriva London South Ltd* UKEAT/0067/15 (3 July 2015, unreported) is authority that contributory fault can apply to findings of automatically unfair dismissal.

The Witnesses

42. There was an agreed Bundle of documents though some of these documents were disputed as to their authenticity. Witness statements were provided and I heard oral testimony from the following persons:

For the Claimant:

i. Mr Ibrar Hussain – Claimant

For the Respondent:

i. Mrs Neela Bibi – Sister of the Claimant and Director of the Respondent
ii. Mr Zahran Hussain – Brother of the Claimant and Mrs Bibi
iii. Mrs Grace Fagan – HR Consultant

43. Mrs Bibi's original written statement was supplemented by two further statements served in rebuttal of matters in the Claimant's statement. In the event it was as much the evidence adduced in cross-examination as that adduced in chief that went to the issues and served to illuminate the family dynamics and background to this litigation, which background is of particular significance in this case.

The Evidence and Findings of Fact

44. Judge Russell's reference at paragraph 10.1 of her Case Summary (and see above herein) to *'...the Claimant's complaint of July 2017'* raised a factual issue as to the authenticity and effect of the document to be found at page 370 of the Hearing Bundle, namely the letter of July 2017 and said by the Claimant to have been handed by him to Neela Bibi. In any event Neela Bibi denies ever having received this letter. This letter raised the Claimant's concerns over the carer to infant ratio at the Respondent's nurseries and the validity of the UK driving licence held by Mr Ali, Mrs Bibi's husband. It further stated that the Claimant intended to take his concerns to OFSTED and the Police if matters were not rectified. The meta data establishes that the letter was created by the Claimant's wife on 15th July. On 21st July it is common ground that the Claimant and Mrs Bibi had a heated argument about the Claimant's wife, whom Mrs Bibi considered unsuitable as wife for her brother. The Claimant insists he gave this letter to his sister at that time and that she was unconcerned by its contents. If so then this is at odds with the Claimant's email to OFSTED of 10th August 2017 (pages 362 to 364) where the Claimant was very keen that his identity as a whistle-blower be kept anonymous. That is only really consistent with Mrs Bibi's account that she never received this letter.

45. The burden of proving both the provenance and delivery of this letter fell to the Claimant and, as will become apparent, I was not satisfied that this letter was ever received by Neela Bibi, either in July or at all. It was accepted by the Respondent that

after the Claimant's suspension by Mrs Bibi on 22nd October, and prior to being dismissed, the Claimant told Neela Bibi that he had reported the matters complained of to both Ofsted and to the Police. The Respondent submitted that these later admissions by the Claimant to Mrs Bibi of his whistleblowing to OFSTED was actively motivated by the Claimant seeking to ensure whistleblowing was at least in play now he was facing a disciplinary procedure. I find as a fact that the Claimant did not give the letter to Mrs Bibi and that by the time, after his suspension, he told Mrs Bibi that he had 'whistleblown' to OFSTED (and to the DVLA) Mrs Bibi had already formed a settled intention to terminate his employment, albeit after "going through the motions" of a disciplinary procedure. She formed this intention on the night of 22nd October when she learnt from her brother Zafran Hussain that the Claimant had accessed her office computer and emailed images he found there to his wife. I come to my reasons for so finding later in this Judgement.

46. The Claimant is a brother of Neela Bibi, the latter being the principal director and shareholder of the Respondent Company, Little Rainbow Nursery. By all accounts the Respondent is a successful provider of nursery and crèche facilities to infant children operating on two sites, at Stratford and Manor Park.

47. There was some dispute as to the date on which the Claimant began working as an employee for the Respondent. The Respondent's ETI asserts this started on 23rd November 2015, the Claimant in his ETI that it was 1st November 2015, and in his oral evidence the Claimant thought it might have been 23rd November (not, as Mr Perry suggested in his Submissions, 24th November). I find as a fact that the start date was 23 November 2015, at which time he made known his ambition to join the Police which, since the termination of his employment, has come to pass. Whilst the Claimant's period of employment was three days short of two years, Sections 86 and 97(2) Employment Rights Act 1996 serves to add a further week to the actual period and thus the Claimant had sufficient service to bring a claim in unfair dismissal.

48. The Respondent company is something of a family affair in that at different times several of the Claimants relatives, in particular his brother Zafran and his brother-in-law Mr Ali, Mrs Bibi's husband, also worked for the Respondent Company, certainly Mr Ali undertook tasks for the Company. Indeed the entire family had something of a shared existence with the Hussain brothers living, as I understand it, in the same family property, then latterly also with the Claimant's wife when she joined the Claimant.

49. Into this family came Faryaal Hussain, the Claimant's wife, a law graduate and occasional law tutor, though from time to time in the correspondence generated by this matter she has also described herself as a law professor. Be that as it may, Mrs Hussain had an understanding of the relevant law and helped the Claimant in his 'whistleblowing' concerns with some enthusiasm. It became clear in the course of this Hearing that Faryaal Hussain had, as well as writing to the DVLA in her own name concerning her husband's disclosures, also helped the Claimant draft most of the correspondence sent in his name to Mrs Bibi, Ofsted and to Mrs Fagan, which in my view this goes some way to explain the legalistic tone and, towards the end of that correspondence, hostile tone of the letters to Mrs Bibi and Mrs Fagan. In the later correspondence there was a noticeably sarcastic and defiant edge to this correspondence which was unhelpful for all concerned. The Claimant's insistence that he be accompanied by a Police officer to the disciplinary hearing (itself no more than a fact finding hearing) was a disproportionate and unreasonable request. That it was

granted (though never exercised by the Claimant) made little difference as, from 23rd October when Mrs Bibi learnt of the Claimant's activities with her computer, Mrs Bibi had a clear and settled intention to terminate the Claimant's employment in any event as she no longer trusted the Claimant. There was no evidence before me that this intention was ever made known to Mrs Fagan by Mrs Bibi, but if it was then it made no difference to the eventual outcome.

50. My abiding impression from all the evidence in this case is that events were driven in great measure by the antagonism between Mrs Bibi and Mrs Hussain which, inevitably, had a corrosive effect on the relationship between the Claimant and his sister. I formed the impression that, were if not for this antagonism, then the Claimant is unlikely to have made his approaches to Ofsted, or to the Police/DVLA. The clearest example of the Claimant's whistleblowing disclosures approach to Ofsted, and the one relied upon in these proceedings, is at pages 362 to 364 of the Bundle. This is the Claimant's email to OFSTED of 10 August 2017 and was to the effect that the Claimant believed that Mrs Bibi's husband, Mr Ali, was transporting infants at the Nursery without having a valid UK driving licence, and that the staff to infant ratio at the Manor Park nursery, where the Claimant worked, routinely breached relevant Regulations. As to which Regulations these might be was never made clear to me though the matter proceeded on the acceptance by both Parties that there are such Regulations and that if the registration document at page 46 is correct then it evidenced that the number of registered infants to qualified staff on site breached Regulations on the day in question. The Claimant's evidence was that these Regulations were routinely breached, the evidence of Mrs Bibi that they were never breached and that the Claimant had forged the registration document at page 46 as part of he and his wife's vendetta against her.

51. Prior to being employed by the Respondent the Claimant had been involved in a separate and unconnected business. It seems that this business was not a success and the Claimant commenced employment with the Respondent in November 2015 through the invitation of his sister, Mrs Bibi. By all accounts the Claimant was initially grateful for that employment, even though he regarded it as an interim position prior to his joining the Police. I am also satisfied that by July 2017 there was a significant degree of mutual antagonism between Neela Bibi and the Claimant's wife, Faryaal Hussain which had, to coin a term used by the Respondent, poisoned the relationship between the Claimant and Mrs Bibi. In his evidence the Claimant stated that at some stage, I gathered in the course of their heated argument on 21st July 2017, Neela Bibi said words to the effect that he would be better off divorcing his wife and finding a different life partner. Needless to say the Claimant was upset at this suggestion and, although Mrs Faryaal Hussain gave no evidence and tried to confine herself to representing her husband, it was clear that Faryaal Hussain, unsurprisingly, also took exception to these remarks. It seems at this stage the die was cast.

52. I am not in a position to make any comment on the rights or wrongs of this antagonism, still less how it arose, and nor do I seek to do so. I simply register that it existed and that in my view it played a significant role in determining the Claimant's attitude and conduct towards his sister and eventually spurred him on to seek yet more evidence against his sister by later accessing her computer. I am also satisfied that prior to all this Mrs Bibi and the Claimant had enjoyed a close sibling relationship in which the imparting of confidences, that might otherwise not occur between an

unrelated employee and employer, would and did take place. None of this is to say that the Claimant did not reasonably believe in the truth of the matters he came to report to Ofsted and the Police/DVLA. On the evidence I am satisfied that he reasonably believed in the truth of these, and that his primary reason for reporting these matters was the public interest. The Claimant had seen with his own eyes the matters he complained of and, as it turned out, there was subsequent support for the Claimant's beliefs in the findings of OFSTED and the DVLA (docs at pages 62 and 171-173 and 179). In my view there were objectively reasonable grounds for the Claimant's belief in the truth of his disclosures. Unfortunately, as time went on, the Claimant adopted a much more investigatory stance which led him to improperly investigate Mrs Bibi's computer in the hope of either finding yet more evidence against her or finding copies of her dealings with OFSTED, the Police and the DVLA as a result of his disclosures.

53. On the evidence I am satisfied that at some stage Neela Bibi confided in the Claimant that she had illegally obtained a fake UK driving licence for her husband by paying a substantial sum to a third party to provide this fake document. Prior to the Claimant and Neela Bibi falling out they were close enough to share such confidences, as siblings often are, and I find nothing remarkable in Mrs Bibi confiding in her brother that Mr Ali's Licence was not legitimate. Doubtless it was unwise of her but that is not the point.

54. It was common ground that the Claimant had notified OFSTED of these matters and I am satisfied that this disclosure met the criteria for protected disclosures. In her evidence, Mrs Bibi denied acquiring a fake UK driving licence for her husband, as alleged or at all, or that her husband ever drove without having first passed a UK driving test. I found Mrs Bibi to be noticeably evasive in her answers to questions relating to this particular matter. It would no doubt have been a simple matter to produce in evidence Mr Bibi's UK driving license, but this was not done. There was evidence (see pages 171-173 and 179) that the DVLA was not satisfied that Mr Ali's driving licence was lawfully held. In answer to my own questions as to whether her husband had, within the past 18 months, been required to take a UK driving test, Mrs Bibi at first affected not to understand this question then admitted that he had taken and passed such a test in this period. I then asked if her husband had driven in the UK prior to taking the test, to which she finally accepted that he might have so driven, though swiftly added the qualification that he *"only drove our own children"*. I do not accept that qualification. I make no finding of fact as to whether Mrs Bibi did illegally procure a fake driving licence for her husband, nor for the purpose of deciding the matters before me is it necessary to do so, but I am satisfied that for whatever reason she had told the Claimant this, that he reasonably believed her in this, and that he saw Mr Bibi driving at the relevant times.

55. As to the allegations of routinely breaching the staff to infant ratio, I am satisfied that the Claimant genuinely believed that these breaches did occur. Mrs Bibi denied any such breaches and whilst I am unable to determine as a matter of Regulation if there were in fact such breaches, in particular because I was not given the relevant statutory or other basis for the same, both Parties accepted that if the registration document at page 46 is genuine then this evidenced a breach. However, whether or not there were any breaches of regulation is not to the point. It is only necessary for the Claimant to reasonably believe that there were such breaches and I am satisfied

that he held that genuine belief on objectively reasonable grounds. There was a suggestion that the Claimant had falsified the infants' registration document found at page 46 (the "longer list") in order to "build a case" against Mrs Bibi and that the genuine registration document was to be found at page 46a, this being a "shorter list" of infants being present at Manor Park on the day in question. I was told by Mrs Bibi that the nursery was always Regulation compliant so far as infants to qualified staff was concerned. I am not persuaded by that suggestion or Mrs Bibi's evidence on this. Nor am I persuaded that the Claimant unlawfully removed Registration documents from the nursery in order to photograph them. I am satisfied that the Claimant (nor his wife) forged this document. I am also satisfied that he was asked by Neela Bibi to put Registration documents, including that now found at page 46 amongst others, into the boot of her car and that the Claimant took the opportunity to photograph this document. I find as a fact that the Registration document at page 46, the longer version, was an accurate record of the infants attending the nursery that day. The Claimant might have misunderstood the Regulations but if he did that does not matter.

56. That said, as I have already observed, I am persuaded that the Claimant was most unlikely to have made disclosures to OFSTED, or the Police and the DVLA were it not for the antagonism that existed between Mrs Bibi and Faryaal Hussain that had seeped into his own relationship with his sister. In so doing he was still principally motivated by public interest concerns but, were it not for this growing antagonism, his former filial family loyalty is likely to have stayed his hand, otherwise he would have blown the whistle earlier in his employment. Unfortunately, as time went on, this legitimate whistleblowing turned into a full blown investigation of Mrs Bibi by the Claimant. I also accept, and this at least is common ground, that eventually the Claimant told Neela Bibi that it was he who had notified OFSTED of his concerns though he told her this only after he had been suspended on 22nd October, his email of 14th November to Neela Bibi making that clear. By this time, however, Mrs Bibi had already decided to dismiss him for his activities in accessing her computer and, in particular, forwarding images from the computer to his wife, which revelation I am satisfied came as a shock to Mrs Bibi and which invoked in her a sudden and lasting loss of trust. I am not persuaded that the initial non-payment of the Claimant's October Salary was a simple error and find that in stopping the Claimant's salary from 22nd October, the very day on which Mrs Bibi learned of the Claimant's activities regarding her computer, this was Mrs Bibi's immediate, very probably angry, response to learning of this event. I am satisfied that Mrs Bibi then decided to end the Claimant's employment and it was only the arrival of Mrs Fagan on the scene that caused this situation to be reversed, if only for the sake of appearances. That his pay was stopped from 22nd October was not accidental but reflected Mrs Bibi's settled intention. From that moment, with or without a proper procedure, her determined intention was to dismiss her brother for his actions in accessing her computer and then sending his wife the images. The existing antagonism played a large part in all this and from that moment on a continued working relationship between the Claimant and Mrs Bibi had become impossible. Nevertheless, no doubt on the advice of Mrs Fagan, a disciplinary procedure was commenced. This having been commenced, and then ostensibly relied upon by the Respondent, it should have properly ran its course. It did not. Had it done so then in my estimation this would have reached its conclusion in no more than a further three weeks.

57. I have no reason to suppose that Mrs Fagan was aware of Mrs Bibi's longer term intention. Mrs Fagan found herself in difficult circumstances given the family aspect of the matter. In the event the procedure actually followed fell well short of a fair procedure. At the very most the two meetings to which the Claimant was invited, but did not attend, were only fact finding and not disciplinary hearings. Furthermore her Report should have done no more than determine whether the Claimant had a misconduct case to answer. It went some way beyond this and suggested dismissal for gross misconduct. This was seized upon by Mrs Bibi who duly dismissed the Claimant. It was only on his dismissal that the Claimant was told the allegations against him though in truth his only uncertainty at that stage was whether the allegations included his (only latterly admitted) whistleblowing.

58. That he had mixed motives in whistleblowing does not prevent his disclosures meeting the statutory tests, nor would it make lawful the Respondent's termination of the Claimant's employment if that decision had been as a result, or predominantly by reason of, the Claimant's whistleblowing. Pages 46 and 46a of the Bundle show very different numbers of infants registered at the Manor Park site on the 11th May 2017. The Claimant's explanation for this was that the longer list, which evidenced a breach of the relevant staff to infant Regulation, was the accurate list of those infants attending that location on that day. The much shorter list shown at page 46a is, according to the Claimant, the list which was then "created" by the Respondent to meet the Regulations. The longer list has been provided by the Claimant and the shorter list by the Respondent. Before me it was argued that the Claimant had created this longer document in order to discredit Mrs Bibi. The Claimant's account was that he photographed the genuine registration list (page 46) when the opportunity arose upon his being instructed to remove these lists, along with other documents, to Mrs Bibi's car so that they might not be inspected in the event of an OFSTED check. As to the allegation that he illegally accessed Mrs Bibi's computer, the Claimant stated that he did access her computer but that he had no need to "hack into" this as it was routinely open for general use by staff.

59. I am satisfied that the Claimant took a photograph of a genuine registration list as now appears at page 46, even if the second list shown at page 46a for the same day reflects a different state of affairs. I find that there was nothing unlawful or in breach of any contractual or other duty owed to the Respondent in his photographing that list – it was right before his eyes and required no surreptitious act on his part. I accept that he did this in a private unobserved moment when taking files to Mrs Bibi's car on her instructions. I find that the Claimant deliberately interrogated Mrs Bibi's personal computer for the purposes of further obtaining information concerning what he believed to be her unlawful conduct and then emailed what photographs he found therein to his wife. This was a step too far, whether or not he had to "hack" into that computer by using, or bypassing Mrs Bibi's password or not. In the event I do not believe he had to 'hack into' her computer as he had from time to time previously accessed it for ordinary work purposes, it was his then purpose, and in particular his emailing material to his wife, that was his downfall and breached Mrs Bibi's trust in her brother even though, at that time, she was unaware he had already made disclosures.

60. As to the disciplinary procedure, this was implemented by Mrs Fagan after Mrs Bibi asked for her assistance in the matter. Mrs Fagan is a friend of Mrs Bibi but I am not in a position to say that she was privy to Mrs Bibi's continuing intention to

dismiss the Claimant "come what may". Mrs Bibi had eventually been made aware of the Claimant's actions in reporting his concerns to OFSTED, but this was not the effective cause of his eventual dismissal. Mrs Bibi had by then already made up her mind as a result of the events on the evening of 22nd October. I am further satisfied that, but for the poisonous relationship that had developed between the parties, neither the protected disclosures nor the Claimant's photographing and accessing the computer would have arisen as filial loyalty, even if misplaced, would have prevailed. The question therefore arises as to whether the Claimant's conduct regarding the computer can properly be separated from his earlier whistleblowing. In my view these are separable. It was the Claimant's later conduct, that is to say accessing Mrs Bibi's personal computer and emailing to his wife, that resulted in the complete breakdown of Mrs Bibi's trust in the Claimant at a time when she was unaware of his OFSTED and other disclosures. Any employer would have been reasonably entitled to have taken this position. I am satisfied that Mrs Fagan was consulted by Mrs Bibi after she had suspended, and in fact initially dismissing, the Claimant on 22nd October. Mrs Fagan advised as to the appropriate procedure to use in the prevailing circumstance and I am not in a position to say, nor do I find, that Mrs Fagan was privy to Mrs Bibi's firm intention to dismiss in any event despite initiating those disciplinary proceedings. In my view the purpose of those proceedings, so far as Mrs Fagan was concerned, was to provide a fair procedure so far as possible in this difficult situation even if, as I find is the case, Mrs Bibi was determined that it end with the dismissal of the Claimant and that it suited her purposes that the procedure be initiated . In the event the procedure was unfair. It did not proceed beyond the first finding stage and the allegations in play were not put to the Claimant until his dismissal. Thus the procedure fell "at the first fence" and, in all the circumstances, an appeal would have been pointless. Had the procedure run its course then, in my view, this would have taken a further three weeks to run is course whether or not the Claimant had fully engaged.

61. Once Mrs Fagan appeared on the scene she implemented a fact finding exercise. The "stop" put on the Claimant's salary from the date of his suspension, later explained by the Mrs Bibi as a clerical error though I do not accept that, was lifted and the Claimant eventually received his salary to the date of his termination on 29th November 2017.

62. The Claimant was invited to two fact finding meetings. He objected to attending the first on grounds that he had not been told of the allegations against him and also on grounds of short notice, child care obligations and (inexplicably) supposed fears for his own safety. On rescheduling the hearing (the second invitation) at a different location and time of day, the Claimant raised the same objections and also insisted that he be accompanied by a Police Officer. The tone and content of the Claimant's correspondence by this time was becoming increasingly belligerent and caustic. There was no obvious reason why the Claimant thought it necessary to be accompanied by a Police Officer though as I say the Claimant, in this correspondence, spoke of the need to ensure his "safety". In the event this condition was accepted by the Respondent.

63. The Claimant says he attended the second interview but on his arrival was told no one from the Respondent as there. The copy messages sent at about that time suggest that the Claimant was by then very agitated indeed. The Respondent's

Mrs Fagan gave evidence that she and Mrs Bibi were waiting for the Claimant but that he simply did not arrive. I was told by Mrs Fagan that upon receiving messages from the Claimant that he had attended, but been told the Respondents were not there and had left, she then checked the entrance lobby CCTV and spoke with the lobby receptionist, but there was no evidence of the Claimant ever arriving, with or without a Police officer.

64. I am satisfied that whilst the Claimant might well have begun his journey to the appointed location in the event, and for whatever reason, he did not enter the building. My overall impression of the Claimant was that once he had been suspended (he at first thought he had been dismissed and I share that view) he felt isolated from most of his immediate family and became increasingly anxious. I certainly got the impression that he was reluctant to confront his sister. There was no evidence of his securing the company of a Police officer.

65. Mrs Fagan was entitled to thereafter draft her report, largely on the basis of the evidence of Zafran Hussain who had reported to his sister Neela Bibi the photographs from Mrs Bibi's computer which he had seen on Mrs Faryaal Hussain's mobile phone. Mrs Fagan was not entitled to go beyond finding a case for the Claimant to answer in respect of the Claimant accessing and photographing information on Mrs Bibi's computer. She went beyond that point, in effect sanctioning an immediate dismissal before offering the Claimant an opportunity to attend a disciplinary hearing. The Claimant had engaged with the process, at least in correspondence, and he might well have attended a disciplinary hearing had he been offered the chance. Whether his conduct amounted to a breach of trust and confidence was a matter for Respondent, in effect Mrs Bibi, not for Mr Fagan to decide. I have already found that it did.

66. Had this Report then been sent to the Claimant with an invitation for him to attend a Disciplinary Hearing to answer the allegations in the Report, the matter might have proceeded, so far as procedure was concerned, in a seemingly satisfactory way. However, that is not what happened. Mrs Bibi took this Report as providing sufficient reason to then dismiss the Claimant for gross misconduct and on grounds that the Claimant's conduct had breached the implied term of trust and confidence.

67. This dismissal letter was the first occasion on which the Claimant was expressly told the allegations against him. It might be that he had a very good idea of what the allegations relied upon by the Respondent were, and he might have thought they also included the whistleblowing matters. In truth they were unlikely to have included whistleblowing matters at all since to include them would be to court a subsequent finding of automatic unfair dismissal. Be that as it may, and whether deliberately omitted or not, I find it made no difference to the outcome.

68. The Respondent having elected to invoke a disciplinary procedure the Claimant was entitled to be invited to a disciplinary hearing at which he would have had the opportunity, if he had chosen to attend, to have put his case and, had he so wished, raised the matter of his disclosures to OFSTED. Even though Mrs Bibi's knowledge of these disclosures came after she had suspended the Claimant he no doubt would have argued, had he been given the opportunity and as he does in this Tribunal, that a dismissal from a disciplinary hearing was by reason of his OFSTED disclosures, only belatedly made known to Mrs Bibi.

69. As I have made clear, Mrs Bibi's decision to dismiss the Claimant at the earliest opportunity was already formed on 22nd October 2017. The Respondent had chosen to invoke a disciplinary procedure, even though the outcome was already decided so far as Mrs Bibi was concerned, and in the event this procedure was fatally flawed. Accordingly, by reason of this procedural failure, the dismissal was unfair. Had the procedure run its proper course this is likely to have taken a further three weeks during which time the Claimant would have remained suspended on full pay.

70. Whilst I am satisfied that on 22nd October Mrs Bibi had formed a settled intention to terminate the Claimant's employment before she came to know of his OFSTED disclosures, she would have been entitled to find that the claimant's activities with her computer amounted to misconduct. I am not satisfied that by simply accessing her computer this would have been conduct that Mrs Bibi could reasonably have considered to be misconduct, not least because on the evidence it seems to me that from time to time the Claimant, and indeed other staff, could and did access her computer in the course of their work. The Claimant's culpable misconduct lay in copying material and forwarding it to his wife. In the particular circumstances of this case I am not prepared to find that the reasonable employer would have found this to be gross misconduct but I am satisfied that it irrevocably breached the relationship of trust and confidence and by so acting the Claimant rendered his continued employment impossible.

Submissions

71. I took the submissions of each Representative into account in reaching my findings of fact. No useful purpose would be served by rehearsing these respective submissions in detail, suffice it to say that these followed the lines of the pleadings and the evidence, and that Mr Perry accurately and comprehensively set out the relevant law. The Claimant submits that he was subjected to verbal abuse by his family and eventual dismissal by reason of his making protected disclosures, first to Mrs Bibi by letter of 21st July 2017 and later on 10th August to OFSTED. For these proceedings the question of whether a protected disclosure was made to the DVLA is not relied upon (see list of Issues as per Judge Russel) though for completeness I am satisfied that such a protected disclosure was made. The Claimant admits that he photographed documents from Mrs Bibi's computer and that he emailed these to his wife. In so doing he argues that Mrs Bibi's computer was generally "open" to all staff and that in so doing he did nothing wrong. He says his motive was his continuing interest in what he reasonably believed to be Mrs Bibi's wrong doing. He claims he did make efforts to attend the hearings but was never told the allegations against him. My findings on those submissions are set out above.

72. For the Respondent Mr Perry drew particular attention to the need for causation to be established in claims of whistleblowing. He points out that if Mrs Bibi had received the Claimant's letter of 21st July 2017, relied upon by the Claimant as a protected disclosure but denied by Mrs Bibi having been received, then in fact the Claimant's evidence was that Mrs Bibi was not troubled by its contents. Indeed it would have served Mrs Bibi well to have said she did receive the letter when she did not, because the Claimant's evidence was that the only outcome from serving this letter on his sister, it was said in the midst of a heated row about Mrs Hussain, was that he and she decided that the Claimant would leave her employment some six or seven months

hence. Mr Perry submits it was the Claimant's action in accessing Mrs Bibi's computer, photographing documents therein, then sending these to his wife that brought about the Claimant's demise. He characterises the computer incident as being reasonably been regarded by Mrs Bibi as misconduct and that it also served to destroy the relationship of trust and confidence between them. I accept that it did destroy the relationship of trust and confidence. As to the Respondent's other submissions my findings are set out above.

73. The circumstances of this case are most unfortunate in terms of the likely consequences on the relationships with the protagonists' family. I am satisfied that the Claimant made protected disclosures in the public interest but that was not the reason for his dismissal, nor was it causative of any family difficulties he then suffered. The Respondent elected to invoke a disciplinary procedure when arguably she need not have done that. Once invoked the Claimant was entitled to expect it to run its course. Had it done so that would have taken no more than a further three weeks beyond the actual date of termination. The Claimant is therefore entitled to receive a sum equivalent to his net wages for that period.

74. Finally, I should expressly deal with a point raised by Mrs Faryaal Hussain in her Submissions though not raised in evidence. She refers to documents at pages 52 to 62 to which I was not directed in the course of evidence but which she now describes as *"paramount to the case"*. Mrs Hussain submitted that because an OFSTED letter to Mrs Bibi, her reply to that, and the contents of the OFSTED Report, are in her words *"identical to the disclosures made (*earlier*) to the Respondent (*on 21st July*)"* this proves that the *"Respondent was fully aware of the disclosures prior to the suspension/dismissal of the Claimant."* There would be some merit in that argument if I was persuaded that the Claimant had given the letter of 21st July to Mrs Bibi, however for the reasons set out, I am not satisfied that he did, as a result this argument falls away.

Employment Judge Brook

12 December 2018