THE EMPLOYMENT TRIBUNALS

Claimant: **(1) Ms Sophie Louise Stead**
(2) Ms Abbie Georgia Rain

Respondent: **Holley Park Academy**

Heard at: **North Shields Hearing Centre** **On: 25, 26, 27 February 2019 & 1 and 2 May 2019**
Deliberations 3 May 2019

Before: **Employment Judge A M Buchanan**

Members: **Ms S Don**
Mr S Carter

Representation:

Claimant: **Mr T Wilkinson of Counsel**
Respondent: **Mr G Vials - Solicitor**

JUDGMENT

It is the unanimous Judgment of the Tribunal that:-

Claim Number 2501388/2017: Ms S L Stead

1. The claim of detriment on the grounds of protected disclosure advanced pursuant to section 47(B) of the Employment Rights Act 1996 Act ("the 1996 Act") fails and is dismissed.

2. The claim of automatic unfair dismissal by reason of protected disclosure advanced pursuant to section 103(A) of the 1996 Act fails and is dismissed.

3. The claim of ordinary unfair constructive dismissal advanced pursuant to sections 94 – 98 of the 1996 Act is well-founded and the first claimant is entitled to a remedy.

Claim Number 2501390/2017: Ms A G Rain

4. The claim of detriment on the grounds of protected disclosure advanced pursuant to section 47(B) of the 1996 Act fails and is dismissed.

5. The claim of automatic unfair dismissal by reason of protected disclosure advanced pursuant to section 103(A) of the 1996 Act fails and is dismissed.

6. The claim of ordinary unfair constructive dismissal advanced pursuant to sections 94 – 98 of the 1996 Act is well-founded and the second claimant is entitled to a remedy.

Both claims

7. A Remedy Hearing will take place pursuant to Orders issued separately.

REASONS

Preliminary matters

1. In this Judgment the following expressions have the following meanings:
1.1 "the first claimant" means Sophie Louise Stead
1.2 "the second claimant" means Abbie Georgia Rain
1.3 "the claimants" is the collective expression for the first claimant and the second claimant.
1.4 "X" is the child at the centre of the incident on 21 November 2016
1.5 "LADO" is the local authority designated officer in respect of safeguarding issues.
1.6 "Z" is a member of staff of the respondent referred to by the second claimant as having, as one of his/her duties, a responsibility to sit on the mat with the Nursery children when they were being dismissed. We did not hear from this person and think it appropriate to refer to him/her only as "Z".

2. The claimants filed separate claims on 24 October 2017 but both advanced claims of ordinary unfair constructive dismissal pursuant to sections 94/98 of the 1996 Act, automatic unfair constructive dismissal pursuant to section 103A of the 1996 Act and a claim of detriment on the grounds of having made a protected disclosure pursuant to section 47(B) of the 1996 Act. It was confirmed at the outset of the hearing that the claims intimated in both claim forms in respect of written particulars of employment were in respect of the provisions of section 38 of the Employment Act 2002 and not sections 11/12 of the 1996 Act.

3. The respondent filed a separate response to both claims on 23 November 2017 and denied all liability to both claimants.

4. On 14 December 2017 an order was made by the Tribunal combining these claims.

5. On 21 December 2017 a preliminary hearing took place before Employment Judge Garnon at which the issues in the claims were identified and case management orders made.

6. A hearing was fixed for 30 April – 3 May 2018 but subsequently postponed due to the illness of Glenda Wood a witness for the respondent. The matter was relisted for 17 – 20 September 2018 but again postponed for the same reason and the matter was re-listed for February 2019. Regrettably that same witness could not attend by reason of illness on the days set for the hearing in February 2019. It was decided to proceed so far as possible over three days and the claimants presented their cases. The matter was then adjourned until May 2019 for the respondent to present its case with all witnesses present. The hearing proceeded as planned in May 2019.

7. At the end of the hearing on 2 May 2019, the Tribunal reserved its judgment and therefore this judgment is issued with full reasons in order to comply with the provisions of Rule 62 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Witnesses

7. In the course of the hearing the Tribunal heard from:-

For the claimants

7.1 The first claimant.
7.2 The second claimant.

For the respondent

7.3 Susan Kitchen (“SK”) – Deputy Head Teacher.
7.4 Sharon Richards (“SR”) – Head Teacher (Job Share).
7.5 Glenda Wood (“GW”) – Business Manager/Director. This witness dealt with the investigation into the conduct of the claimants.
7.5 David Haw (“DH”) - Chair of Governors. This witness dealt with a grievance investigation in respect of grievances raised by the claimants.
7.5 Richard Ian Chamberlain (“RC”) – Governor. This witness chaired the panel of governors which dealt with the appeals raised by the claimants in respect of the outcome of their grievances.
7.6 William George McGill (“WM”) – Governor. This witness dealt was a member of the panel which dealt with the disciplinary hearings in relation to both claimants but in their respective absences.

Comment on witnesses

8.1 Sophie Louise Stead. This witness evinced great upset in respect of the conduct of the officers of the respondent particularly in relation to the report made on her to the LADO which named her daughter. We assessed her evidence as having been given in a straightforward and truthful manner.
8.2 Abbie Georgia Rain. This claimant was junior to the first claimant and found herself caught up in the events which lie at the centre of this matter. Her evidence was given in an entirely straightforward way and she was entirely credible.
8.3 Susan Kitchen (“SK”). This witness gave brief straightforward evidence which we accepted.

8.4 Sharon Richards. This witness gave her evidence in a defensive way and we did not find her to be an impressive witness. She was intent in particular on defending her actions of 21/22 November 2016 – actions which, ultimately, we judge not to have been properly thought through and entirely motivated by a desire to limit any damage to the respondent.
8.5 Glenda Wood. This witness gave her evidence in a forceful way which, at times, was in danger of becoming aggressive. She was very defensive of the reports which she produced after having investigated the actions of the claimants. In cross examination she gave replies which were at times reluctant and obstructive.
8.6 David Haw. This witness demonstrated a very poor – bordering on non-existent - grasp of his role as the person charged with the investigation of grievances raised by the claimants. His approach to that investigation centred on a desire to be empathetic to the claimants and to be liked by them rather than to carry out an independent and robust grievance investigation.
8.7 Richard Chamberlain showed himself entirely reliant on HR advice and brought to the appeal process little, if any, independence of thought. His evidence was not impressive.
8.8 William McGill. This witness gave evidence in an entirely straightforward and credible fashion. The Tribunal was satisfied that this witness brought independence and mature consideration to the processes with which he was involved.

<u>Documents</u>

9. The Tribunal had before it two lever arch files of documents initially extending to 825 pages. During the course of the hearing, additional documents were added taking that number to more than 839 pages. Any reference in this Judgment to a page number is a reference to the corresponding page within the trial bundle.

<u>The Issues</u>

10. The following issues were identified as being relevant to these claims:

<u>Protected disclosure detriment</u>

10.1 Did the claimants disclose information? Of what, to whom and when?
10.2 Did oral and written communications by the claimants in their reasonable belief tend to show one or more of the relevant failings under section 43(B)(1)(a)-(f) of the 1996 Act?
10.3 Was the disclosure in the reasonable belief of the claimants made in the public interest? For remedy purposes, was it made in good faith?
10.4 Were the claimants subjected to a detriment? If so, what were the detriments, who subjected the claimants to them and when?
10.5 Was the material reason, not necessarily the principal reason, for the detriments that the claimants had made a protected disclosure?

<u>Unfair dismissal</u>

10.6 Did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimants?

10.7 If so, did the claimants resign, at least in part, in response to such breach without first affirming the contract?
10.8 If so, and there was a dismissal, does the respondent show a potentially fair reason for its breach or was the principal reason for it that the claimants had made a protected disclosure?
10.9 If the former, was the dismissal fair applying the test in section 98(4) of the 1996 Act?
10.10 For remedy purposes, would the claimants have been dismissed in any event and/or did their conduct contribute towards the breach and was any disclosure made in good faith?

Findings of fact

11. The Tribunal has considered in detail the oral evidence received by it and in particular the way in which that evidence was given. The Tribunal has considered all the documents to which it was referred. Having carried out that exercise, the Tribunal makes the following findings of fact on the balance of probabilities:-

Findings of fact applicable to both claimants

11.1 The respondent is a primary school in Washington near to Newcastle upon Tyne. On 1 August 2012 the respondent converted to an Academy. It is part of Acer Learning Trust which was formed in 2015: the Trust is a company limited by guarantee. The respondent offers education to children from nursey age to year 6 namely from 3 to 11 years of age. The respondent buys into Human Resources ("HR") advice from its local authority ("the Authority") Sunderland City Council. Both claimants worked at all material times in that part of the Academy known as the Foundation Stage Unit which covers reception classes and, since 2014, a nursery which we refer to hereafter as "the Nursery". The respondent was subject to an Ofsted inspection and subsequent report in March 2015 (page 139d) where it was rated as "Good". It was stated (page 139h) that the work of the respondent to keep pupils safe and secure was outstanding. It was noted (page 139i) that there were well understood routines and practices to keep children safe at the beginning and the end of the school day. A short Ofsted inspection took place in December 2018 which concluded (page 139m) that the provision provided by the respondent remained good.

11.2 The respondent has a variety of policies which govern its relations with its staff.
11.2.1 It has a Whistleblowing Policy (pages 826-831) which aims to encourage workers to feel confident in raising serious concerns and reassuring them that workers who raise matters in good faith will be protected from reprisals or victimisation. Neither claimant referred to this policy or made reference to it at any time during the events relevant to these claims.
11.2.2 It has a Grievance Policy provided by the Authority (pages 140-161) which in its formal procedure requires grievances to be raised in writing without unreasonable delay. Grievances are to be investigated by the Headteacher unless made against the Headteacher when in such circumstances the investigation is taken by the Chair of Governors. Appeals are heard by the Appeals Committee of the Governing Body. The policy at section 9 (pages 152/3) provides for a discretion to suspend a disciplinary procedure if a grievance is raised during a disciplinary process. In addition, a grievance raised during a disciplinary process which relates to the disciplinary case can be dealt

with within the disciplinary procedure if that is made clear or it can be dealt with in parallel to the disciplinary matters if there is no connection between the two. In so providing the procedure reflects the ACAS Code of Practice on Disciplinary and Grievance Procedures 2013 (page 161r). This policy was replaced during 2017 but the policy applied by the respondent to the grievances of the claimants was the policy described.

11.2.3 The respondent is subject to the statutory guidance "Keeping Children Safe in Education" (pages 162-237). That guidance emphasises that all school staff have a responsibility to provide a safe environment in which children can learn. Part four of the guidance deals with the duties of the respondent when it is alleged a teacher or member of staff has behaved in a way that has harmed or may have harmed a child. In respect of suspension of an employee, the guidance states that risk of harm to children should be evaluated and "*in some rare cases that will require the case manager to consider suspending the accused until the case is resolved. Suspension should not be an automatic response….If the case manager is concerned about the welfare of other children in the community or the teacher's family those concerns should be reported to the designated officer or police…..the case manager should also consider whether the result that would be achieved by immediate suspension could be obtained by alternative arrangements. In many cases an investigation can be resolved quickly and without the need for suspension…."* (page 208). If immediate suspension is considered necessary the rationale and justification for it should be agreed and recorded.

11.2.4 The respondent is subject to the Department for Education Statutory Framework for the Early Years Foundation Stage (pages 237b-237z). This framework applied to the Nursery. This provides that there must be at least one member of staff for every 13 children (page 237p) and schools are not required to have separate policies to cover the nursery provision provided the requirements of the framework are met through existing policies.

11.2.5 The respondent has a disciplinary procedure provided by the Authority (pages 279-292). This provides for disciplinary issues to be dealt with promptly without unreasonable delay. Investigations should be carried out by an appropriate senior manager who has had no previous involvement in or been connected with the case. Section 11 states that where an allegation of a safeguarding nature is made against a member of staff, the Headteacher should give urgent consideration as to whether there is sufficient substance in the allegation to warrant an investigation and prior to that the Headteacher will have contacted the LADO.

11.3 The second claimant was born on 21 August 1997. On 31 July 2014 the second claimant began work for the respondent as an Apprentice Teaching and Learning Curriculum Support Assistant on a two-year apprenticeship: this was the second claimant's first job after leaving school and at the material time for these claims she was aged 19/20. On the expiry of that fixed term employment, the second claimant was retained by the respondent as a Teaching and Learning Curriculum Support Assistant in the Nursery. The second claimant was sent a fixed term contract governing the period from the start of her employment until 31 August 2016 by the Authority (pages 556 – 563) on or around 11 December 2014. We accept the evidence from SR that contracts were sent out by the Authority on behalf of the respondent direct to members of staff and a copy sent to the respondent at the same time. We accept therefore that the copy contracts held by the respondent are not usually signed. The only contractual document sent to the second claimant was that at pages 556-563 and that contract expired on 31 August 2016. The notice provisions in that contract are set out at clause

13 and a note is appended which reads: *"the above notice provisions do not apply at the end of the contract – see letter of appointments".* We were not shown any other contractual documents and we accept the evidence of the second claimant that no contract was sent to her at the end of the fixed term appointment or subsequently. The fixed term contract provided for the second claimant to give to the respondent one month's notice of termination with the month beginning on the first day of the month following that in which the notice was given. The second claimant worked in the Nursery under the supervision Barbara King after the nursery was opened in autumn 2014 but Barbara King had been absent from work for some time prior to the events of 21 November 2016. At the material time, the second claimant was working in the Nursery under the supervision of the first claimant.

11.4 The first claimant was born on 9 October 1974. On 1 September 2014 the first claimant began work for the respondent as an Early Years Foundation Stage Professional Practitioner. The first claimant worked full-time initially that was reduced to 20 hours per week after the return of the first claimant from statutory adoption leave with effect from 6 June 2016 (page 257). We conclude that on or around 7 July 2015 the first claimant was sent by the Authority a contract (pages 244 – 251) in the same circumstances as set out above. That contract was a rolling contract and it provided at clause 12 for the first claimant to give one calendar month's notice to terminate her contract with the month beginning on the first day of the month following that in which the notice was given. Both claimants stated that they had not received any contractual documents. We do not accept that evidence. We had clear evidence before us that contracts as described above had been prepared by the Authority and it is highly unlikely that, once prepared, they were not sent out. We infer that both claimants did receive their respective contracts but had simply forgotten that was so. The evidence of SR as to how contracts were dealt with and why the respondent held an unsigned copy was both plausible and credible and we accepted that aspect of the evidence of SR.

11.5 On 20 September 2016 the first claimant was temporarily appointed as replacement to Barbara King in the Nursery to teach children of nursery age.

11.6 On 4 October 2016 the first claimant replaced Barbara King on a long-term basis. The second claimant worked alongside and under the supervision of the first claimant.

11.7 Over the summer holiday period in 2015, some building work had been carried out at the Nursery which resulted in the children entering and leaving the Nursery by a different route. No alteration to the written policies dealing with the dismissal of the children from the Nursery had been made as a result of these alterations. The alterations were not of great significance but there was a failure on the part of the respondent to update its written policies after those alterations. The alterations are demonstrated on pages 139q and 139r.

11.8 The job descriptions of each of the claimants provided as one of their main duties that they should ensure all children under their care were safe at all times and that they should promote and safeguard the welfare of the children under their control.

11.9 On 21 November 2016 an incident occurred when children were being dismissed from the Nursery at the end of the morning session at around 12 noon. The dismissal of the children from the Nursery was being undertaken as usual by both the first claimant

and the second claimant: as the senior member of the pair, the first claimant was in charge. Both were standing at or close to the door of the Nursery. There were some 26 children to dismiss (page 237a). On that day and not unusually, the first claimant was required to give out letters to the parents or guardians collecting their children in addition to dismissing the children and the second claimant had a first aid issue to report to a parent in addition to dismissing the children. At the material time the first claimant was approached by a parent to speak about her child and at the same time a child, who had been dismissed, returned with his parent because he had forgotten something. At the same time the second claimant was speaking to the relevant parent about the first aid issue. At that point and in some unknown way, the child X left the Nursery contrary to the laid down practice which was that children should sit on a mat close to the door with the other children and wait until their name was called when the person coming to collect them arrived. No blame of whatever nature can possibly attach to X who was only three years old nor does any blame of any kind attach to her grandmother who had come to collect X on that day at the correct time. Whilst both the first claimant and the second claimant were momentarily distracted as set out above, X walked passed them both, without her name having been called, and made her way out of the door to the Nursery and then out of a nearby gate which gave onto a path which led down to a main road. Very fortunately the grandmother of X was making her way up the path towards the door of the Nursery to collect X and was able to intercept X before she reached the main road. The grandmother of X was understandably upset and then angry at meeting X on the path and rightly concerned at the potential harm to her granddaughter. The matter was a potentially very serious incident but fortunately no harm resulted from it.

11.10 The grandmother of X went with X to the door of the Nursery and spoke to the first claimant and made her aware of what had just happened. The first claimant was shocked and spoke to X and her grandmother in an attempt to find out how X had been able to leave the Nursery unobserved. It was subsequently alleged that the first claimant spoke to X in an inappropriate manner and effectively told her off for leaving the Nursery without having had her name called. The first claimant denied that allegation and it was not proceeded with. The matter was soon resolved at the door between the grandmother and X and the grandmother made her way to the main door of the respondent in order to make a complaint.

11.11 As soon as the incident happened, the first claimant reported the matter to SK and then, as instructed by SK, went to see SR in order to report the incident.

11.12 At the same time the grandmother made her way to the front door of the respondent school and asked to see SR. SR was not available and therefore GW went to see the grandmother who in an emotional conversation explained to GW what had happened and how unimpressed she was with the situation in general and the respondent in particular.

11.13 GW as Business Director of the respondent immediately recognised the potential gravity of the situation for the reputation of the respondent and went to see SR whom she found in the company of the first claimant. The first claimant having completed her oral report then left the Nursery for the day. SR and GW then discussed together what actions should be taken in response to the incident. Both were concerned about potential adverse comment in the public press. The potential damage to the reputation

of the respondent and indeed their own reputations was at the forefront of their minds. A draft press release was prepared in case the matter was reported to the press. We infer by reason of the ensuing actions taken that afternoon that a sense of panic had developed.

11.14 SR telephoned the Authority for HR advice and also the LADO. In the course of the afternoon and without giving any thought to any alternative method of approaching the situation, it was decided after advice from HR and the LADO that both claimants should be suspended from duty. SR followed that advice blindly and did not bring to bear on that decision any independence of thought or consideration of alternatives to suspension. In addition, a form (pages 339-340) was completed by SR giving details of the matter which was sent to the LADO. We find there was no requirement for that form to have been completed so long as the Headteacher had notified the LADO orally which she had. In completing that form, the Headteacher also included on it the name and personal details of the first claimant's daughter and of the first claimant and potentially that could have caused considerable difficulties for the first claimant who had recently adopted her daughter after a lengthy difficult process. The purpose of including details of children on that form was if the person being reported (the first claimant) posed a risk to a child. There was no suggestion in this case that what had happened was anything other than an unfortunate accident and no suggestion whatever that first claimant posed a risk to any child let alone in particular her own child. Nonetheless the form sent to the LADO was completed in the manner described. The first claimant did not come to know of this matter for some time but, when she did come to know of it, that matter caused her considerable distress and upset. The brief outline of the incident contained on the form reads:
"X a nursery child was brought back into nursery by her grandmother after she was found walking out of school without an adult having collected her. All staff involved have made a statement, an internal investigation has been started. X's mother has been contacted and the situation explained to her and both parents are attending a meeting tomorrow at 2pm 22.11.16. LADO was informed. HR have been informed - action suggested suspension of the member of staff in charge until the investigation is complete. Staff member suspended 22.11.16. Sunderland City Council Media Team - Press Office have also been alerted on the advice of HR".

11.15 The completion of that form in the manner in which it was done was indicative of the ill thought out and knee-jerk reaction of both SR and GW to the situation which faced them on the afternoon of 21 November 2016. We conclude that the actions of SR and GW that afternoon were characterised by an absence any proper and objective consideration of the situation and a desire to be seen to be reacting to the situation in order to placate the grandmother of X who was vociferous in her complaints. No proper consideration was given to any alternative to suspension of the claimants and no consideration was given to the effect of suspension on the claimants themselves. No consideration was given to the fact that the first claimant was in charge of the dismissal procedures on 21 November 2016 and that the second claimant was assisting her and effectively following her instruction and thus whether the second claimant should be suspended. The Chair of the Board of Governors DH was contacted about the matter and it was agreed he would see the parents of X together with SR on the following day.

11.16 On 22 November 2016 when they arrived for work, both claimants were suspended in separate meetings with SR and GW. Their relevant passes were removed from them and they were escorted from the premises.

11.17 On that same day SR had an interview with the parents of X, at which DH was present, and again expressed her apologies and assured them that the matter was being taken very seriously. She listened to what the parents had to say. On the following day a new procedure in respect of the dismissal of the children was introduced into the Nursery. This entailed the children sitting at a greater distance from the exit door than had been the case previously. The children also were to sit in a space where they themselves could not see the exit door and so would not be tempted to leave before their name was called. This was in contrast to the procedure in place on 21 November 2016 which required the children to sit on a mat very close to the door and in sight of it. As a result of that change of procedure, the risk assessment for the Nursery was updated by the respondent (page 831) and an entry was made into the section marked "*EYFS external red door*" with the additional words added "*On departure an adult will be supervising between Reception and Nursery by arch".* The policy of the respondent for the Foundation Stage of the Academy (of which the Nursery formed part) read in terms of departure of the children at the end of a session: "*The wooden gates to Foundation Stage entrance open at 11.45 each morning. Parents and carers are then asked to wait in single file next to the red Foundation Stage Entrance Doors where a member of staff will be on duty. As each parent or carer reaches the front of the line, their child's name is called to another member of staff within the building who alerts the member of staff supervising the children, who will dismiss each child in turn".* As written, this policy suggests that three members of staff were involved in the process. We find that on the majority of days the children were dismissed from the nursery with only two members of staff involved. We accept the evidence of the claimants that what they did on 21 November 2016 was what they had always done either together or when individually working with Barbara King.

<u>Findings of fact in relation to the first claimant</u>

11.18 Subsequently a letter was sent to the first claimant (page 258) confirming her suspension the purpose of which was said to be *"to remove you from the workplace whilst an investigation is carried out in respect of failing to promote and safeguard the welfare of the children and young people that you are responsible for, or coming to contact with".* It was emphasised that suspension was not of itself disciplinary action but disciplinary action was said to be a possibility on completion of the investigation. The first claimant was invited to a meeting on 1 December 2016 with GW who was to carry out the investigation.

11.19 At the meeting on 1 December 2016 with GW (pages 312-315), the first claimant gave her account of the events on 21 November 2016. In the course of answering a question on how the situation could have been handled better, the first claimant stated that in hindsight there should have been a risk assessment on the exit door and a different procedure with a teacher on the door, one inside and maybe the pupils in another class area. The first claimant stated that she had had no instruction on the dismissal procedure and simply followed what she had seen Barbara King do when she had worked under her supervision and that there was no specific exit policy for the Nursery. A further investigation meeting with the first claimant was held on 9 December

2016 (pages 327-330). The statements of other staff members as to the procedure for the dismissal of pupils were put to the first claimant for comment. The first claimant asked where the procedure was written down and re-iterated that she had followed the procedure given to her by Barbara King. She stated that she felt other staff were covering themselves.

11.20 The report into the actions of the first claimant (pages 266 – 350) was issued on 24 January 2017 to the first claimant. There were twenty-two appendices to the report including details of the meetings which GW had had in the course of her investigation and at appendix 21 a copy of the report on the first claimant to the LADO. The report sent to the first claimant effectively combined the investigations by GW into the actions of both claimants. The report into the first claimant concluded that the first claimant should face a disciplinary hearing to face four allegations which read as follows:

11.20.1 On 21 November 2016 Mrs Stead failed to follow the recognised procedure for the dismissal of Foundation Stage Unit children in relation to the nursery class
11.20.2 On 21 November 2016 pupil X left the Foundation Stage Unit without the knowledge of a member of staff and without an appropriate adult. Mrs Stead therefore failed to safeguard a child in the care of the Foundation Stage Unit on that day
11.20.3 On 21 November 2016 following Mrs Stead being made aware by the pupil's grandmother that she had left the building without her knowledge, Mrs Stead proceeded to tell the pupil off in front of the grandmother for leaving school without permission
11.20.4 The evidence would suggest that Mrs Stead has not been wholly truthful and therefore leaves the Academy with little trust and confidence in Mrs Stead.

11.21 In section 2 of the report (page 269) a summary was given of the events of 21 November 2016 which includes the sentence at the second paragraph numbered 2.2: *"This allowed the child unrestricted access to a busy main road running alongside other school which is also a bus route".* Paragraph 2.8 of the report read: "*Following initial investigation meetings, a decision was made on the morning of 22 November 2016 supported by the Chair of Governors, based on the evidence available at that point, to suspend Mrs Stead from duty. The suspension was confirmed in writing in a letter dated 22 November 2016".* There followed the four allegations set out above which the claimant was to face at a disciplinary hearing. Section 5 of the report set out the findings of GW. It was made clear that there was no specific written procedure within the respondent's Arrivals and Departures Policy in terms of how to dismiss each year group including nursery pupil. No reference was made in the report to the changes made to the Arrivals and Departures Policy on the day following the incident. It was stated that all staff interviewed *"seemed to have an understanding of "the procedure" for dismissing the nursery pupil from verbal instructions or having seen other staff dismiss the pupils".* In section 6 of the report the four allegations were repeated and in respect of the third allegation the words "*her actions on becoming aware that a nursery pupil had left the building without her knowledge demonstrated poor use of judgement"* were added at the end of the third allegation set out at 11.20.3 above. The report concluded with three recommendations expressed as follows:
11.21.1 "It is recommended that governors deliberate all of the facts included in this report for a disciplinary hearing to consider the evidence contained within this document and give consideration to the disciplinary sanctions regarding Mrs Stead's continued employment at the Academy.

11.21.2 Consideration should be given to reviewing the Academy's written policy and procedures around the dismissal of pupils and in particular the procedures for dismissing children within the Foundation Stage Unit.
11.21.3 Staff should be reminded in a timely manner for the need of honesty and transparency around their conduct in the workplace adhering to the staff code of conduct".

11.22 On 25 January 2017 the first claimant was signed off work with "*work related stress".* The disciplinary hearing due to be held in respect of the first claimant on 31 January 2017 did not proceed because the first claimant was not fit to attend. She was referred to occupational health ("OH") and a report on her was received on 16 February 2017. In view of the perceived impact of the situation on the first claimant's well-being, arrangements were made for her to access psychological support through OH confidential counselling.

11.23 On 1 March 2017 the first claimant raised a grievance (pages 365 – 373). In that grievance the first claimant set out her grievances at length. The first claimant asserted that she had received no formal training in how the Nursery worked when she took over from Barbara King in September /October 2016. There was no written procedure for the dismissal of Nursery children at the end of the morning. The first claimant asserted that she simply followed the actions of Barbara King in dismissing the pupils and that the second claimant (who had worked with Barbara King for some time) did not seek to correct the procedure which the first claimant adopted from October 2016 onwards. The policy which she adopted on 21 November 2016 was the same policy which she had adopted from the beginning of October 2016 and no one had questioned her actions. The first claimant asserted that the investigation of GW was not (page 367) "*fair thorough or objective"* and the first claimant set out 15 matters about which she was concerned in respect of the investigation. These included that GW had found there was a recognised procedure for the dismissal of pupils but that there was no evidence to support that conclusion. The first claimant raised the absence of any reference in the report to the change in the dismissal of pupil procedures in the Nursery which had taken place shortly after the incident. She made the point that the procedure which she was following required children to sit on a mat 4 metres away from the open door and in view of it. It was asserted that GW had not been objective in the report and had concentrated on evidence to support the allegations. The first claimant complained that allegation four asserted that she had not been "*wholly truthful"* without providing any evidence that that was so. The first claimant asserted that the record of the meeting on 9 December 2016 was not complete and that the statement attributed to her "*the truth has been embellished and rightfully so"* should in fact read "*the truth has been embellished to ensure that nobody else gets into trouble and rightfully so".* The first claimant asserted again that the report had been written in a way to support the allegations made against and without any analysis of evidence. The first claimant asserted her view that the mandate of GW was to present her in the worst possible light. The first claimant complained that there was no basis for any report to the LADO and particularly complained that the details of her daughter had been included on that form and that X had been described on the form as the "*victim".* She complained that her own personal standards had been compromised by the respondent's lack of correct risk assessment and safeguarding procedures. The first claimant asserted that her professional reputation had been irreparably damaged and she refuted any accusation of negligence on her part. She asserted her belief that the incident occurred due to a failure to fully

assess the risk when it was decided that the new reception room was to be used as a Nursery exit and that the incident on 21 November 2016 was a rogue situation which had never been anticipated or planned for. The first claimant asked that her grievance be investigated by someone other than a senior manager of the respondent or the respondent's HR representative.

11.24 A meeting with SR to review the claimant's sickness absence was suggested for 15 March 2017 but the first claimant refused to attend whilst her grievance was outstanding. A further meeting was suggested for 7 April 2017 but the first claimant refused to attend for the same reason.

11.25 DH volunteered to consider the first claimant's grievance and a meeting to discuss it was held on 24 March 2017. No consideration was given as to whether that was an appropriate step either because of the involvement of DH in meetings with the parents of X at a very early stage or because of the difficult position his involvement may place any colleagues called upon to deal with the grievance appeal as in fact occurred. DH was assisted by an HR adviser from the Authority. Minutes of the meeting were not produced. DH explained that on advice he had concluded the majority of the matters raised by the first claimant were more properly dealt with as part of the disciplinary action which was then ongoing. He stated that he had not been provided with a copy of the report and could not therefore respond to many of the points raised. DH considered that he could deal with some of the points which had been raised in the grievance namely:
11.25.1 concerns in respect of the lack of training following the first claimant's move from reception to nursery
11.25.2 concerns about the way in which the first claimant's suspension had been carried out
11.25.3 concerns about the appropriateness of the investigation officer – GW
11.25.4 information that had been provided to the LADO.

11.26 A letter was sent by DH to the first claimant dated 12 April 2017 (pages 395-399) giving the outcome of the grievance investigation.
11.26.1 In respect of the first matter it was accepted that the first claimant may not have had specific training but it was concluded that the first claimant had had general training in safeguarding in the early years foundation stage. That part of the grievance was not upheld.
11.26.2 In respect of concerns about the suspension, it was concluded that the matter had been appropriately dealt with and the grievance was not upheld. It was acknowledged the matter could have been handled more sensitively.
11.26.3 It was not accepted that GW was an inappropriate person to carry out the investigation. It was acknowledged that the first claimant had been told not to have contact with the second claimant but that she had been put in a waiting room with the second claimant during the investigation process. This part of the grievance was not upheld but it was acknowledged that the first claimant should not have been put in a position where it could be perceived that she was communicating with the second claimant.
11.26.4 It was concluded that the procedure adopted in relation to the reporting of the incident to the LADO and the completion of the form was appropriate and the grievance was not upheld. Various recommendations were made and the first claimant was advised of her right of appeal.

11.27 The approach taken by DH to the investigation was flawed. No rigorous investigation into the matters raised by the first claimant was carried out. DH approached the matter on the basis that he needed to be empathetic to the first claimant to seek to persuade her to continue with the disciplinary process. DH did not interview a witness Amanda Hoggett but asked his HR adviser to do so on his behalf. DH made no enquiries as to the suitability of GW to carry out the investigation. DH made no enquiries as to whether GW had any conflict of interest in respect of the investigation particularly in respect of her signing off of the risk assessment and the Arrivals and Departures Procedures which were central to the matter. DH accepted what he was told by the respondent namely that GW was an appropriate person to carry out the investigation. DH accepted without question that he was not to look at the investigation report and his sole aim was to engage with the first claimant and to seek to persuade her to engage with the disciplinary process. In cross examination DH accepted that if the investigation report was flawed and biased that could lead the disciplinary panel to dismiss the claimants but nonetheless confirmed that he had decided to investigate the matters he thought it right to investigate and no more. DH spent some time in the school investigating the matter but made no notes as to his investigations or of the persons spoken to. All the investigation was carried out after the meeting with the first claimant who was not afforded any opportunity to comment on the outcome of that investigation. DH did not access the training records of the first claimant in order to check on the training she had received. He accepted what he was told by the respondent namely that appropriate training had been given and appropriate procedures were in place without any challenge to that statement. DH accepted that there had been no lack of training of the first claimant in respect of the dismissal of pupils even though he did not investigate the matter because two members of staff had confirmed the position to him. He was not aware of any need to make notes of his discussions. DH did not speak to GW at all during the course of his investigations. DH made no enquiries in respect of the procedure adopted on informing the LADO but left that investigation to his HR adviser. DH accepted in cross examination that he had met with the parents and grandmother of X shortly after the incident and he had concluded they were acting in a reasonable manner. DH denied in cross examination that he had blindly supported the senior leadership team of the school in investigating the grievance but we conclude that is exactly what he did. He accepted that he could see why it might be thought he was unprepared to deal with the grievance investigation but confirmed that he was. His wish in dealing with the grievance was to help the first claimant and to be liked by and to empathise with her.

11.28 The first claimant attended an attendance review meeting with SR on 27 April 2017 and the disciplinary hearing was rescheduled for 5 May 2017. At the attendance review meeting the first claimant was encouraged to proceed with the disciplinary process. However, that hearing was postponed when the first claimant submitted an appeal against the grievance outcome.

11.29 By a letter (pages 417-419) dated 2 May 2017 the first claimant appealed against the grievance outcome which she received on 22 April 2017. The first claimant challenged the findings in respect of the training she had received. She challenged the finding in relation to the retention by the respondent of a USB stick at the time of her suspension. She challenged the finding that GW was the correct choice to act as investigating officer and pointed out the absence of any reference in the report to

exculpatory evidence. The first claimant noted that there was no reference in the outcome to the absence of any mention in the report of a change to the dismissal procedure or the finding in the report that she had not been wholly truthful and that the respondent had little trust and confidence in her. The first claimant raised for the first time the fact that the LADO referral form had been disclosed by the respondent to the second claimant – this matter having only then recently come to her knowledge.

11.30 The grievance appeal hearing before a committee of the governors was arranged for 5 June 2017. The disciplinary hearing was rescheduled to take place on 9 June 2017 and it was stated that that hearing would consider additional information being a statement from Barbara King dated 12 May 2017 which she had given on her return to work after a lengthy absence.

11.31 The grievance appeal meeting took place as planned and was minuted (pages 453-460). Three governors heard the appeal and the chair of the panel was RC. The first claimant presented her appeal and went through the grounds of appeal in detail. DH attended the appeal meeting and was questioned by the governors in respect of his findings. The following matters were discussed:
11.31.1 DH assured the panel that he was confident he had fully investigated the question of the training of the first claimant and made reference to the recent statement obtained from BK. The first claimant asserted that that statement should not be tabled as it related to the disciplinary procedure. The statement was not tabled. Despite not having seen or investigated risk assessments in respect of the Nursery, DH confirmed to the panel that risk assessments on dismissal and pickup of children had been carried out. DH confirmed that he had volunteered to deal with the grievance and gave the panel information about his dealings with the grandmother of X and also advised that the dismissal procedure had been changed as a result of the incident on 21 November 2016. The panel did not have access to the investigation report.
11.31.2 The first claimant outlined her grounds of appeal in respect of the suspension. The first claimant advised the panel that she had not had her USB stick returned to her. The governors directed that it be returned to her as soon as possible.
11.31.3 The first claimant explained her grounds of appeal in relation to the identity of the investigating officer. DH confirmed that the investigating officer had to be a member of the respondent organisation and that the process had been followed correctly. DH was asked if he had considered whether GW had any conflict of interest and confirmed that he had relied upon HR advice and that he had confidence in the outcome of the investigation: this he did without seeing the investigation report. The panel refused to look into the fact of the changes in procedure in respect of the dismissal of pupils which had taken place shortly after the incident. The panel noted that the first ground of appeal really related to the disciplinary issues and that they were not able to look further into the matter.
11.31.4 The first claimant explained her grounds of appeal in respect of the LADO referral and form. DH confirmed a copy of the form had been sent to the second claimant. The HR adviser to the appeal panel confirmed that the form should have been excluded from the report sent to the second claimant. The governors agreed and apologised. The first claimant summarised her grievance and DH stated again that he empathised with the first claimant and encouraged her to seek resolution.

11.32 The panel considered matters in private after the hearing and decided they could not deal with appeal grounds one and three. It was decided that the USB drive be

posted to the first claimant and that the copies of the LADO referral form sent to the second claimant should be retrieved and destroyed. After deliberating for 15 minutes in the absence of the first claimant and DH, the panel communicated their decision orally to the first claimant.

11.33 The first claimant requested an adjournment of the disciplinary hearing and this was rescheduled for 16 June 2017. As with all previous letters convening the disciplinary hearing, the first claimant was told that the disciplinary sanction up to and including summary dismissal could be imposed. The first claimant was told if she failed to attend on 16 June 2017, the governors may decide to proceed in her absence.

11.34 By a letter dated 8 June 2017 (pages 475-6) the first claimant resigned her employment using the words "*I hereby give you my notice".* The letter included the following reasons for resignation: "*I feel that I am left with no choice but to resign following the recent events which I highlighted in my grievance letter dated March 2 2017. Dr Haw failed to address a number of the matters I raised in my grievance in his outcome letter dated April 12, 2017. I appealed his decision and set out my grounds of appeal by letter dated May 2 2007. My appeal has been dismissed without any full and proper consideration of the matters I had raised".* The first claimant asserted that she had tried to raise concerns in respect of the absence of training and the absence of a clear procedure for the dismissal of pupils at every stage but that at each stage her concerns were not taken seriously and the view of the respondent that she was being dishonest had prevailed. The first claimant referred in particular to the contents of the investigation report in that regard. The letter concludes: "*I believe Holley Park has repeatedly failed in its duty of care to me. It is a fundamental breach of my contract of employment and as a consequence, I have lost all trust and confidence in Holley Park. I consider therefore that I have been constructively dismissed".* The letter did not specify the date on which notice would expire.

11.35 By a letter dated 16 June 2017 (page 483-488) the findings of the appeal panel were confirmed to the first claimant. It was confirmed that the governors did not feel able to deal with the first or third ground of appeal. It was noted that the USB stick had been returned to the first claimant. It was noted that three copies of the LADO referral form had been retrieved from the second claimant and destroyed. The appeal was upheld in respect of the inappropriate distribution of the LADO form.

11.36 By letter dated 20 June 2017 (page 489-90) SR acknowledged the resignation of the first claimant effective from 31 July 2017 and made it plain that the first claimant's attendance of the disciplinary hearing was still required. That hearing was rearranged for 24 June 2017 but was again rescheduled to 7 July 2017. The first claimant advised that she was not well enough to attend on that date but the governors decided to proceed with the hearing in any event.

11.37 The disciplinary hearing proceeded on 7 July 2017 before three governors including WM. The first claimant did not attend. GW attended to present the investigation report and two HR advisers were present one to advise the panel and one to advise GW. The governors listened to the presentation of GW and then asked robust questions of her. GW confirmed that the dismissal of pupils' procedures were part of the induction process of employees in general and the first claimant in particular and she assured the governors that all staff were aware of the process and procedure to be

followed. GW asserted that the first claimant was aware of the seriousness of the incident but had sought to blame others for it and that she had not given an apology to the grandparent of X. GW informed governors that the respondent had changed its dismissal process not because of the incident on 21 November 2017 but because of a change around of office and classrooms. GW asserted that the first claimant had been on her guard during the meeting she had had with her and she expressed the view that it may be difficult for the first claimant to return to the respondent having seen the statements made by her colleagues during the investigation. GW advised that the dismissal procedure was checked at regular intervals by other members of staff in particular the head of the Foundation Unit Trish Pearson.

11.38 The disciplinary panel found that the first allegation was not proven because whilst there may have been an informal procedure, there was no formal documentation evidencing the procedure to dismiss pupils. The second allegation was found to be proved. The third allegation was found partially proved in that the first claimant had spoken to X but the panel felt unable to determine what had been said. The fourth allegation was found neither proved nor unproved. The governors imposed a final written warning in respect of the matters found to be proved.

11.39 By letter dated 11 July 2017 (page 510- 516) the outcome of the disciplinary hearing was confirmed to the first claimant. The final written warning was said to be in place for 12 months and it was made known that the disciplinary sanction would be reflected in any future employment reference provided by the respondent. The first claimant was advised of her right of appeal.

11.40 By letter dated 30 July 2017 (page 518) the first claimant appealed against that finding and set out her detailed grounds in a letter of 3 August 2017 (pages 525-530). It was asserted that the hearing should not have gone ahead in her absence while she was ill. She asserted that her letter of resignation provided for three weeks' notice and that her employment therefore came to an end on 29 June 2017 at the latest and that she therefore was not an employee when the disciplinary sanction was imposed. The first claimant made detailed representations about the decision which had been reached and in particular the evidence given by GW to the hearing. She asserted that the outcome in respect of the third allegation being partly proven was implausible and that the outcome in respect of allegations four being neither proven nor unproven made no sense.

11.41 Attempts were made to have an appeal hearing listed but, in the event, that hearing did not take place. The first claimant was offered a date on 2 November 2017 but she did not confirm her attendance and so the hearing was adjourned and not relisted. The first claimant instituted these proceedings on 24 October 2017.

Findings of Fact in respect of the second claimant

11.42 A letter was sent to the second claimant (page 564) confirming her suspension the purpose of which was said to be *"to remove you from the workplace whilst an investigation is carried out in respect of failing to promote and safeguard the welfare of the children and young people that you are responsible for, or coming to contact with".* It was emphasised that suspension was not of itself disciplinary action but disciplinary action was said to be a possibility on completion of the investigation. The second

claimant was invited to a meeting on 1 December 2016 with GW who was to carry out the investigation.

11.43 At the meeting on 1 December 2016 with GW (pages 597-8 and 311)), the second claimant gave her account of the events on 21 November 2016. She stated that the practice on dismissal was that both adults would be at the door and would take it in turns to call the names of the children. In the course of answering a question on how the situation could have been handled better, the second claimant stated that the day in question was a normal day on which the second claimant dismissed the children as she had always done. The second claimant said that she was devastated by the incident and felt the procedure needed to be changed. Before the building works, there was a cloakroom with one member of staff inside and one member of staff outside. A further investigation meeting with the second claimant was held on 9 December 2016 (pages 618-621). The statements of other staff members as to the procedure for the dismissal of pupils were put to the second claimant for comment. The second claimant stated that she stood around the same place she had always stood on 21 November 2016 and had never sat down on the mat with the children and she emphasised she had never been told to sit on the mat with the children. The second claimant was told by GW that this was her opportunity to be truthful. The second claimant asserted that she had been truthful throughout and felt intimidated by that comment from GW. We prefer the evidence of the second claimant as to the manner in which the meeting on 9 December 2016 was conducted. Her evidence was given in an entirely straight forward and credible manner in contrast to that of GW who was defensive. We conclude she had much to be defensive about in this regard. We conclude that the second claimant was effectively bullied at that meeting and refer to this more fully in our conclusions.

11.44 The report into the actions of the second claimant (pages 568-651) was issued on 24 January 2017 to the second claimant. There were twenty-two appendices to the report detailing the meetings which GW had had in the course of her investigation and at appendix 21 a copy of the report on the first claimant to the LADO. The second claimant had not been reported to the LADO. The report effectively combined the investigations by GW into the actions of both claimants. The report into the second claimant concluded that the second claimant should face a disciplinary hearing to face three allegations which read as follows:

11.44.1 On 21 November 2016 Miss Rain failed to follow the recognised procedure for the dismissal of Foundation Stage Unit children in relation to the nursery class
11.44.2 On 21 November 2016 pupil X left the Foundation Stage Unit without the knowledge of a member of staff and without an appropriate adult. Miss Rain therefore failed to safeguard a child in the care of the Foundation Stage Unit on that day
11.20.4 The evidence would suggest that Miss Rain has not been wholly truthful and therefore leaves the Academy with little trust and confidence in Miss Rain.

11.45 In section 2 of the report (page 573) a summary was given of the events of 21 November 2016 which includes the sentence at the second paragraph numbered 2.2: *"This allowed the child unrestricted access to a busy main road running alongside the school which is also a bus route".* Paragraph 2.8 of the report read: "*Following initial investigation meetings, a decision was made on the morning of 22 November 2016 supported by the Chair of Governors, based on the evidence available at that point, to suspend Miss Rain from duty. The suspension was confirmed in writing in a letter dated*

22 November 2016". There followed the three allegations set out above which the second claimant was to face at a disciplinary hearing. Section 5 of the report set out the findings of GW. It was made clear that there was no specific written procedure within the respondent's Arrivals and Departures Policy in terms of how to dismiss each year group including nursery pupils. No reference was made in the report to the changes made to the Arrivals and Departures Policy on the day following the incident. It was stated that all staff interviewed *"seemed to have an understanding of "the procedure" for dismissing the nursery pupil from verbal instructions or having seen other staff dismiss the pupils".* In section 6 of the report the three allegations were repeated and the report concluded with three recommendations expressed as follows:

11.45.1 "It is recommended that governors deliberate all of the facts included in this report for a disciplinary hearing to consider the evidence contained within this document and give consideration to the disciplinary sanctions regarding Miss Rain's continued employment at the Academy.

11.45.2 Consideration should be given to reviewing the Academy's written policy and procedures around the dismissal of pupils and in particular the procedures for dismissing children within the Foundation Stage Unit.

11.45.3 Staff should be reminded in a timely manner for the need of honesty and transparency around their conduct in the workplace adhering to the staff code of conduct".

11.46 On 27 January 2017 the second claimant was signed off work with "*stress related problem"* (page 656). The disciplinary hearing due to be held in respect of the second claimant on 31 January 2017 did not proceed because the second claimant was not fit to attend. She was referred to occupational health and a report on her was dated 13 February 2017. Recommendations were made in respect of how to conduct any disciplinary hearing in order to reduce the stress on the second claimant.

11.47 On 7 March 2017 the second claimant raised a grievance (pages 662-667). In that letter, addressed to DH, the second claimant set out her grievances at length. The second claimant asserted that her concerns related principally to failures on the part of the respondent which had come to light following the incident on 21 November 2016. The second claimant asserted that she had received no formal training for work she carried out in the nursery where she had been based throughout her time with the respondent. There was no written procedure as to how the Nursery worked and the Nursery was not included in the respondent's Arrivals and Departures policy. There was no register in the Nursery to record when children left. She had not been made aware of any risk assessment carried out on the newly built reception classroom from which nursery children were dismissed. There was no written policy as to where staff should stand when dismissing children from the nursery. The foundation stage leader Trish Pearson had never checked the way in which she dismissed children from the Nursery. The procedure followed on 21 November 2016 was the same which had been followed on all previous occasions. Z was required to sit on the mat with the children at dismissal time but on this day she did not fulfil that duty but had not been disciplined. After the incident the respondent almost immediately changed the dismissal procedure. The second claimant set out her concerns in respect of the lack of fairness of the investigation by GW in six numbered paragraphs (pages 665-5). GW had made her feel that she had been lying in her interviews and made to feel that she could not be trusted. She was told by GW that she had an opportunity now to tell the truth and that GW did not accept what she had said. GW and the HR representative had tried to bully her to

change her version of events. She had been reduced to tears in the investigation meeting when she had been asked the same question over and over again. She asserted the conduct of GW was disgraceful and that it had had a lasting effect on her health. She asserted that GW refused to listen to what she had to say about the lack of procedure and lack of training. She asserted that GW accepted the evidence of Tricia Pearson that she made daily checks on the dismissal procedure when that was certainly not the case. The second claimant referred to the change in the dismissal procedure and the fact that children were now held in an adjoining classroom and that the two members of staff now stand in different positions. The second claimant asserted that GW had not provided any evidence for her assertion that the second claimant had not been "*wholly truthful"* and that that was not her role in any event. The second claimant asserted that GW was clearly trying to protect the respondent at the cost of herself and the first claimant. The second claimant concluded: "*I wish to make it clear that I have been made a scapegoat to cover up the many failings in the Academy. I have done nothing wrong and have never failed to properly safeguard the children in my care. I have followed instructions from senior staff at all times…. If the Academy has failed to train me, has failed to implement appropriate procedures and risk assessment and has failed in its safeguarding duties, I cannot be blamed for this".* The second claimant asked for the grievance to be dealt with in writing.

11.48 A meeting with SR to review the second claimant's sickness absence was suggested for 15 March 2017 but the second claimant felt unable to attend whilst her grievance was outstanding. A further meeting was suggested for 7 April 2017 but the second claimant refused to attend for the same reason and because she had a meeting with her counsellor on that same day.

11.49 DH volunteered to consider the second claimant's grievance and a meeting to discuss it was held on 24 March 2017. No consideration was given as to whether that was an appropriate step either because of the involvement of DH in meetings with the parents of X at a very early stage or because of the difficult position his involvement may place any colleagues called upon to deal with the grievance appeal as in fact occurred. DH was assisted by an HR adviser from the authority. Minutes of the meeting were not produced. DH explained that on advice he had concluded the vast majority of the matters raised by the second claimant were more properly dealt with this as part of the disciplinary action which was then ongoing. He stated that he had not been provided with a copy of the report and could not therefore respond to many of the points raised. DH considered that he could deal with some of the points which had been raised in the grievance namely:
11.49.1 Concerns in respect of the lack of training
11.49.2 Concerns about why Z had not been the subject of disciplinary action
11.49.3 Concerns about the suspension not being handled appropriately
11.49.4 The conduct of GW during the investigation.

11.50 A letter was sent by DH to the second claimant dated 12 April 2017 (pages 676-679) giving the outcome of the grievance investigation.
11.50.1 In respect of the first matter it was stated that the respondent had advised that all staff were trained in respect of the dismissal of pupils together with the general safeguarding training and pupil movement training. This part of the grievance was not upheld.

11.50.2 In respect of the actions of Z, it was confirmed she was not part of the disciplinary investigation because on the day in question she had not been responsible for the dismissal of the pupils. She had been told she was not needed and had gone to work in the dining hall. She was not present when the incident occurred. This part of the grievance was not upheld.
11.50.3 In respect of the question of suspension, it was confirmed that the appropriate procedure had been carried out and the grievance was not upheld.
11.50.4 It was concluded that GW carried out the investigation fairly. The notes of the meetings with the second claimant had been reviewed. It was accepted that the repeating of questions may have been difficult but that was to ensure the second claimant had been given full opportunity to provide any further information. It was also necessary to challenge where there may be discrepancies in order to make a judgement on what was reasonable in terms of the truth. The investigation was not to determine the outcome of the matter in any way. The grievance was not upheld.

11.51 The approach taken by DH to the investigation was flawed. No rigorous investigation into the matters raised by the second claimant was carried out. DH approached the matter on the basis that he needed to be empathetic to the second claimant to seek to persuade her to continue with the disciplinary process. DH made no enquiries as to the suitability of GW to carry out the investigation. DH made no enquiries as to whether GW had any conflict of interest in respect of the investigation particularly in respect of her signing off of the risk assessment and the Arrivals and Departures procedures which were in place and which were central to the matter. DH accepted what he was told by the respondent namely that GW was an appropriate person to carry out the investigation. DW accepted advice that he was not to look at the investigation report and his sole aim was to engage with the second claimant and to seek to persuade her to engage with the disciplinary process. In cross examination DH accepted that if the investigation report was flawed and biased, that could lead the disciplinary panel to dismiss the claimants but nonetheless confirmed that he had decided to investigate the matters he thought it right to investigate and whether GW was an appropriate person to investigate the matter was not one of them. DH spent some time in the school investigating the matter but made no notes as to his investigations or of the person spoken to. All the investigation was carried out after the meeting with the second claimant who was not afforded any opportunity to comment on the outcome of that investigation. DH did not access the training records of the second claimant in order to check on the training she had received. He accepted what he was told by the respondent namely that appropriate training had been given and appropriate procedures were in place without any challenge to that statement. DH accepted that there had been no lack of training of the second claimant in respect of the dismissal of pupils even though he did not investigate the matter because two members of staff to whom he spoke confirmed the position to him. He was not aware of any need to make notes of his discussions. DH did not speak to GW at all during the course of his investigations. DH accepted in cross examination that he had met with the parents and grandmother of X shortly after the incident and he had concluded they were acting in a reasonable manner. DH denied in cross examination that he had blindly supported the senior leadership team the school in investigating the grievance but we conclude that is precisely what he did. He accepted that he could see why it might be thought he was unprepared to deal with the grievance investigation but confirmed that he was. His wish in dealing with the grievance was to help the second claimant and to be liked by her and to empathise with her.

11.52 The second claimant had an attendance review meeting with SR on 27 April 2017 at her home (pages 686-7) and the disciplinary hearing was rescheduled for 5 May 2017. At the attendance review meeting the second claimant was encouraged to proceed with the disciplinary process as that would ultimately help her recovery. However, that hearing was postponed when the second claimant submitted an appeal against the grievance outcome.

11.53 By a letter (pages 692-694) dated 4 May 2017 the second claimant appealed against the grievance outcome which she received on 22 April 2017. The second claimant asserted that it was not appropriate to deal with her complaints through the disciplinary process. The grievance had addressed matters much wider than the findings of the investigation report and dealing with the matter in that way was a failure to address the concerns which had been raised. The second claimant stated that DH had admitted he was not familiar with all the documentation relating to the investigation and his failure to do so meant either that he was not an appropriate person to deal with the grievance or that he was inadequately prepared to do so. The fact that DH had not considered the report meant the grievance had not been properly considered. The second claimant appealed on the basis that the finding in relation to the training she had received was based on incorrect information. The second claimant stated that her grievance in that regard had been "*blindly dismissed*" and that the comments in the grievance outcome that she had been trained did not address the grievance and were meaningless. The second claimant asserted that her concerns in relation to the conduct of Z had not been properly investigated and that the conclusion that the investigation was carried out fairly failed to adequately deal with the points which she had set out in her grievance. She asked that the points be fully considered by the grievance appeal panel.

11.54 The grievance appeal hearing before a committee of the governors was arranged for 5 June 2017. The disciplinary hearing was rescheduled to take place on 9 June 2017 and it was stated (page 703) that that hearing would consider additional information being a statement from Barbara King which was dated 12 May 2017 which she had given on her return to work after a lengthy absence.

11.55 The grievance appeal meeting took place as planned and was minuted (pages 712-716). Three governors heard the appeal and the chair of the panel was RC. The second claimant, accompanied and supported by her father, presented her appeal and went through the grounds of appeal in detail. The second claimant attempted to read out her letter of appeal but became upset and the hearing was adjourned for a short time. When it was resumed the governors agreed to take the letter as read. The governors concluded that the letter of appeal raised five points and dealt with each point in turn.

11.56 DH explained some of the difficulties he had investigating the matters raised by the second claimant in respect of the disciplinary investigation. The panel asked the second claimant questions about the training she had received. DH confirmed that the training of staff was both formal and informal and that Barbara King had returned to work and had confirmed that training had taken place with the second claimant. DH assured the panel that the process of collecting children from the Nursery had been explained to all staff, parents, carers and children. The second claimant made the point

that Z was not where she should have been on the day in question. The governors noted that the majority of the matters raised by the second claimant related to the investigation report and indicated that they were not going to consider those matters.

11.57 There was an adjournment whilst the panel deliberated for 15 minutes and the second claimant was then told the outcome of those deliberations which was that the appeal was directly linked to the management of the disciplinary investigation and the governors did not have access to that report. It was concluded that it was more appropriate for the appeal to be treated as a submission to the forthcoming disciplinary hearing.

11.58 The second claimant's mother contacted the respondent by email on 6 June 2017 (page 721) to advise that the second claimant was very upset and she was unsure if she could attend the disciplinary hearing set for 9 June 2017. The respondent decided to adjourn the hearing.

11.59 By a letter dated 6 June 2017 (pages 723-4) the second claimant resigned her employment and gave two weeks statutory notice. The letter included the following reasons:
"I feel that I am left with no choice but to resign following the recent events which I highlighted in my grievance letter dated 7 March 2017. Over the course of my employment certain matters have increasingly caused me concern about the way in which Holley Park operates. These concerns came to a head on 21 November 2016, as I explained in my grievance letter. Dr Haw failed to address a number of the matters I raised in my grievance in his outcome letter dated 12 April 2017. I appealed his decision and set out my grounds of appeal by letter dated 4 May 2017. Yesterday my appeal was dismissed without any full and proper consideration of the matters I had raised". The second claimant asserted she had been made a scapegoat for the incident on 21 November 2016. She continued: *"Even though I am still unwell, I was intimidated at the appeal hearing by David Haw, whose decision I was appealing. David Haw should not have been present at the appeal hearing. The grievance process was not fair and impartial and the appeal process was a sham. This was a further breach of contract and the last straw… I believe Holley Park has repeatedly failed in its duty of care to me. It is in fundamental breach of my contract of employment and, as a consequence, I have lost all trust and confidence in Holley Park. I consider therefore that I have been constructively dismissed".*

11.60 By letter dated 9 June 2017 (pages 726-8) the second claimant was required to attend the postponed disciplinary hearing on 16 June 2017. As before she was told that GW would attend to present the report and the allegations were again set out and the second claimant was invited to submit written submissions if she wished. The second claimant was told that disciplinary action could result up to and including the sanction of summary dismissal. On 15 June 2017 the second claimant advised that she would not be attending due to her ill health.

11.61 By letter dated 16 June 2017 (pages 731-4) the grievance appeal outcome was confirmed in writing to the second claimant.

11.62 On 19 June 2017 GW and SK visited the home of the second claimant in order to retrieve the LADO report in respect of the first claimant which had been included in the

report sent to the second claimant in error. The document was not there but was lodged with the solicitor for the second claimant (who was also the solicitor for the first claimant) and in due course the document was returned to the respondent by a letter from the solicitor dated 16 June 2017 (page 735) but not received until after 19 June 2017.

11.63 By letter dated 20 June 2017 (page 743-44) SR acknowledged the resignation of the second claimant effective from 31 July 2017 and made it plain that the second claimant's attendance at the disciplinary hearing was still required. That hearing was rearranged for 27 June 2017 but was again rescheduled to 7 July 2017. The second claimant advised (page 749) that she was not well enough to attend on that date but the governors decided to proceed with the hearing in any event.

11.64 The disciplinary hearing proceeded on 7 July 2017 before the same three governors who dealt with the hearing in relation to the first claimant and immediately after that first hearing concluded. The second claimant did not attend. GW attended to present the investigation report and two HR advisers were present - one to advise the panel and one to advise GW. The governors decided to proceed. The meeting was minuted (pages 755-759). The governors listened to the presentation of GW and then asked questions of her. GW confirmed that the dismissal of pupils' procedure was used consistently by all staff and had been established within the Nursery. In answer to a question, GW stated that the second claimant had told her she usually stayed on the mat rather than at the door when working with Barbara King and that it may be difficult for the second claimant to return because of collusion between the first claimant and the second claimant.

11.65 The panel deliberated and found the first allegation against the second claimant not proven. Whilst there may have been an implicit procedure for the dismissal of pupils, there was no formal documentation showing that procedure. The panel found the second allegation proven. In respect of the third allegation, the panel found the allegation neither proven nor unproven. The panel decided to impose a final written warning on the second claimant.

11.66 By letter dated 11 July 2017 (page 760-765) the outcome of the disciplinary hearing was confirmed to the second claimant. The final written warning was said to be in place for 12 months and it was made known that the disciplinary sanction would be reflected in any future employment reference provided by the respondent. The second claimant was advised of her right of appeal.

11.67 By an email dated 27 July 2017 (page 767) the second claimant appealed against the findings of the disciplinary panel and set out her detailed grounds in a letter of 3 August 2017 (pages 771-773). The second claimant asserted that the hearing should not have proceeded in her absence while she was ill. She asserted that her letter of resignation had provided for two weeks' notice and that her employment therefore came to an end on 20 June 2017 and that she therefore was not an employee when the disciplinary sanction was imposed. The second claimant made detailed representations about the decision which had been reached and in particular the evidence given by GW to the hearing. She asserted that the outcome in respect of the third allegation was implausible and made no sense.

11.68 Attempts were made to have an appeal hearing listed but in the event that hearing did not take place. The second claimant was offered a date on 2 November 2017 for that hearing. The second claimant did not confirm her attendance at the proposed hearing and so it was adjourned by the respondent and not relisted.

11.69 The second claimant instituted these proceedings on 24 October 2017 after early conciliation which began on 11 September 2017 and ended on 26 September 2017.

11.70 The Foundation Stage policy of the respondent in place at the time of the incident on 21 November 2016 (pages 833-840) reads in relation to the question of departure of children from the Nursery: *"The wooden gates to Foundation Stage entrance open at 11:45am each morning. Parents and carers are then asked to wait in single file next to the red foundation stage entrance doors where a member of staff will be on duty. As each parent or carer reaches the front of the line, their child's name is called to another member of staff within the building who alerts the member of staff supervising the children who will dismiss each child in turn".*

11.71 The risk assessment (pages 827-832) of the respondent in relation to the dismissal of pupils from the Nursery now reads: "*EYFS red entrance and exit door is supervised by staff when opened. Two adults are to be on the door when the children enter on a morning and one adult when children exit from the morning session. On departure an adult will be supervising between Reception and Nursery by arch".*

Submissions

Respondent

For the respondent Mr Vials provided written submissions extending to 28 pages (152 paragraphs) and these were supplemented by oral submissions. They are briefly summarised:

12.1 An analysis of the relevant law was provided. Particular reference was made to the decision of the Court of Appeal in **Googay -v- Hertfordshire County Council 2000 IRLR 703** and **Mayor and Burgesses of the London Borough of Lambeth -v- Agoreyo 2019 EWCA Civ 322.** It was submitted that so long as an employer has a reasonable basis for suspecting an employee of misconduct, taking disciplinary action against the employee on that basis should not lead to a breach of the implied term of trust and confidence.

12.2 In respect of the facts and the evidence it was submitted that the respondent is a school independently verified by Ofsted as good with certain aspects namely behaviour and safety of students being judged outstanding. There were clear and understood procedures for the dismissal of children and historically there have been no previous issues or "*near misses".* Common sense and diligence is required when it comes to the dismissal of children from any part of the school. In addition to the everyday practice which is well known, the respondent has various policies such as the arrival and departure policy (page 355) and the foundation stage policy (page 833). At page 831, there is a generic risk assessment setting out a reference to the door through which X escaped.

12.3 The approach of having one person on the door and another supervising the children on a mat close by was reflected by all of the staff interviewed as part of the disciplinary investigation. The evidence of the claimants contradicts the evidence of all other staff as both claimants maintain that it was normal for them to be at the door speaking to parents whilst dismissing children. This is contradicted by all other staff and even by the second claimant herself in her second interview on 9 December 2016 (page 620). The respondent submits that the claimants have adopted the approach they have to seek to minimise or avoid any disciplinary action being taken against them.

12.4 It is accepted that the child X was found near the main road by her grandmother on 21 November 2016 and there is a specific duty of care placed on the claimants by section 3(5) of the Children Act 1989. In addition, the Department for Education Guidance "*Keeping Children Safe in Education"* confirms that safeguarding and promoting the welfare of children is the responsibility of everyone and all school and college staff have a responsibility to provide a safe environment in which children can learn.

12.5 Neither claimant had raised any previous concerns to the respondent about the processes or procedures to follow when dismissing children from their care and the first time any concern was raised specifically was on 1 December 2016. The respondent submits that the claimants would have individually raised concerns earlier had they had genuine and reasonable concerns.

12.6 The second claimant accepted in cross examination that suspension of her was appropriate. The first claimant did not accept that in cross examination.

12.7 In conducting and investigating this matter the respondent followed and complied with its disciplinary policy (page 623). Suspension was appropriate in this case because the allegations were so serious that gross misconduct was possible and because a child had been placed at risk. Prior to suspending SR consulted both the LADO and HR as set out in the policy and both organisations independently confirmed there was no alternative other than to suspend. The decision to suspend was not automatically imposed and was not a knee-jerk reaction. It was taken after careful consideration. This is not a breach of contract let alone a fundamental breach of contract.

12.8 The investigation undertaken by GW was an appropriate one for her to carry out and she was not conflicted. Despite the first claimant unequivocally stating that GW was not an appropriate person to undertake the investigation, she did not raise that matter until she submitted her grievance in March 2017. All relevant witnesses were spoken to. The investigation report was fair and balanced. The allegations put forward were framed with the assistance of HR and accurately reflected the allegations as GW saw them. The allegations were not rushed following the incident on 21 November 2016 but were formulated in January 2017 once a proper investigation had taken place. The claimants raised no concerns on receipt of the investigation report in January 2017 and if they had genuine concerns to raise they would have done so far earlier than they did. The simple fact is that the claimants made a mistake and are seeking to raise grievances and concerns about training and procedures to justify or mitigate any action taken by the respondent. It was submitted that the actions of the claimants were purely tactical. A question to be asked is why did either claimant not resign earlier than she

did? The grievances raised by the claimants were tactical and an attempt to delay the disciplinary process by the claimants who knew they were potentially at risk of dismissal. The claimants have acted together and the dates and timings of the events from January 2017 onwards clearly demonstrate that they worked together to build a case against the respondent. The claimants both resigned before they received the outcome of the grievance appeal hearing. The respondent acted entirely appropriately and in line with both its grievance and disciplinary policies in acting in the way that it did in respect of the grievances raised by the claimants.

12.9 The claimants were not pressurised to attend disciplinary hearings. The second claimant had wrongly assumed that GW would conduct the hearing and be the decision maker which demonstrates that the second claimant did not understand the process and supports the view that she was a passenger to this litigation. The claimants have affirmed their contracts of employment by their delay in resigning.
12.10 The respondent does not accept that either claimant made any qualifying or protected disclosure nor that they have been subjected to any detriment. The reason that there has been no appeal hearing against the final written warning was because the claimants did not respond to an invitation to specify a date for that hearing. It was submitted that the alleged protected disclosures did not provided any information to the respondent.

12.11 The respondent submits that written contracts were provided to the claimants. The respondent did not fundamentally breach the contract of employment of either claimant. Neither claimant has made any protected disclosures or been subjected to detriment or dismissal because of them.

<u>Claimants</u>

For the claimants Mr Wilkinson provided written submissions extending to 10 pages (35 paragraphs) and these were supplemented by oral submissions. They are briefly summarised:

13.1 It was submitted that both claimants gave notice to terminate their contracts in accordance with their statutory notice obligation and that neither of them had received a contract with any other notice provision. In any event both were constructively dismissed and therefore not bound by any alleged contractual notice period in their respective contracts. Both claimants deny ever receiving contracts of employment and both claimants gave credible oral evidence on this point. No evidence was provided by the respondent as to who presented the claimants with their contracts, when and by what means. There was no contractually agreed notice period and no reason for extension of the statutory minimum notice period.

13.2 In relation to the claims of unfair constructive dismissal, the claimants rely on four broad issues namely the nature of the investigation, identifying the claimants as being untruthful in the investigation reports, the contents of the investigation reports and the failures by the respondent to properly consider their grievances. The grievance appeal outcomes were the final straw upon which both of them relied.

13.3 In respect of the nature of the investigation, the second claimant accepted that the decision to suspend her did not form part of her decision to resign but it did in the case

of the first claimant. Both were suspended on the morning after the incident and there was no evidence that any consideration was given to alternatives to that course of action despite suspension being the last resort. There was no danger to children and no suggestion that evidence could be interfered with. There was no justification for the knee-jerk suspension. The first claimant was referred to LADO on the same day. There was discretion as to whether or not to do so but no serious thought was given to not doing so at that time. It was a knee-jerk reaction. The claimants were not aware of the allegations against them until they received the investigatory reports: the claimants were labelled as liars without the allegation being put to them. The manner in which the second claimant's investigation meeting was conducted on 9 December 2016 was wholly unreasonable.

13.4 The investigation report concluded that the first claimant had been untruthful and the recommendation that staff should be reminded *"for the need of honesty and transparency around their conduct"* clearly set out that GW had decided the guilt of both claimants. The reports do not make it clear what the first claimant was allegedly untruthful about. The same is true of the second claimant.

13.5 There are many issues in respect of the investigation reports which the claimants assert were biased, unfair and prejudicial. A simple reading of the reports gives a clear and overwhelming impression of guilt particularly allegations three and four in respect of the first claimant and allegation three in respect of the second claimant. The claimants would have no doubt reading the reports that GW had decided their guilt. The allegations were not put to the claimants prior to being finalised, they failed to mention that the respondent changed its dismissal of pupils procedure on 23 November 2016, they present evidence from other staff members and the dismissal procedure as being facts, they fail to emphasise the claimants' consistency of evidence, the evidence of TP in particular was entirely inconsistent but no reference is made to that matter, no efforts were made to delve into the concerns regarding training, risk assessments or briefings and the reports gave no hint of any lack of instruction or training.

13.6 The respondent hides behind its policy in respect of the grievances being dealt with at the same time as disciplinary matters but the reality is that the respondent did have discretion and failed even to consider the exercise of that discretion in investigating the grievances prior to the disciplinary. The grievances raised a clear complaint that there was a root and branch problem in the way in which the investigation had proceeded and the answer was not to go to a disciplinary hearing on such flawed evidence but the answer was, at the reasonable request of the claimants, to hold an independent investigation into the allegations and this the respondent failed to do. DH refused to engage in matters relating to the disciplinary process but yet did so when it suited him. The grievance hearings were a whitewash. The grievance appeal is similarly tainted.

13.7 It was submitted that each claimant resigned shortly after the grievance appeal outcome. They did not affirm their contracts and their resignations were at least in part because of the actions of the respondent. The claimants were unfairly and constructively dismissed.

13.8 It is the claimants' case that they were scapegoated because they had made protected disclosures. The first claimant relies on the disclosures made on 1 December

2016, at the investigation meeting on 9 December 2016 and then in her grievance letter. The second claimant relies on the matters that she disclosed on 1 December 2016 and then in her grievance letter.

13.9 Whilst neither claimant named a particular legal obligation, the claimants identify them as safeguarding issues and both were clearly aware that the respondent was legally obliged to safeguard children in its care. The claimants need only show that they had a reasonable belief that there had been or was a breach of legal obligation. They also only need to show a reasonable belief that the disclosures were in the public interest. It is clear that information was disclosed. Disclosures were made to the employer and it is possible to bring a post termination detriment claim.

13.10 The detriments alleged were targeting/scapegoating, unfair investigation, failing to deal with issues in the grievance hearing and subsequent appeal and the final written warning. It is also asserted that the dismissals were automatically unfair for the same reason.

The Law

Protected Disclosures

14.1 The Tribunal has reminded itself of the detailed provisions set out in Part IVA of the 1996 Act in relation to protected disclosures.

14.2 In particular the Tribunal has reminded itself of the provisions of section 43B (1) of the 1996 Act which read:-

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

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

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

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

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

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

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

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

Disclosure

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

Reasonable Belief

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

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

We remind ourselves that the requirement for a disclosure to be in good faith is no longer a liability issue but something to be considered when assessing any remedy which might be due.

Legal Obligation

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

In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered and so did fall within the provisions of section 43B(1)d of the 1996 Act.

Method of Disclosure

14.7 The Tribunal notes that the claimants in this case seek to rely on disclosures to the respondent and the Tribunal has reminded itself of the provisions of section 43C of the 1996 Act which read:-

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …… –

(a) to his employer….."

Public Interest

14.8 We note that the courts have construed the requirement for a disclosure to be *"in the public interest"* narrowly. We are particularly to consider the numbers in a group whose interest the disclosure served, the nature of the interests affected, the nature of any wrongdoing disclosed and the identity of the alleged wrongdoer. We must consider whether each claimant considered any disclosure made by her to be in the public interest, whether she believed that the disclosure served that interest and whether that belief was held reasonably held.

Detriment Claim – Section 47B 1996 Act

14.9 The Tribunal has reminded itself of the provisions of section 47B of the 1996 Act which read:-

"(1) A worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure
(2) … this section does not apply where … -
(b) the detriment in question amounts to dismissal (within the meaning of Part X)".

14.10 The Tribunal has reminded itself of the provisions of section 48 of the 1996 Act and in particular to section 48(2) which reads:-

"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".

14.11 In relation to causation the Tribunal has reminded itself of the decision of the EAT in **Fecitt (Supra)** and the reference in that Judgment to the speech of Lord Nichols in **Nagarjan v London Regional Transport [1999] IRLR 572** where it was stated:-
"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases with different shades of meaning have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others although in the application of this legislation legalistic phrases as well as subtle distinctions are better avoided so far as. If racial grounds or protected acts have a significant influence on the outcome discrimination is made out".

14.12 The decision in **Barton v Investec Henderson Crossway Security Limited [2003] ICR 1205** is noted where the burden of proof guidelines were discussed and the following guidance given:-
"To discharge the burden it is necessary for the respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex since 'no discrimination whatsoever' is compatible with a burden of proof directive".

14.13 We note the decision in **Fecitt** and the following guidance at paragraph 66:-

*"We bear in mind that in the legislation relating to whistle blowing, Parliament has sought to offer protection to whistle blowers. We consider that we should take a broad view of provisions for their protection. Further, the law stated by the Court of Appeal in **Igen v Wong** is binding upon us. The Court of Appeal considered the relevant earlier authorities and insofar as we are concerned its decision is both definitive and binding upon us. Accordingly, in our opinion once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act the employer's liability under section 48(2) is to show the ground on which any act or deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. That is the meaning in the test of **Igen v Wong**. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatsoever on the ground of the protected act.*

14.14 The Tribunal has reminded itself of the decision in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** and the guidance from the head note which reads:-

*"In order for a disadvantage to qualify as a 'detriment', it must arise in the employment field in that the court or tribunal must find that by reason of the actor acts complained a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to 'detriment'. However, contrary to the view expressed by the EAT in **Lord Chancellor v Coker** on which the Court of Appeal relied in the present case, it is not necessary to demonstrate some physical or economic consequence".*

14.15 The Tribunal further reminded itself of the words of Lord Scott in the same case:-

"The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold that ought to suffice. However, an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".

Ordinary Unfair Constructive Dismissal Claim – Section 98 of the 1996 Act

14.16 We set out the principles that we have considered relevant to the issues in this matter. We have reminded ourselves of the provisions of Section 95(1)(c) of the Employment Rights Act 1996:

"For the purposes of this part an employee is dismissed by his employer if and only if …

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

14.17 We have reminded ourselves of the classic definition of constructive dismissal by Lord Denning in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:**

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by reason of the employers conduct. He is constructively dismissed."

14.18 We have reminded ourselves of the decision in **Malik -v- Bank of Credit of Commerce International SA [1997] IRLR 463** where Lord Steyn states that there is implied into a contract of employment an implied term of trust and confidence which provides that: *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee".* We note that the impact on the employee of the employer's behaviour is what is significant and not its intended effect and that the effect is to be judged objectively.

14.19 We have reminded ourselves of the decision in **Lewis -v- Motorworld Garages Limited [1985] IRLR 465** where Glidewell LJ stated:-

"The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract: the question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the 'last straw' situation".

14.20 We have reminded ourselves of the words of Browne- Wilkinson J in **Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666:**

"To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

14.21 We have reminded ourselves of the decision in **London Borough of Waltham Forest -v- Omilaju** where Dyson LJ states:-

"Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things… is of general application……The question specifically raised at this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract?... The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. … Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct… The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred…
If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. Moreover an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

14.22 We have noted the authority of **Tolson v Governing Body of Mixenden Community School [2003] IRLR 842** where Judge Wakefield stated: "*The conduct to be considered when determining an issue as a constructive dismissal is that of the employer. An alleged failure by the employee for example regarding following or not following certain grievance procedures cannot be relevant."*

14.23 We have considered also the decisions in **Lakshmi v Mid Cheshire Hospitals NHS Trust, Court of Appeal - Queens Bench Division, April 24, 2008, [2008] EWHC 878 (QB)** and the guidance there given that there is an implied term in a contract of employment that the employer will follow its own disciplinary procedures unless it can show good reason for not doing so. It is an incidence if you like of the Respondent's duty of good faith. We have noted the decision in **Lim v Royal Wolverhampton Hospitals Trust [2011] 2178** where it was stated by Slade J that the implied term to conduct disciplinary proceedings fairly is fact sensitive in every case. At paragraph 93 it was stated: *"It is no doubt an implied term of contracts of employment that disciplinary processes be conducted fairly and without undue delay. The effect of such an implied term depends on the circumstances of the particular case".*

14.24 We have reminded ourselves of the decision in **Hamill –v- J V Strong & Co EAT/1179/**99 where Judge Altman stated on the question of affirmation of breach:

"It seems to us that a Tribunal confronted with this sort of situation must look and see if the final incident is sufficient of a trigger to revive the earlier ones. This will, it seems to us, involve looking at the quality of the incidents themselves, the length of time both overall and between the incidents, and it will also involve looking at any balancing factors which may have, at any point, been taken to constitute a waiver of earlier breaches.
Finally when considering the issue of waiver, the very nature of the waiver will need to be considered. It is not only a question of seeing whether the facts give rise to either an express or implied waiver, but considering the terms of the waiver itself. Is it a once and for all waiver, or do the circumstances give rise to the implication of a conditional waiver, for instance a waiver subject to the condition that there would be no repeat of similar conduct or, as in this case, that the Appellants would not continue the lack of support. Finally, of course, any finding of waiver has to be identified and based on clear facts or inferences from established facts".

14.25 The Tribunal has reminded itself of the decision in **Nottinghamshire County Council –v- Meikle 2004 IRLR 703** and notes that once a repudiation of the contract has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned at least in part to fundamental breaches by the employer. We note that this position was confirmed in **Wright v North Ayrshire Council 2014.**

14.26 We have noted the guidance from Underhill LJ in **Kaur –v- Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978**.Paragraph 55:

I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory[1] breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

14.27 We have reminded ourselves of the authority referred to by Mr Wilkinson on the question of suspension namely The **Mayor and Burgesses of the London Borough of Lambeth -v- Simone Agoreyo 2019 EWCA Civ 322** and the guidance at paragraphs 98/99:

"There is no test of "necessity". Mr Allen accepts that as a matter of law but he valiantly sought to defend the approach of Foskett J on the basis that, in the circumstances of this particular case, there would have been no reasonable and proper basis for suspension unless it were necessary to suspend the Respondent. I am unable to accept that submission. In my respectful view, Foskett J did fall into error in the ways suggested by Mr Glyn. First, he introduced a test of necessity where the only test is whether there was reasonable and proper cause to suspend an employee. Secondly, the test he formulated at para. 21 of his judgment, which he described as setting out the "central issue" in the appeal before him, was confusing and erroneous because it used the formula "and/or".

There can be no doubt that, in some cases, the act of suspension will not be reasonable and so may amount to a breach of contract. The court may consider the wider circumstances beyond the fact and manner of suspension, including events preceding the suspension and the extent to which the suspension was a "knee-jerk" reaction: see Hale LJ in Gogay v Hertfordshire County Council [2000] EWCA Civ 228; [2000] IRLR 703, at paras. 53-58".

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

14.28 The Tribunal reminds itself of the provisions of section 103A of the 1996 Act which read:-

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

14.29 In relation to the burden of proof the Tribunal reminds itself that the burden of proof lies with the respondent to establish the reason for dismissal. In a claim of unfair constructive dismissal, we note the explanation for the respondent to show the reason was explained in **Berriman -v- Delabole Slate Company 1985 ICR 546:**
"First in our judgement even in a case of constructive dismissal section 57 (now section 98 of the 1996 Act) imposes on the employer the burden of showing the reason for dismissal notwithstanding it was the employee not the employer who actually decided to terminate the contract. In our judgement the only way in which the statutory requirements of the Act can be made to fit the case of constructive dismissal is to read section 57 as requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer".
If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

14.30 The Tribunal reminds itself that there is no requirement of reasonableness in relation to this claim. If the reason for dismissal is that the claimant made a protected disclosure then the dismissal is unfair without further enquiry.

14.31 The Tribunal notes the decision in **Kuzel v Roche Products Limited [2008] IRLR 530** where the following guidance is given from the head note:-

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

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

The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Employment Tribunal that the reason was what he asserted it was it is open to the Employment Tribunal to find that the reason was what the employee asserted it was. But it is not correct as a matter of law or of logic that the Tribunal must find that if the reason was not that asserted by the employer then it must be that asserted by the employee. That may often be the outcome in practice but it is not necessarily so".

Conclusions

General Matters

15.1 In approaching our conclusions, we have reminded ourselves that whilst these two claims were combined for the purposes of the hearing, they are two distinct set of claims and we have considered each set of claims separately. The respondent produced two separate investigation reports and, whilst both reports were very similar in content and form, there were important differences in the way the respondent approached matters in respect of the first claimant and the second claimant. In the event we reach the same conclusion in respect of the claims advanced by both of the claimants but that is a coincidence and results from separate and distinct consideration of the cases advanced by both claimants.

15.2 We approach our deliberations in this matter by considering first whether the relevant claimant had made any protected disclosure. We then consider the claim of detriment on the grounds of having made a protected disclosure. We then consider the claim of ordinary unfair constructive dismissal and finally we consider the claim of automatic unfair constructive dismissal. In the event, we have decided that neither claimant had made a protected disclosure. Nonetheless, and in the alternative, we went on to consider the protected disclosure claims for the sake of completeness. Finally, we give consideration to the question of the notice required to be given by each of the claimants to terminate their contracts of employment when they did so in June 2017. Before moving to those matters, we set out our conclusions in respect of the factual

issues which lie at the heart of this case and in order to inform our conclusions on the legal questions involved.

The events of 21 November 2016 – factual conclusions

15.3 At the heart of these claims lie the events of 21 November 2016 when the child X left the nursery without either of the claimants being aware that X had done so. Potentially that was a very serious incident which all involved in this matter accept. Very fortunately no harm resulted to X but clearly it could have done. We reiterate again that wherever any fault lies in relation to that matter, it does not lie and cannot lie with X nor with her grandmother nor with her parents. The incident was one which clearly very greatly upset the grandmother and parents of X. That degree of upset and dissatisfaction was communicated at the time to GW and to SR and to DH and we conclude that the actions of those three players in this matter were very greatly influenced by what was said to them by the parents and grandmother of X. We conclude that the way in which those three officers of the respondent ultimately dealt with the matter placed the respondent in fundamental breach of the contracts of employment of both claimants.

15.4 The question at the heart of this matter relates to the procedure for the dismissal of children from the Nursery at the end of the morning session. We conclude that what the claimants did on 21 November 2016 was what they had both done since the first claimant took over the role of Barbara King in late September 2016. That procedure had been followed openly for almost 2 months without it being questioned by any other member of the senior management team or anyone else on the staff of the respondent. We accept the evidence of the claimants that they were following the procedure which had been applied by Barbara King from whom we did not hear. We heard a great deal of evidence as to where the two members of staff involved in the dismissal of children should stand. In fact, as is clearly shown from the photograph on page 639, whether the members of staff stood at or near the exit door or close to or on the mat on which the children being dismissed were required to sit is splitting hairs. The mat was very close to the exit door and therein in our judgement lies the main explanation for the incident on 21 November 2016. That had been the position since the new classroom had opened in the Nursery in September 2015 and for over a year that procedure had been in place without any cause for concern. We accept also that on some occasions when staffing levels permitted a third person Z would assist in the dismissal of pupils from the Nursery by standing at or sitting on the mat with the children. That third person was often called away to other duties as had occurred on 21 November 2016. The procedure for the dismissal of children from the Nursery was not set out in writing prior to the incident and, in doing what they did on that day, the claimants were following what they understood was the procedure for the dismissal approved by the respondent.

15.5 Very sensibly and entirely appropriately after the incident occurred, the respondent reviewed the dismissal procedure. The procedure was changed by having the mat, on which the children to be dismissed were required to sit, moved around a corner so that the children could not see who was arriving at the door from which they were to leave. In addition, a member of staff was required to stand at the door and a second member of staff at a point between where the children were then to sit and the door itself so that s/he could relay the name called by the member of staff at the door to the children on the mat. That was clearly a very sensible change to make. The fact that that crucial

change found no mention whatever in the investigation reports prepared by GW is a matter of very great concern for this Tribunal and provides valuable evidence for this Tribunal to base its conclusions as to the approach taken in this matter by GW and SR and DH.

15.6 When an unforeseen and even unforeseeable event occurs and a child is placed at potential risk, there is a tendency to want to find someone to blame. We conclude that the incident on 21 November 2016 was one which GW and SR saw as potentially very damaging to the reputation of the respondent and by extension their own individual reputations. The fact that these two officers saw fit to involve the Chairman of the Board of Governors in meetings with the parents of X on the day following the incident is illustrative of their concern. This was a management matter and no explanation was afforded to us as to why DW as Chairman of the Board should have been involved so directly. Whilst we might understand the Chairman being advised of the incident, actually to have the Chairman involved directly in meetings with parents was highly unusual and we conclude ultimately affected the way in which DH himself dealt with the grievance hearings of the claimants. Leaving aside whether DH was an appropriate person to deal with the grievances at all, given that it placed his governor colleagues in a difficult position when they came to deal with the appeal from his decision, we conclude that the meetings held by DH with the parents of X coloured his approach to this matter just as it did with the approach of GW and SR. We conclude that GW and SR in particular set out to ensure that neither the respondent nor by extension themselves were to be held to blame for the incident. Instead the claimants were to carry all the blame for the incident and that approach ultimately in our judgement lead to placing the respondent in fundamental breach of contract with the claimants. The investigation reports set out to scapegoat both claimants and the conclusions reached by both claimants to that effect was a reasonable one.

15.7 As issues of contributory conduct are raised by the respondent, we have considered the incident on 21 November 2016. Occasionally events occur which are unforeseen and sometimes unforeseeable. Such events often occur when a combination of circumstances produces a result which no one could have foreseen. We consider such to be the case in relation to the incident on 21 November 2016. On that morning a variety of events occurred which combined to cause the incident. The first claimant in addition to dismissing the children was giving out letters to each parent she saw and the second claimant was required to speak to a parent about a first-aid issue. As it happened that parent arrived and was being spoken to at the same time as a parent returned to the Nursery with a child to collect something he had forgotten and momentarily the first claimant was distracted by that conversation. At that moment, the child X left the Nursery unobserved in a split second. It could be said that unfortunate combination of events was simply unforeseeable. However, if it could have been foreseen, the cause of it could be said to lie with the respondent in relation to its procedure placing the mat so close to the exit door and not having the dismissal procedure reduced to writing and/or with the claimants in allowing themselves to be distracted simultaneously and/or with the parent who returned to distract the first claimant and/or even with the parent who happened to arrive when she did to collect her child who had had a first-aid incident. The incident caused the respondent to consider and to change its procedure and that, in our judgment, is very indicative of where the majority of any blame lies in this case - if blame can be said to lie anywhere.

15.8.1 We have considered the allegation that the first claimant told off the child X when she returned with her grandmother to the Nursery. We did not hear from the grandmother. We accept the evidence of the first claimant that while she spoke to X and to the grandmother she did not tell the child X off as was asserted. All parties were understandably in a state of shock at that time and we infer that the grandmother's perception was that the first claimant had told off X but we do not accept that that was so from the evidence we heard. We have considered whether the first claimant had a conversation with SR on 22 November 2016 during which SR raised the question of a change in procedure for the dismissal of children from the Nursery. We accept that that conversation took place as described in paragraph 24 of the first claimant's witness statement. We reach this conclusion because the procedure was changed and very shortly thereafter and it is entirely plausible and credible that SR was giving consideration to such matters at that time. SR's denial of that conversation does her no credit.

15.8.2 We have considered the evidence of the second claimant in respect of her second meeting with GW on 9 December 2016. On balance, we prefer the evidence of the second claimant to that of GW as to the way that meeting was conducted. We accept that the second claimant, who was 18 at that time, was questioned three times over on the same matter and that she was told that that was her opportunity to tell the truth. Effectively the second claimant was accused of lying. Effectively she was bullied at that meeting by GW and the conduct of the meeting by GW, even with an HR representative present, was unacceptable by any standards. The second claimant was reduced to tears but the meeting was not stopped. The second claimant felt unable to get her points across properly. We infer that this was a further attempt on the part of GW to place the blame firmly on the first claimant and to a lesser extent on the second claimant and to remove any question of blame from the respondent and by extension from herself and SR. We have considered the evidence of the second claimant that she did not tell GW at any time that she had sat on the mat with the children when they were being dismissed. In cross examination, GW was asked about this and her response was defensive, reluctant and obstructive. We accept the evidence of the second claimant and accept that when GW told the governors at the disciplinary hearing for the second claimant that the second claimant had made that concession, she was misrepresenting the position of the second claimant. That does GW no credit at all. GW did not see that she might be placed in a position of conflict in investigating the two claimants by reason of her involvement in the preparation of the policies and risk assessments which were at the centre of that investigation. We conclude that there was such a conflict and this further influenced GW in the way that she constructed the investigation reports.

The claims of the first claimant

Protected Disclosures

15.9 We have reminded ourselves of the lengthy grounds of complaint in this matter (pages 13-31) and of the clarification provided by Mr Wilkinson at the outset of this matter as to the alleged protected disclosures and the alleged resulting detriments. It was confirmed to us that both claimants relied on disclosures made to GW on 1 December 2016. In addition, the first claimant relied on disclosures made to GW on 9 December 2016 and both claimants relied on disclosures made in their respective grievances of March 2017. The information said to have been disclosed by those

vehicles was set out so far as the first claimant was concerned at page 29 and the detriments said to have resulted at pages 29 and 30. We have considered these matters in detail.

15.10 We have considered what the first claimant said on 1 December 2016 and refer to our findings at paragraph 11.19 above. We accept that at that meeting the first claimant disclosed information to the respondent through GW about the absence of training or instruction when she moved to the Nursery, that there was no written procedure on the dismissal of pupils from the Nursery, that there was no register of dismissal from the Nursery and no written policy detailing where staff should or should not stand when dismissing children. We do not accept that the matters referred to in paragraphs 57e – h of the grounds of complaint were referred to at that time. Clearly there was a disclosure of information by the first claimant at that time and we so conclude.

15.11 We have considered what the claimant said to GW on 9 December 2016 and refer again to our conclusions at paragraph 11.19 above. We reach the same conclusion as to matters disclosed as we do at paragraph 15.10 above.

15.12 We have considered the contents of the grievance of the first claimant dated 1 March 2017 and refer to our findings at paragraph 11.23 above. We are satisfied that the first claimant disclosed information in that grievance letter in respect of all the matters referred to in paragraph 57 of her grounds of complaint with the exception of paragraph 57h. We are satisfied that what the first claimant said was to disclose information and not merely raise allegations. Accordingly, across those three vehicles all that the first claimant asserted she disclosed was disclosed with the exception of any disclosure about pupil teacher ratios. If there was any reference to such matters, it was in the nature of an allegation and nothing more.

15.13 However, in making those disclosures of information, the first claimant did not make any direct or indirect reference to any of the matters set out in section 43B(1) of the 1996 Act and in particular did not specify any legal obligation to which the respondent was subject even in the broadest terms nor did she assert any concern about health or safety even in the broadest terms. The first claimant did not refer to blowing the whistle.

15.14 We have considered whether the first claimant held a belief that the information she disclosed tended to show any of the matters referred to in section 43B(1) of the 1996 Act. We do not accept that the first claimant held any such belief. The first claimant made no reference at any time to the whistleblowing policy of the respondent and gave no hint whatever at the meetings or in her grievance that she was seeking to blow the whistle. She gave us no evidence that such was her belief and we do not accept that she held any such belief. Everything smacks in this case of an attempt after the event to shoehorn into the complex provisions of Part IVA of the 1996 Act matters spoken of during a disciplinary process without there being any belief, let alone a reasonable belief, held at the time that the matters disclosed tended to show any of the situations required in section 43B(1) of the 1996 Act.

15.15 The first claimant gave us no evidence at all that she believed the matters she disclosed were disclosed in the public interest. The matters disclosed were all disclosed in the course of a disciplinary investigation and in the context of the first claimant

seeking to defend herself. Whilst it is conceivable that the matters to which the first claimant referred were capable of being disclosed in the public interest, it is necessary that the first claimant should persuade us that she did hold a belief that her disclosures were made in the public interest. She made no reference to the public interest at the time the disclosures were made and gave us no evidence that she held any such belief. We do not accept that she did. We are supported in this conclusion by reference to the authority relied on by Mr Vials namely **Parsons -v- Airplus International Limited UK EAT 011/17.** We are satisfied that all the first claimant said to the respondent in the investigation meetings and in her grievance was understandably out of concern for her own position and in an attempt to defend herself from potential disciplinary allegations. She did not put her mind to the public interest nor to the provisions of section 43B(1) of the 1996 Act. She held no belief that she was making either a qualifying disclosure or that what she disclosed was in the public interest.

15.16 In those circumstances, we conclude that the first claimant did not make any qualifying disclosure at any time to the respondent and therefore no protected disclosure. In those circumstances the claims of detriment and unfair dismissal which rely on protected disclosures fail at the first hurdle.

Detriment claim on the ground of having made a protected disclosure

15.17 In case that conclusion should be wrong, then we have considered briefly the alleged detriments said to have been suffered by the first claimant on the grounds of having made a protected disclosure. These are details at paragraph 58 of the grounds of complaint on pages 29 and 30.

15.18 For the reasons we have set out above, we are satisfied that the first claimant was targeted and scapegoated by GW and SR in an attempt to avoid any blame for the unfortunate incident lying with the respondent. We do not accept that an investigation into the actions of the first claimant was of itself unfair but we are satisfied that the resulting investigation report was neither fair nor objective in its format or content. We are not satisfied that subjecting the first claimant to disciplinary proceedings was of itself unfair. We are satisfied that the first claimant's grievance and appeal were not investigated and that her concerns were ignored. We are satisfied that the first claimant was subjected to a breach of confidentiality when the LADO form was sent to the second claimant and we are satisfied that that action potentially put at risk the claimant and her daughter to some extent. For the reasons set out below in relation to the contractual position in respect of notice, we are satisfied that the respondent was entitled to proceed with disciplinary action against the first claimant.

15.19 We conclude that the matters referred to in the last paragraph about which we are satisfied did amount to detriments to the first claimant.

15.20 Accordingly we have considered the motivation of the witnesses for the respondent (excluding SK and WM against whom no allegation of detriment is made) in relation to their actions and whether one or more of them were materially influenced by the fact that the first claimant had made the protected disclosures alleged – if that had been our conclusion.

15.21 We are satisfied that the motivation of GW and SK in relation to their conduct towards the first claimant was not affected in any way by any disclosures made to them. Neither witness thought for one moment that she was receiving a protected disclosure from the first claimant and we conclude that the motivation of these witnesses was entirely due to their wish to ensure that neither the respondent nor themselves were fastened with any responsibility for the events of 21 November 2016. That factor guided all that they did in this matter and we conclude that the disclosures made by the first claimant had no influence, let alone a material influence, on any of their actions. We reach the same conclusion in relation to DH. This witness had allowed himself to be involved in the details of the incident on 21 November 2016 at an early stage. He had taken part in interviews with the family of X and thereby placed himself in a very difficult position. That situation was compounded when DH volunteered to investigate the grievances of both claimants - a process he undertook without any apparent understanding of what was required of an investigation officer or indeed any apparent competence to do so. That action on the part DH meant that his colleagues on the board of governors were ultimately required to deal with an appeal from his decision which given his senior position on the board was an invidious position for those governors to find themselves in. We conclude that the motivation of DH in this matter was governed by his concern to limit any damage to the respondent or its senior managers and to seek to placate the concerns of the family of X by which he was much affected in his interview with them and to empathise with and be a friend to the claimants who brought grievances. This witness had no knowledge or appreciation of any disclosures made by the first claimant and we are satisfied that the disclosures did not materially influence the actions of this witness in any way when he chose not to investigate all the details of the grievances raised - which is the only detriment alleged for which he was responsible. We have considered the motivation of RC in dealing with the grievance appeal. We conclude that this witness and the panel of which he was the chair slavishly followed the HR advice which was given to them without bringing to the appeal process any independent or robust questioning. We conclude that his motivation was to resolve the appeal as quickly as possible and to support the decision made by the chairman who appeared before them and gave assurances which they accepted without question. Neither RC nor his panel were aware of any disclosures and we are satisfied that their actions were not materially influenced in any way by the disclosures made by the first claimant.

15.22 In those circumstances and even if we had found that the first claimant had made protected disclosures, the claim of detriment on the ground of protected disclosure would have failed and been dismissed at this final stage of our consideration.

15.23 It follows that as we conclude the actions of the respondent were not materially influenced by any disclosure that the reason for the dismissal or, if more than one the principal reason, for the dismissal was not because the first claimant had made a disclosure. In those circumstances the claim of automatic unfair constructive dismissal must also be dismissed as we set out below.

15.24 For all those reasons the claim of detriment on the ground of protected disclosure advanced by the first claimant fails and is dismissed.

Ordinary unfair constructive dismissal claim

15.25 We have considered whether the first claimant has established that the conduct of the respondent breached the implied term of trust and confidence in her contract of employment by the time of her resignation on 8 June 2017 and whether, as a result, she was dismissed by the respondent. In dealing with that question we have considered whether the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the first claimant and itself. We have reminded ourselves that a breach of the implied term of trust and confidence does not have to be an intentional act on the part of the respondent. Our function is to look at the respondent's conduct as a whole and consider whether its effect, judged reasonably and sensibly, is such that the first claimant could not be expected to put up with it. We have reminded ourselves that we can take no account of matters which occurred after the date of the letter of resignation or of matters which were unknown to the first claimant at the point she resigned her employment.

15.26 We have reviewed our findings of fact and the relevant acts on the part of the respondent which cumulatively are said to amount to a breach of the implied term of trust and confidence. We have considered the conduct of the respondent under the four broad headings as set out by Mr Wilkinson in his submissions:-

Nature of the investigation

15.27 The first claimant was suspended on the morning following the incident in November 2016. The suspension was carried out in a manner which led the first claimant to perceive the respondent considered her to blame. The first claimant was made to surrender her pass and was escorted from the premises. No discussion took place with the first claimant to show that there had been any consideration of adopting an alternative to suspension. In fact, SR had considered no such alternatives but had followed without question the advice received from the LADO and from HR to suspend. However, the decision to suspend was for SR to make and it is clear that the decision was made without any consideration of alternatives and in circumstances which can only be described as a "knee-jerk reaction". There was no suggestion in this case that the first claimant had set out deliberately to cause potential harm to a child. It was clear from the outset that what happened on 21 November 2016 was a freak event and yet the response of the respondent was to treat the first claimant as if she was to blame for the incident. Clearly it would be right for the claimants to be removed from duties in respect of the dismissal of pupils pending an investigation, but no consideration was given to asking the first claimant to work elsewhere in the Academy or carry out alternative duties of some kind whilst that investigation was ongoing. Suspension should be an act of last resort but, in this case, it was a decision reached without any proper consideration of the necessity to suspend or of available alternatives. Once the suspension was in place, it was not reviewed and it remained in place until the first claimant resigned over six months later. Those actions on the part of the respondent undermined her trust and confidence in the respondent.

15.28 The first claimant was referred to the LADO on the day of the incident. Her own details and those of her daughter were included on the referral suggesting that her

daughter may be at risk. No thought was applied by SR as to the implications of the completion of that form which again evidences the knee jerk reaction by SR which pervaded all her actions at that time. No consideration of the implications for the first claimant and her family was given by SR who instead was motivated by a desire to be seen to be doing something in response to the concerns raised by the grandmother of X. The first claimant was not told by SR that she had been referred to the LADO and that her daughter's details had also been provided. When the first claimant came to know of that situation, she was understandably most upset and that greatly undermined her trust and confidence in the respondent and in SR in particular.

15.29 The effect on the first claimant's trust and confidence caused by that referral was compounded when the first claimant came to know in April/May 2017 that a copy of the referral form had been sent to the second claimant without any restriction on its distribution. The fact that the grievance appeal panel members saw it necessary to require all copies of that form sent to the second claimant to be returned is evidence of the gravity of that situation. When the first claimant came to know of this situation her trust and confidence in the respondent was undermined.

<u>The first claimant identified as untruthful</u>

15.30 The first claimant was suspended for the reasons set out in paragraph 11.18 above. When the first claimant received the investigation report on 24 January 2017 the allegations against her had been widened without her knowledge and in particular she saw in the fourth allegation a suggested conclusion that she had not been wholly truthful and that as a result the respondent was left with little trust and confidence in her. Those matters had not been discussed with the first claimant at any time and when she saw such allegations and the manner in which they were framed, the first claimant's trust and confidence in the respondent was undermined.

15.31 The investigation report does not make clear in what way the first claimant was allegedly untruthful and makes allegations of dishonesty without seeking to justify that allegation further undermining the first claimant's trust and confidence in the respondent.

<u>The contents of the investigatory report</u>

15.32 The first claimant saw the investigation report as one which set out to prove her guilt as opposed to providing a balanced and fair investigation as is should have done. The report made no reference to the fact that the respondent had changed the dismissal of pupil procedure in the Nursery very shortly after the incident. The report made no reference to any exculpatory evidence of any kind. Instead the report included recommendations (paragraph 11.21.1 above) which spoke of questions being raised about her continued employment at the Academy and (paragraph 11.21.3 above) of the need for honesty and transparency around conduct in the workplace. The first claimant saw the report as being biased and partial and one which wholly failed to set out the matters investigated in a fair and balanced way. That greatly damaged the trust and confidence of the first claimant in the respondent.

15.33 The allegations set out in the report were not put to the first claimant prior to them being finalised. There is no mention of the change in the dismissal procedure. The

report presents the evidence from other members of staff who disagreed with the claimants in respect of the dismissal procedure as fact and no attempt is made to point out the inconsistencies in the evidence of other members of staff. Equally no comment is made as to the consistency of the evidence of the claimants in respect of the dismissal procedure. No mention is made that the original evidence from the Head of the Foundation Unit Trisha Pearson (page 298) was entirely consistent with the claimants' version of the dismissal procedure until that evidence was changed in a subsequent statement on 1 December 2016 (page 318). The report failed to highlight that inconsistency. The report failed to engage with the concerns raised by the first claimant in respect of the absence of training and appropriate risk assessments and written dismissal procedures and no mention was made as to how those matters might impact on the level of the first claimant's liability or otherwise. Rather than being a balanced and objective report designed to present an impartial statement of events for consideration as a disciplinary hearing as it should have been, the report was partial, one-sided and written in a manner designed to lead a disciplinary panel to find against the first claimant. The first claimant had many genuine concerns about the contents of the report and she raised these concerns at length in her grievance of 2 March 2017. The contents of the report and the way in which it was written undermined the first claimant's trust and confidence in the respondent.

Failure to consider the grievance

15.34 The first claimant raised detailed and cogent objections to the way in which the investigation report was presented in her grievance of 2 March 2017. It was clear from the grievance that the first claimant was concerned that the investigation report was fundamentally unfair and there was (to borrow the phrase from Mr Wilkinson's written submissions) a "*root and branch problem with the way in which the investigation had proceeded".* The first claimant requested that the report be examined and it would have been a relatively straightforward matter for an independent person to review the investigation report and consider the concerns of the first claimant. If the reviewer shared some or all of the first claimant's concerns then arrangements could have been made for amendments to the report before it was submitted to the disciplinary panel. As it was, DH, on advice, refused to engage at all with that central grievance and simply sheltered behind a discretion in the grievance policy not to engage with the grievance when it related to disciplinary matters. In investigating the grievance DH had a discretion. He did not exercise that discretion at all. He sought advice from HR and blindly followed it without giving the matter any independent and objective consideration. It is difficult to see how anyone could consider the grievances raised by the first claimant without reviewing the investigation report. However, that is what happened and the major part of the grievance raised by the first claimant was not considered at all. That approach seriously damaged the trust and confidence of the first claimant in the respondent.

15.35 In respect of those matters which he chose to investigate, the approach of the DH was flawed. His approach to his investigatory duties was to seek to empathise with the first claimant and to be a friend to the first claimant which was not at all what was required of the grievance investigator. A grievance investigation requires independence of thought and rigorous objectivity and that was lacking in the way in which DH chose to approach the issues he decided to investigate. Having seen the first claimant, DH then made some enquiries but did not refer the results of those enquiries back to the first

claimant for any comment by her. DH accepted what he was told about the training the first claimant had received in respect of the dismissal of pupils and in respect of the decision to suspend the first claimant and made no attempt to check what he had been told. That that is so is evidenced by the matters which DH gave evidence about at the grievance appeal hearing where he assured his colleagues that procedures had been followed correctly, that GW had no conflict of interest in acting as investigation officer and that he had confidence in the outcome of the investigation of GW without having seen or reviewed her report. The approach to the investigation was flawed and lacked rigour or any independent assessment. The grievance investigation was described by Mr Wilkinson as a "*whitewash".* That is how the first claimant perceived it and she was right to do so. The resulting refusal of the grievance further undermined the first claimant's trust and confidence in the respondent.

Grievance appeal

15.36 The approach of the grievance appeal panel was flawed. RC as chairman made enquiries about the matters raised by the first claimant from his wife who also worked at Academy and informally from GW but did not make the first claimant aware of this matter. This was unknown to the first claimant at the point of her resignation and did not affect the decision to resign but it is indicative of the flawed approach of RC and the panel. The panel refused to engage with the central concern of the first claimant raised in the grievance in respect of the investigation report. In doing so the panel blindly followed advice from HR that that was the appropriate step to take without giving the matter any more independent consideration. Such consideration could only have been given by having someone review the investigation report about which the first claimant was so concerned but that the panel refused to do. The panel had a discretion whether or not to consider the matters raised by the first claimant but did not seek to exercise that discretion but blindly followed the advice they received from HR without question. As with the grievance investigation itself, the process lacked rigour or independence of thought and provided no proper consideration of the serious matters raised by the first claimant. The panel found themselves in the difficult position of being called upon to review and potentially overturn the decision of the Chairman of the Board of Governors of which they were a part. The panel failed to uncover the failings of the grievance investigation by DH and blindly followed the advice given to them by HR without seeking to challenge or question that advice in any way. In such circumstances when she received the outcome of the appeal orally at the end of the meeting after only a very brief period of deliberation by the panel, the trust and confidence of the first claimant in the respondent was destroyed.

15.37 We conclude that the outcome of the grievance appeal was the final straw which caused the first claimant to resign her employment as she made clear in her letter of 8 June 2017. Having looked at the matter as a whole and judged all the matters raised by the first claimant reasonably and sensibly, we conclude that the first claimant could not be expected to put up with the conduct of the respondent any longer at the point of her resignation and that she resigned her contract in the face of a fundamental breach of it by the respondent.

15.38 We have considered whether the first claimant resigned because of that conduct and we are satisfied that she did and we are also satisfied that she did not delay too long in doing so and that no question of affirmation of the contract arises in this case.

Accordingly, we conclude that the first claimant was constructively dismissed by the respondent.

15.39 The respondent did not seek to advance any reason for the dismissal of the claimant if dismissal was found but rather argued there was no dismissal. In the absence therefore of any reason for the dismissal, it follows that the dismissal was unfair and that the first claimant is entitled to a remedy for unfair constructive dismissal.

Automatic unfair constructive dismissal claim

15.40 In dealing with this claim we are required to consider whether the reason or principal reason that the respondent had committed a fundamental breach of the contract of employment of the first claimant was because she had made one or more protected disclosures. We repeat our findings above namely that the claimant made no protected disclosure in this case. Even if that conclusion is wrong, then we repeat our conclusions in relation to the motivation of the relevant witnesses of the respondent set out above. Their actions were not influenced by any disclosure made by the first claimant and it follows that the reason or, if more than one, the principal reason for the conduct which led the respondent to be in fundamental breach of the first claimant's contract of employment was not by reason of any protected disclosure. In those circumstances the claim of automatic unfair constructive dismissal fails and is dismissed.

Contractual Notice

15.41 We refer to our findings of fact at paragraph 11.4 above. We are satisfied that the first claimant did receive a written contract in this matter and that that contract provided in its notice provisions for a period of one month's notice beginning on the first of the month after the day on which notice was given.

15.42 We refer to our findings of fact at paragraph 11.34 above and the letter of resignation written by the first claimant on 8 June 2017. In that letter the first claimant simply said that she gave notice to the respondent. The first claimant did not specify how much notice was being given. In those circumstances we conclude that the words used by the first claimant indicated a wish to give proper notice and, in view of our findings of fact, that meant that the contract of employment ended on 31 July 2017. It would have been open to the first claimant to have resigned with immediate effect but she did not do so. It would have been open for the first claimant to have clarified what she meant in her letter of resignation and brought the contract to an end earlier than 31 July 2017 by means of a subsequent letter but she did not do so. It was only on 3 August 2017 that the first claimant wrote to the respondent setting out for the first time that she had meant to give statutory notice only and that the contract thereby ended on 29 June 2017 which crucially was before the disciplinary hearing which imposed the sanction of the final written warning took place. We conclude that it was not open to the first claimant retrospectively to alter what she had written on 8 June 2017 and the effect of that letter of resignation was that the proper notice required to be given by the first claimant was given and, as a result, the contract of employment came to an end on 31 July 2017. The disciplinary sanction of the final written warning was imposed on the first claimant at the hearing she did not attend in July 2017 and confirmed to her by letter dated 11 July 2017 as confirmed the paragraph 11.39 of our findings of fact. Given that

the first claimant remained an employee of the respondent at that time, the respondent was within its contractual rights to deal with the disciplinary hearing as it did.

15.43 We reject the submission advanced by Mr Wilkinson that because the respondent was in fundamental breach of contract with the first claimant that it could not rely on the notice provisions. In this case, the first claimant herself gave the notice in her letter of resignation which brought the contract to an end on 31 July 2017 and therefore that submission is rejected.

The claims of the second claimant

Protected Disclosures

15.44 We have reminded ourselves of the lengthy grounds of complaint in this matter (pages 71-86) and of the clarification provided by Mr Wilkinson at the outset of this matter as to the alleged protected disclosures and the alleged resulting detriments. It was confirmed to us that the second claimant relied on disclosures made to GW on 1 December 2016 and in her grievance on March 2017. The information said to have been disclosed by those vehicles was set out so far as the second claimant was concerned at page 84 and the detriments said to have resulted at page 85. We have considered these matters in detail.

15.45 We have considered what the second claimant said on 1 December 2016 and refer to our findings at paragraph 11.43 above. We do not accept that at that meeting the second claimant disclosed any information to the respondent through GW about any of the matters referred to in paragraph 55 of the grounds of complaint at page 84. The meeting was a short one and the second claimant simply made no disclosure of information to the respondent.

15.46 We have considered the contents of the grievance of the second claimant dated 7 March 2017 and refer to our findings at paragraph 11.47 above. We are satisfied that the second claimant disclosed information in that grievance letter in respect of all the matters referred to in paragraph 55 of her grounds of complaint with the exception of paragraph 55h. We are satisfied that what the second claimant said was to disclose information and not merely raise allegations. Accordingly, we conclude that in her grievance all that the second claimant asserted she disclosed was disclosed with the exception of any disclosure about pupil teacher ratios.

15.47 However in making those disclosures of information, the second claimant did not make any direct or indirect reference to any of the matters set out in section 43B(1) of the 1996 Act and in particular did not specify any legal obligation to which the respondent was subject even in the broadest terms nor did she assert any concern about health or safety even in the broadest terms. The second claimant did not refer to blowing the whistle and we conclude that nothing was further from her mind.

15.48 We have considered whether the second claimant held a belief that the information she disclosed tended to show any of the matters referred to in section 43B(1) of the 1996 Act. We do not accept that the second claimant held any such belief. The second claimant made no reference at any time to the whistleblowing policy of the respondent and gave no hint whatever in her grievance that she was seeking to blow

the whistle. She gave us no evidence that such was her belief and we do not accept that she held any such belief. Everything smacks in this case of an attempt after the event to shoehorn into the complex provisions of Part IVA of the 1996 Act matters raised in a grievance without there being any belief, let alone a reasonable belief, held at the time that the matters disclosed tended to show any of the situations required in section 43B(1) of the 1996 Act.

15.49 The second claimant gave us no evidence at all that she believed the matters she disclosed were disclosed in the public interest. The matters disclosed were all disclosed in the course of a grievance and in the context of the second claimant seeking to defend herself in disciplinary proceedings. Whilst it is conceivable that the matters to which the second claimant referred were capable of being disclosed in the public interest, it is necessary that the second claimant should persuade us that she did hold a belief that her disclosures were made in the public interest. She made no reference to the public interest at the time the disclosures were made and gave us no evidence that she held any such belief. We do not accept that she did. We are supported in this conclusion by reference to the authority relied on by Mr Vials namely **Parsons -v- Airplus International Limited UK EAT 011/17.** We are satisfied that all the second claimant said to the respondent in her grievance was understandably out of concern for her own position and in an attempt to defend herself from potential disciplinary allegations. She did not put her mind to the public interest nor to the provisions of section 43B(1) of the 1996 Act. She held no belief that she was making either a qualifying disclosure or that what she disclosed was in the public interest.

15.50 In those circumstances, we conclude that the second claimant did not make any qualifying disclosure at any time to the respondent and therefore no protected disclosure. In those circumstances the claims of detriment and unfair dismissal which rely on protected disclosures fail at the first hurdle.

Detriment claim on the ground of having made a protected disclosure

15.51 In case that conclusion should be wrong, then we have considered briefly the alleged detriments said to have been suffered by the second claimant on the grounds of having made a protected disclosure. These are detailed at paragraph 56 of the grounds of complaint on page 85.

15.52 For the reasons we have set out above, we are satisfied that the second claimant was targeted and scapegoated by GW and SR in an attempt to avoid any blame for the unfortunate incident lying with the respondent. We do not accept that an investigation into the actions of the second claimant was of itself unfair but we are satisfied that the resulting investigation report was neither fair nor objective in its format or content. We are not satisfied that subjecting the second claimant to disciplinary proceedings was of itself unfair. We are satisfied that the second claimant's grievance and appeal were not investigated and that her concerns were ignored. For the reasons set out below in relation to the contractual position in respect of notice, we are not satisfied that the respondent was entitled to proceed with disciplinary action against the second claimant when it did.

15.53 We conclude that the matters referred to in the last paragraph did amount to detriments to the second claimant in so far as we are satisfied the relevant matter occurred as we detail in paragraph 15.52 above.

15.54 Accordingly, we have considered the motivation of the witnesses for the respondent (excluding SK and WM against whom no allegation of detriment is made) in relation to their actions and whether one or more of them were materially influenced by the fact that the second claimant had made the protected disclosures alleged – if that had been our conclusion.

15.55 We are satisfied that the motivation of GW and SK in relation to their conduct towards the second claimant was not affected in any way by any disclosures made to them. However, neither witness received any disclosure from the second claimant as the grievance document was directed to DH: accordingly, their motivation with regards to the second claimant is not relevant either to this detriment claim or to the automatic unfair dismissal claim. With regards to DH, this witness had allowed himself to be involved in the details of the incident on 21 November 2016 at an early stage. He had taken part in interviews with the family of X and thereby placed himself in a very difficult position. That situation was compounded when DH volunteered to investigate the grievances of both claimants - a process he undertook without any apparent understanding of what was required of an investigation officer or indeed any apparent competence to do so. That action on the part DH meant that his colleagues on the board of governors were ultimately required to deal with an appeal from his decision which, given his senior position on the board, was an invidious position for those governors to find themselves in. We conclude that the motivation of DH in this matter was governed by his concern to limit any damage to the respondent or its senior managers and to seek to placate the concerns of the family of X by which he was much affected during his interview with them and to empathise with and be a friend to the claimants who brought grievances. This witness had no appreciation of any disclosures made by the second claimant and we are satisfied that the disclosures in the grievance letter did not materially influence the actions of this witness in any way when he chose not to investigate all the details of the grievances raised - which is the only detriment alleged for which he was responsible. We have considered the motivation of RC in dealing with the grievance appeal. We conclude that this witness and the panel, of which he was the chair, slavishly followed the HR advice which was given to them without bringing to the appeal process any independent or robust questioning. We conclude that their motivation was to close off the appeal as quickly as possible and to support the decision made by their chairman who appeared before them and gave assurances which they accepted without question. Neither RC nor his panel appreciated that protected disclosures had been made and we are satisfied that their actions were not materially influenced in any way by the disclosures made by the second claimant.

15.56 In those circumstances and even if we had found that the second claimant had made protected disclosures, the claim of detriment on the ground of protected disclosure would have failed and been dismissed at this final stage of our consideration.

15.57 It follows that as we conclude the actions of the respondent were not materially influenced by any disclosure that the reason for the dismissal or, if more than one, the principal reason for the dismissal was not because the claimant had made a disclosure.

In those circumstances the claim of automatic unfair constructive dismissal must also be dismissed as we set out below.

15.58 For all those reasons the claim of detriment on the ground of protected disclosure advanced by the second claimant fails and is dismissed.

Ordinary unfair constructive dismissal claim

15.59 We have considered whether the second claimant has established that the conduct of the respondent breached the implied term of trust and confidence in her contract of employment by the time of her resignation on 6 June 2017 and whether, as a result, she was dismissed by the respondent. In dealing with that question we have considered whether the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the first claimant and itself. We have reminded ourselves that a breach of the implied term of trust and confidence does not have to be an intentional act on the part of the respondent. Our function is to look at the respondent's conduct as a whole and consider whether its effect, judged reasonably and sensibly, is such that the first claimant could not be expected to put up with it. We have reminded ourselves that we can take no account of matters which occurred after the date of the letter of resignation or of matters which were unknown to the first claimant at the point she resigned her employment.

15.60 We have reviewed our findings of fact and the relevant acts on the part of the respondent which cumulatively are said to amount to a breach of the implied term of trust and confidence. We have considered the conduct of the respondent under the four broad headings as set out by Mr Wilkinson in his submissions:-

Nature of the investigation

15.61 The second claimant was suspended on the morning following the incident in November 2016. The second claimant was made to surrender her pass and was escorted from the premises. No discussion took place with the second claimant to show that there had been any consideration of adopting an alternative to suspension. In fact, SR had considered no such alternatives but had followed without question the advice received from the LADO and from HR to suspend. However, the decision to suspend was for SR to make and it is clear that the decision was made without any consideration of alternatives and in circumstances which can only be described as a "knee-jerk reaction". There was no suggestion in this case that the second claimant had set out deliberately to cause potential harm to a child. It was clear from the outset that what happened on 21 November 2016 was a freak event and yet the response of the respondent was to treat the second claimant as if she was to blame for the incident. Clearly it would be right for the claimants to be removed from duties in respect of the dismissal of pupils pending an investigation, but no consideration was given to asking the second claimant to work elsewhere in the Academy or carry out alternative duties of some kind whilst that investigation was ongoing. No consideration was given as to whether the second claimant needed to be suspended at all given that she was the junior of the two members of staff involved in the incident on 21 November 2016. Suspension should be an act of last resort but, in this case, it was a decision reached without any proper consideration of the necessity to suspend or of available

alternatives. Once the suspension was in place, it was not reviewed and it remained in place until the second claimant resigned over six months later. In cross examination the second claimant accepted that she did not resign because of the act of suspension itself but made no concession in respect of the failure to review that suspension.

15.62 The second claimant was treated in a way which was entirely unacceptable by GW at the investigation meeting with her on 9 December 2016 as we set out above. At that meeting the second claimant was effectively bullied by GW and was unable to get across the points she wanted to make. The second claimant was told more than once that that was her opportunity to tell the truth and understood the implication was that she had not done so previously. To her credit, and despite being intimidated, the second claimant stood her ground. The conduct of that meeting was unacceptable by any standards and considerably undermined the trust and confidence of the second claimant in the respondent.

<u>The second claimant identified as untruthful</u>

15.63 The second claimant was suspended for the reasons set out in paragraph 11.42 above. When the second claimant received the investigation report on 24 January 2017 the allegations against her had been widened without her knowledge and in particular she saw in the third allegation a suggested conclusion that she had not been wholly truthful and that, as a result, the respondent was left with little trust and confidence in her. Those matters had not been discussed with the second claimant at any time and when she saw such allegations and the manner in which they were framed, the second claimant's trust and confidence in the respondent was undermined.

15.64 The investigation report does not make clear in what way the second claimant was allegedly untruthful and makes allegations of dishonesty without seeking to justify that allegation further undermining the second claimant's trust and confidence in the respondent.

<u>The contents of the investigatory report</u>

15.65 The second claimant saw the investigation report as one which set out to prove her guilt as opposed to providing a balanced and fair investigation as is should have done. The report made no reference to the fact that the respondent had changed the dismissal of pupil procedure in the Nursery very shortly after the incident. The report made no reference to any exculpatory evidence of any kind. Instead the report included recommendations (paragraph 11.45.1 above) which spoke of questions being raised about her continued employment at the Academy and (paragraph 11.45.3 above) of the need for honesty and transparency around conduct in the workplace. The second claimant saw the report as being biased and partial and one which wholly failed to set out the matters investigated in a fair and balanced way. That greatly damaged the trust and confidence of the second claimant in the respondent.

15.66 The allegations set out in the report were not put to the second claimant prior to them being finalised. There is no mention of the change in the dismissal procedure. The report presents the evidence from other members of staff who disagreed with the claimants in respect of the dismissal procedure as fact and no attempt is made to point out the inconsistencies in the evidence of other members of staff. Equally no comment

is made as to the consistency of the evidence of the claimants in respect of the dismissal procedure. No mention is made that the original evidence from the Head of the Foundation Unit Trisha Pearson (page 298) was entirely consistent with the claimants' version of the dismissal procedure until that evidence was changed in a subsequent statement on 1 December 2016 (page 318). The report failed to highlight that inconsistency. The report failed to engage with the concerns raised by the second claimant. Rather than being a balanced and objective report designed to present an impartial statement of events for consideration as a disciplinary hearing as it should have been, the report was partial, one-sided and written in a manner designed to lead a disciplinary panel to find against the second claimant. The second claimant had many genuine concerns about the contents of the report and she raised these concerns at length in her grievance of 7 March 2017. The contents of the report and the way in which it was written undermined the second claimant's trust and confidence in the respondent.

Failure to consider the grievance

15.67 The second claimant raised detailed and cogent objections to the way in which the investigation report was presented in her grievance of 7 March 2017. It was clear from the grievance that the second claimant was concerned that the investigation report was fundamentally unfair and there was (to borrow the phrase from Mr Wilkinson's written submissions) a "*root and branch problem with the way in which the investigation had proceeded".* The second claimant requested that the report be examined and it would have been a relatively straightforward matter for an independent person to review the investigation report and consider the concerns of the second claimant. If the reviewer shared some or all of the second claimant's concerns then arrangements could have been made for amendments to the report before it was submitted to the disciplinary panel. As it was, DH, on advice, refused to engage at all with that central grievance and simply sheltered behind a discretion in the grievance policy not to engage with the grievance when it related to disciplinary matters. In investigating the grievance DH had a discretion. He did not exercise that discretion at all. He sought advice from HR and blindly followed it without giving the matter any independent and objective consideration. It is difficult to see how anyone could consider the grievances raised by the second claimant without reviewing the investigation report. However, that is what happened and the major part of the grievance raised by the second claimant was not considered at all. That approach seriously damaged the trust and confidence of the second claimant in the respondent.

15.68 In respect of those matters which he chose to investigate, the approach of the DH was flawed. His approach to his investigatory duties was to seek to empathise with the second claimant and to be a friend to the second claimant which was not at all what was required of the grievance investigator. A grievance investigation requires independence of thought and rigorous objectivity and that was lacking in the way in which DH chose to approach the issues he decided to investigate. Having seen the second claimant, DH then made some enquiries but did not refer the results of those enquiries back to the second claimant for any comment by her. DH accepted what he was told about the training the second claimant had received in respect of the dismissal of pupils and made no attempt to check what he had been told. That that is so is evidenced by the matters which DH gave evidence about at the grievance appeal hearing where he assured his colleagues that procedures had been followed correctly, that GW had no conflict of

interest in acting as investigation officer and that he had confidence in the outcome of the investigation of GW without having seen or reviewed her report. The approach to the investigation was flawed and lacked rigour or any independent assessment. The grievance investigation was described by Mr Wilkinson as a "*whitewash".* That is how the second claimant perceived it and she was right to do so. The resulting refusal of the grievance further undermined the second claimant's trust and confidence in the respondent.

Grievance appeal

15.69 The approach of the grievance appeal panel was flawed. RC as chairman made enquiries about the matters raised by the second claimant from his wife who also worked at Academy and informally from GW but did not make the second claimant aware of this matter. This was unknown to the second claimant at the point of her resignation and did not affect the decision to resign but it is indicative of the flawed approach of RC and the panel. The panel refused to engage with the central concern of the second claimant raised in the grievance in respect of the investigation report. In doing so the panel blindly followed advice from HR that that was the appropriate step to take without giving the matter any more independent consideration. Such consideration could only have been given by having someone review the investigation report about which the second claimant was so concerned but that the panel refused to do. The panel had a discretion whether or not to consider the matters raised by the second claimant but did not seek to exercise that discretion but blindly followed the advice they received from HR without question. As with the grievance investigation itself, the process lacked rigour or independence of thought and provided no proper consideration of the serious matters raised by the second claimant. The panel found themselves in the difficult position of being called upon to review and potentially overturn the decision of the Chairman of the Board of Governors of which they were a part. The panel failed to uncover the failings of the grievance investigation by DH and blindly followed the advice given to them by HR without seeking to challenge or question that advice in any way. In such circumstances when she received the outcome of the appeal orally at the end of the meeting after only a very brief period of deliberation by the panel, the trust and confidence of the second claimant in the respondent was destroyed.

15.70 We conclude that the outcome of the grievance appeal was the final straw which caused the second claimant to resign her employment as she made clear in her letter of 6 June 2017. Having looked at the matter as a whole and judged all the matters raised by the second claimant reasonably and sensibly, we conclude that the second claimant could not be expected to put up with the conduct of the respondent any longer at the point of her resignation and that she resigned her contract in the face of a fundamental breach of it by the respondent.

15.71 We have considered whether the second claimant resigned because of that conduct and we are satisfied that she did and we are also satisfied that she did not delay too long in doing so and that no question of affirmation of the contract arises in this case. Accordingly, we conclude that the second claimant was constructively dismissed by the respondent.

15.72 The respondent did not seek to advance any reason for the dismissal of the claimant if dismissal was found but rather argued there was no dismissal. In the

absence therefore of any reason for the dismissal, it follows that the dismissal was unfair and that the second claimant is entitled to a remedy for unfair constructive dismissal.

Automatic unfair constructive dismissal claim

15.73 In dealing with this claim we are required to consider whether the reason or principal reason that the respondent had committed a fundamental breach of the contract of employment of the second claimant was because she had made one or more protected disclosures. We repeat our findings above namely that the second claimant made no protected disclosure in this case. Even if that conclusion is wrong, then we repeat our conclusions in relation to the motivation of the relevant witness of the respondent set out above. His actions were not influenced by any disclosure made by the second claimant and it follows that the reason or, if more than one, the principal reason for the conduct which led the respondent to be in fundamental breach of the second claimant's contract of employment was not by reason of any protected disclosure. If the conduct of DH was not materially influenced by any disclosure then the reason he acted as he did for unfair dismissal purposes was not because of any protected disclosure. In those circumstances the claim of automatic unfair constructive dismissal fails and is dismissed.

Contractual Notice

15.74 We refer to our findings of fact at paragraph 11.3 above. We are satisfied that the second claimant did receive a written contract in this matter in respect of the fixed term on which she was employed initially by the respondent and that that contract provided in its notice provisions for a period of one month's notice beginning on the first of the month after the day on which notice was given. The contract also provided that those notice provisions would not apply at the end of the contract.

15.75 We refer to our findings of fact at paragraph 11.59 above and the letter of resignation written by the second claimant on 6 June 2017. In that letter the second claimant was absolutely clear that she was giving notice of 2 weeks and that her contract would therefore end on 20 June 2017. We conclude that the provisions of the fixed term contract fell away with the expiry of that contract in 2016 and, even if that is wrong and the terms could be said to have governed the ongoing relationship albeit no longer on a fixed term, the provision included in that contract in respect of the cessation of the notice provisions effectively removed those provisions from any ongoing relationship and they were thus substituted by the statutory notice provisions contained in section 86(2) of the 1996 Act. Those provisions required the second claimant to give statutory notice of one week but in fact she chose to give two weeks. We conclude that the contract of employment of the second claimant came to an end at the end of the period of notice she gave namely on 20 June 2017. Accordingly, when the disciplinary hearing took place in July 2017 in respect of the second claimant, she was no longer an employee of the respondent and as a result, and absent any contractual provision to the contrary, the respondent was not entitled to impose the disciplinary sanction on the second claimant as she was no longer an employee of the respondent when it purported so to do.

Remedy Considerations.

16.1 Both claimants have succeeded in their respective claim for ordinary unfair constructive dismissal and are entitled to a remedy. Orders are issued separately in relation to preparation for that hearing.

16.2 These proceedings have been protracted. With this judgement on liability in place, an opportunity presents itself to the parties to negotiate on the question of remedy and agree matters without the necessity for a further hearing and the parties are urged to do so in order to save any further expense and time and anxiety. Given our findings, the statutory limit on compensation (which we take it is the desired remedy in this case by both claimants) set out in section 124(1ZA) of the 1996 Act will apply. As a result, the compensatory award even of the maximum amount will be relatively modest.

16.3 In case this may assist the parties to resolve this matter without a further hearing, we set out our preliminary view in relation to certain remedy issues. We emphasise that we have reached no firm view on any of these matters. We have heard no submissions on these matters and thus the views expressed are preliminary only. Given our findings the claim of the first claimant for an uplift pursuant to section 38 of the Employment Act 2002 will not succeed. The claim by the second claimant for such an uplift will succeed and we express our view that given the second claimant had received details of her fixed term contract from the respondent, the appropriate level of uplift would be two weeks' pay. In its forms of response, the respondent asserted that both claimants contributed to their dismissal if a dismissal could be established. In the event both claimants have established that they were unfairly constructively dismissed. Even if blame can be attributed to either claimant, our preliminary view is that such contribution is very much at the lower end of the scale. It would not be inappropriate for any deduction in respect of contributory conduct for the second claimant to be at an even lower level than that of the first claimant given that the first claimant was in charge of the dismissal of the pupils on the day in question. As we have referred to above, there were many factors in play which gave rise to the unfortunate incident on 21 November 2016 and the actions of the claimants were no more than a minor part of those many factors.

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EMPLOYMENT JUDGE BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 18 July 2019

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