EMPLOYMENT TRIBUNALS

Claimant: Ms A O Adoh

Respondent: Kido Schools UK Limited

Heard at: London Central **On:** 1 to 4 October 2019 and in Chambers on 25 November 2019

Before: Employment Judge K Welch
Ms C Ihnatowicz
Mr M Reuby

Representation
Claimant: In person, supported latterly by Mr Leonard
Respondent: Mr S Joshi, Solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The correct name of the Respondent is Kido Schools UK Limited.

2. The Claimant's complaints against the Respondent as set out below are not well founded and fail:
    a. Detriment for having made protected disclosures;
    b. Automatic unfair dismissal for having made protected disclosures;
    c. Direct discrimination because of age, race and/or disability; and
    d. Discrimination arising from disability.

3. The Claimant's claims are therefore dismissed in their entirety.

RESERVED REASONS

1. The Claimant brought claims for being subjected to a detriment and automatic unfair dismissal for having made protected disclosures. In addition she brought claims of direct

discrimination on the grounds of age, race and disability and a claim for discrimination arising from disability relating to her dismissal.

2. The claim was submitted on 7 April 2018 following a period of early conciliation from 7 March 2018 to 22 March 2018. The Claim Form purported to be brought against two further individuals being employees or former employees of the Respondent Company, but there being no early conciliation for those individuals the Claimant confirmed at the start of the Hearing that her claim was against the Respondent Company only.
3. The Respondent had changed its name on 19 August 2019 from Safari Kid United Kingdom Limited trading as Safari Kid to Kido Schools UK Limited. The Claimant was concerned whether this was the correct Respondent since she had never been employed by Kido Schools UK Limited. However, having checked the position on the Companies House website we were satisfied that the name change had taken place and therefore the Respondent was correctly named.
4. The Claim did not provide sufficient details in order to be properly considered by the Tribunal. Therefore, at a preliminary hearing for case management before Employment Judge Walker on 21 August 2018, the Employment Judge took the opportunity to attempt to clarify the Claimant's complaints. These were set out in the Case Management Order dated 27 August 2018 in the list of issues as follows, as further clarified by the Panel during the Hearing, as shown below in square brackets.

"Public Interest Disclosure Claims

i. What did the Claimant say or write?

ii. The Claimant says she complained to Naomi [this was later amended to Naziya] about there being no injury forms when one child hit another one on the head [in or around January 2018].

iii. The Claimant complained to Tiffany and Barnabas that there was no risk assessment undertaken for the garden before the children went outside to play [in or around October/November 2017].

iv. The Claimant complained to Tiffany when a vegetarian child was given vegetable food which had been in contact with meat [in or around December 2017/January 2018].

v. The Claimant complained to Tiffany about baby burping telling her that this had to be done before the child could be put down to sleep [in or around November/December 2017].

Did this information tend to show one or other of the following:-

i. That a person failed to comply with a legal obligation to which he was subject;

ii. That the health or safety of any individual had been put at risk.

iii. If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

Detriment Complaint

i. If protected disclosures are proved, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker?

ii. The Claimant has alleged she was subject to coercion and constructive persistent bullying. The Claimant says she meant that the Respondent acted in a manner which ridiculed her and undermined her, so that she felt her manager did not want her to do the work and she had no back up. She said that when she complained to Tiffany, Tiffany would refer to Brandon [Barnabas], who was one of the people who was acting incorrectly.

Automatic Unfair Dismissal Complaint

i. Was the making of any proven protected disclosure the principal reason for the dismissal?

ii. The Claimant did not have two years' continuous employment, so the burden is on the Claimant to show jurisdiction and therefore to prove that the reason,

or if more than one, the principal reason, for the dismissal was the protected disclosure(s).

Disability

Does the Claimant have a physical or mental impairment? The Claimant relies on fibroids, anaemia and her having had a thyroidectomy in 2004.

i. If so, does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?
ii. If so, is that effect long term? In particular when did it start and;
iii. Has the impairment, or any of them, lasted for at least 12 months?
iv. Is, or was, the impairment, or any of them, likely to last at least 12 months or the rest of the Claimant's life if less than 12 months?
v. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

Section 13 Direct Discrimination on Grounds of Disability

i. [If the Claimant is found to be disabled at all relevant times] has the Respondent subjected the Claimant to the following treatment falling within Section 39 of the Equality Act, namely dismissing the Claimant.
ii. Has the Respondent treated the Claimant less favourably than it treated or would have treated the comparators? [The Tribunal was asked to consider a hypothetical comparator along with the rest of the Claimant's team as comparators in this respect].
iii. If so has the Claimant proved primary facts from which the Tribunal can properly and fairly conclude that the difference in treatment was because of the Claimant's [disability]?
iv. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 15 Discrimination arising from disability

i. The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within Section 39 of the Equality Act is the dismissal. No comparator is needed.

ii. There is no dispute that the Claimant was dismissed.

iii. Did the Respondent treat the Claimant as aforesaid because of "something arising" in consequence of the disability? The Claimant says that she was late because the aches and cramps in her body delayed her.

(iv) Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

(v) Alternatively, has the Respondent shown that it did not know and could not reasonably have been expected to know that the Claimant had a disability?

Section 13: Direct Discrimination on grounds of age

(i) Has the Respondent subjected the Claimant to the following treatment falling within Section 39 Equality Act, namely when she told her manager about her suffering from cramps and body aches the manager said "We're not young anymore".

(ii) Was that less favourable treatment? [It was agreed that the Claimant relied upon a hypothetical comparator for this claim].

(iii) If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's age?

(iv) If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

(v) And/or does the Respondent show the treatment was a proportionate means of achieving a legitimate aim?

Section 13: Direct Discrimination on grounds of race

Note the Claimant identifies herself as a black African French person.

(i) Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely removing the Claimant's photo of herself in her African outfit from the team board [at the beginning of January 2018]? (ii) Was that less favourable treatment? [The Claimant relies upon the rest of her team who are not black as comparators for this].

(iii) If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude the difference in treatment was because of a protected characteristic? (iv) If so what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Remedies

5. If the Claimant succeeds in whole or part the Tribunal will be concerned with the issues of remedy."

Background

6. At the case management Hearing, the Claimant was asked to provide further Particulars of her claim, which appeared at pages 22 to 25 of the agreed bundle referred to below. The Respondent provided a response to these Further and Better Particulars, which appeared at pages 26 to 34 of the agreed bundle.
7. The Claimant confirmed prior to evidence being called that the list of issues contained the entirety of her complaints, and that any further matters raised in her Further and Better Particulars were for background purposes only. Therefore the list of issues was agreed, save that approximate dates were given for the alleged protected disclosures and the alleged direct race discrimination complaint, as set out in square brackets as part of the list of issues above.

8. A deposit order was made dated 27 September 2019 in respect of the Claimant's complaints of:

    i. Detriment on the grounds of having made protected disclosures;

    ii. Automatically unfair dismissal on the grounds of having made protected disclosures;

    iii. Discrimination where the protected characteristic is age; and

    iv. Discrimination where the protected characteristic is disability.

9. The Claimant continued with all of her complaints despite the deposit order being made.

10. The parties had agreed a bundle of documents, and references to page numbers in this Judgment relate to documents within that bundle. Additional documents were added to the bundle by the Respondent with no objection from the Claimant. The Claimant sought to adduce additional documents on the third day of the Hearing (being after she had already given evidence and been released as a witness). The Respondent objected to their inclusion, and, therefore, both parties addressed us on whether the documents should be included. The first three documents were not allowed into the bundle since they post-dated (some by a great deal of time) the Claimant's dismissal. They were therefore not considered relevant to the issues that the Tribunal needed to consider. An email from a former colleague was also not allowed to be included within the bundle since the Claimant confirmed that she had had this document since April 2019 and had failed to disclose it, either to the Respondent or to the Tribunal, until the third day of the Hearing. Having considered the overriding objective and the prejudice caused to both parties, we considered that it was not appropriate to allow the document to be adduced. The final document, being the Claimant's minutes of the appeal hearing, were added into the bundle with no objection from the Respondent.

11. The Tribunal heard evidence from:

    (i) The Claimant herself.

    (ii) VT the Claimant's former line manager.

    (iii) SF-H a former colleague; and

(iv) EC a former colleague.

12. The Respondent provided two additional statements, one from GO, a former director of the Respondent, which had been signed and dated on 21 March 2019, and a further document purporting to be a statement from TR-H, a former colleague of the Respondent, which was unsigned and undated. We attached such weight to these statements as we considered appropriate, taking into account that they had not been tested under cross examination and were not sworn evidence.
13. The statements of the witnesses attending the Tribunal were therefore taken as their evidence in chief, and the witnesses were subject to cross examination and questions from the Panel.
14. The Claimant was unrepresented for the majority of the hearing. However, when presenting her submissions to the panel, she was assisted by Mr Leonard, who then went on to provide written submissions on her behalf, as mentioned below.

Findings of Fact

15. The Claimant was employed from 2 September 2017 as an Early Years Educator - French teacher within the Respondent's nursery. The Claimant's contract of employment appeared at pages 46 to 78, having been signed by the Claimant on 31 August 2017. The Claimant's contract included a probationary period of three months which stated at page 46:

    "However, if your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either take remedial action (which may include the extension of your probationary period) or terminate your employment at any time. We reserve the right not to apply our full contractual capability in disciplinary procedures during your probationary period."
16. Within this contract were some general terms and procedures which at page 61 stated: *"Personal mobile phones must be kept in the staff room away from student areas at all times. Your personal mobile phones must only be used in your authorised breaks."*

17. The Claimant attended an induction. The Respondent's evidence, confirmed by a number of its witnesses, was that TV, the manager of the nursery, carried out the induction with a number of staff who were starting at the same time. The Claimant could not recall TV being at the induction, but we were satisfied that she was.

18. Whilst the Claimant could not recall being given an induction pack and could not recall going through the policies, we are satisfied from the evidence of the Respondent's witnesses that an induction pack was given to the Claimant including a mobile phone and social networking policy [pages 79 to 80].

19. This mobile phone and social networking policy stated:

"S*taff must adhere to the following:*

- *To ensure the safety and wellbeing of children we do not allow staff to use personal mobile phones during working hours.*
- *Mobile phones are either turned off or on silent and not accessed during your working hours.*
- *Mobile phones can only be used on a designated break and this must be away from the children, outside of the nursery building by exiting through the main entrance on Central Street.*
- *Mobile phones should be stored safely in the manager's office safe at all times during the hours of your working day."*

20. The Claimant relied upon a clause in her contract [page 61] which stated that "*Personal mobile phones must be kept in the staff room away from student areas at all times*."

21. This differed from the policy contained within the induction pack. However, we are satisfied that the Claimant was told not to keep her mobile phone in the staffroom and instead to keep it in the manager's office.

22. There was a safe box in the manager's office in which staff were to keep their mobile phones. We are satisfied therefore that the Claimant had been told that her mobile phone

should be stored within the safe in the manager's office and not in the staff room as relied upon by the Claimant as outlined above.

23. The Respondent had changed its policy for the nursery in which the Claimant worked, due to the location of the staff room. In the Claimant's nursery, it was located in the centre of the nursery, and the Respondent was concerned about possible safeguarding issues relating to the use of mobile phones around children.

24. The Claimant's probationary period was extended due to the number of absences she had had, and this was confirmed in writing to the Claimant on 12 December 2017 [page 81]. The extension was due to the seven days of sickness absence that the Claimant had taken since the commencement of her employment. It enabled the Respondent to have further time to assess the Claimant's suitability together with an opportunity to ensure that she was able to successfully achieve her Level 3 Early Years' Educator qualification.

25. When the Claimant commenced employment, the Respondent believed that the Claimant had already achieved her Level 3 Early Years' Educator qualification. This was not from any misleading information provided by the Claimant, but from the agency that they had used to source the staff. As a result of this, the Claimant's photograph and description (being on one sheet) were put onto the staff photo board for parents to see with the following description:

"Odile Adoh French Teacher Level 3 also based in Early Explorers and Turbo Toddlers".

26. The picture of the Claimant had been provided by herself and showed her in a green patterned dress. It was contended by the Claimant that this dress showed her to be wearing African clothing.

Claimant's illnesses/conditions

27. The Claimant suffers with fibroids, anaemia and hypothyroidism, having had a thyroidectomy in December 2004. There was no evidence before the Tribunal, other than the Claimant's oral evidence, that the Claimant's thyroid had been removed. However there was evidence from the Claimant's GP records [pages 249 to 296] that the Claimant

did have hypothyroidism and had suffered with this from December 2004 (which is when the Claimant stated that she had her thyroidectomy).

28. There was evidence of anaemia and fibroids from prior to, and subsequent to, her employment with the Respondent.
29. The Claimant's impact statement [page 247] confirmed that the Claimant was suffering with body aches and pains, migraines, fatigue, dizziness and drowsiness together with anaemia which was aggravated by her fibroids.
30. In answer to questions from the Panel, relating to the Claimant's health should she not take her prescribed medicines, she confirmed that she suffered with aches and pains and did not feel at all well, due to her hypothyroidism.
31. The Claimant was late on a number of occasions during her employment with the Respondent. She accepts that she gave a variety of reasons for this, including traffic preventing her punctual attendance, issues with train links as well as her being tired. She had also complained about the neighbours below her smoking cannabis which she considered had also contributed to her lateness, due to making her tired through passive smoking.
32. It was clear that the nursery manager, TV, had agreed to vary the Claimant's shifts to give her more favourable start times in order to assist her in attending work on time.
33. On one occasion, on an unknown date, there was a conversation between TV and the Claimant concerning the Claimant having general aches or pains in her bones or joints. The Claimant's evidence was that TV stated that this was because the Claimant was "not young anymore and it was down to old age". TV's evidence was that she replied to the Claimant to say that she woke up with aches and pains too, and that she thought it was due to her getting older as she felt stiff in the mornings and took time to warm up. At the time of this discussion, the Claimant and TV were both in their early 40s.
34. We accept the evidence of TV that she was commenting generally about the effects of getting older.

Removal of the Claimant's photograph

35. The Claimant stated that her photograph had been removed in the beginning of January 2018. However, TV's evidence on behalf of the Respondent was that this had been removed by GO, a director of the company in December 2017, at a time when TV was not in the nursery. We accept that the Claimant's photograph was removed at some point.
36. The Respondent's evidence was that the Claimant's photograph had been removed due to the wording underneath the photograph being incorrect, since it identified the Claimant as having already obtained a Level 3 qualification, which she was working towards, but had not yet obtained. The Claimant asserted that the reason for its removal was due to her being dressed in African clothing and was due to race discrimination. We accept the evidence of the Respondent that the Claimant's photograph was removed due to it being on the same sheet as incorrect wording.
37. We are satisfied that the removal of the photograph was nothing to do with the Claimant's race.
38. The photograph was not put back onto the staff photo board, but at some point in January 2018, all of the other staff photographs were taken down and a professional photographer came in to take photographs of the staff in uniform, in order to have a professional and consistent approach. We accept this to be the case.
39. The Claimant alleges to have complained to Naziya, her colleague, about there being no injury forms when one child hit another child on the head in or around January 2018.
40. We were provided with copies of accident report forms which had been completed in respect of an anonymised child by the Claimant on 16 January 2018 and by other members of staff on 24 January 2018. These accident report forms, however, did not relate to the incident upon which the Claimant relied, which was where the child in question had been hit on the soft spot of her skull. It was clear that the Claimant considered an accident report should have been completed, but had only stated this to one of her nursery colleagues and not anyone responsible for health and safety at the Respondent's premises, or one of her superiors. There was no evidence that her colleague passed this concern on or that the Claimant reported it herself to any superiors.

41. The Claimant also alleges to have complained to TV and her room supervisor, Barnabas, that there were no risk assessments undertaken for the garden before the children went outside to play. The Claimant considered that this took place in October/November 2017. TV could not recall any such discussions and did not consider that this could have taken place, since her response would have been to refer to the risk assessments, which were undertaken daily in respect of the nursery environment (including the garden) as part of the software management system used by the Respondent. We saw copies of this at pages 348 to 383 for the period of 2 October 2017 to 3 December 2017. We therefore do not accept that the Claimant raised complaints about there being no risk assessments undertaken for the garden before the children went outside to play. TV's evidence was that this was not raised by the Claimant, since it if had been she would have shown the Claimant the risk assessments produced daily.
42. The Claimant also stated that she complained to TV, in either December 2017 or January 2018, when a vegetarian child was given food which had been cooked with meat. TV could not recall the Claimant flagging any concern to her although, could recall another staff member confirming that a child's dietary preferences had not been made clear by the parents. The parents were told of the meal being given to the child and had no concerns relating to this. We accept that the Claimant had raised this as a concern, although accept that others may have raised with TV in addition to the Claimant.
43. It was accepted by the Respondent that the Claimant complained to TV about being told to put a baby down to sleep without being properly winded, in November or December 2017. The evidence from the Respondent's witnesses was that TV provided one to one training for all employees working with the baby to ensure that the baby was properly winded before being laid down to sleep. Whilst the Claimant does not accept that this training had taken place, we are satisfied that it did.
44. The Claimant alleged that she was subjected to persistent bullying during her time in the Respondent's employment. It is clear to the Panel that the Claimant did not have good working relationships with the employees within her team. It is clear to us that the Claimant was not seen as a team player and would regularly raise matters with different members

of the team if she did not consider they were doing things correctly and/or thought that there was a different method that should be followed. We accept the evidence of EC that the Claimant caused others to cry and there was clearly not a good working environment within the nursery. However, we do not accept that the Claimant was bullied during her employment, nor that she was ridiculed and/or undermined.

Events on 24 January 2018

45. There were two incidents which took place concerning the Claimant on this date. Firstly, the Claimant asked to leave for her lunch earlier than her designated time (at 12.20pm as opposed to 12.30pm) in order that she could collect her passport from the Embassy. The nursery is in Clerkenwell and the Embassy is in South Kensington.
46. This resulted in a bus and tube journey, together with a walk either end. The Claimant gave evidence that she informed Naomi, the second in charge of the nursery, as she had been unable to speak to TV. She gave evidence that the appointment was given in advance and that she had received the appointment by the Monday, before the Wednesday on which she went to the Embassy to collect her passport.
47. The Claimant gave evidence that she had to obtain the passport during working hours and it was agreed that she would leave the nursery at 12.20pm. We accept that she requested to leave slightly early for her lunch but did not say how long she would be. Therefore, we find that the Claimant was expected to return by 1.30pm. The Claimant did not return until either 2.10 or 2.15pm. Further, she failed to telephone the nursery to let them know that she would be late. The nursery attempted to call her, in order to understand when she would be back, but at this point the Claimant was on the telephone to her bank and therefore did not answer the call. This meant that other staff within the nursery were unable to take their lunch break on time since, had they done so, the required ratios would not have been satisfied to look after the children in the nursery room in which the Claimant worked. This would therefore have caused a breach in their legal obligations.
48. Secondly, the Claimant had refused an additional yoghurt for a child within the nursery, which caused him to get upset. Having told him that he could not have an additional yoghurt, one of the Claimant's colleagues said that she should comfort the child in order

to stop him crying. The Claimant refused to do so and said that it would "not kill him". The Claimant gave evidence that this was translated from a French expression. Following on from this, two of the Claimant's colleagues informed TV of this incident, as they considered that the Claimant had not acted appropriately and in accordance with procedures. At the time, TV was away from the nursery.

49. TV returned to the nursery as soon as she could, following receipt of telephone calls from colleagues of the Claimant's, who relayed both of these incidents to TV, since she considered that these issues were serious.

50. TV got staff to write out their own witness statements (copies of which were not provided to the Tribunal). TV then suspended the Claimant on full pay pending an investigation into these allegations. The Claimant's suspension was confirmed in writing [page 83] which referred to "allegations of misconduct and poor time keeping".

51. The investigation was carried out by TV, who then went on to chair the disciplinary hearing.

52. TV read a report which included typed up anonymised statements from various witnesses. This was included with the invitation letter dated 31 January 2018 [pages 91 to 100]. The invitation letter confirmed that the Hearing was to discuss the following concerns:

- *"Alleged persistent lateness detailed in Annex 1 of evidence.*
- *Alleged poor timekeeping on 24 January 2018.*
- *Alleged rudeness to students and other employees on 16 January 2018 and 24 January 2018.*
- *Alleged objectionable behaviour on 24 January 2018.*
- *Alleged bullying on 21 September 2017 and 5 November 2017.*
- *Alleged failure to follow our rules and procedures on 24 January 2018.*
- *Alleged failure to carry out all reasonable instructions given by the nursery manager…in December 2017."*

53. The Claimant attended a disciplinary hearing on 8 February 2018 during which she was dismissed for "*persistent lateness despite allowances,*

lack of respect for senior staff

failure to follow our rules and procedures.".

54. One of the allegations raised against the Claimant was that she failed to follow the mobile phone policy in having her mobile phone with her in the staffroom contrary to the updated procedure from April 2017. The Claimant relied upon the statement within her Terms and Conditions of Employment [page 61] as referred to above. Despite being asked to remove her telephone to the manager's office, she argued with her room supervisor.

55. The dismissal was confirmed in writing [pages 115 to 116]. The Claimant was paid in lieu of her one week notice period.

56. We believe that the reason for the Claimant's dismissal was her failure to follow the mobile phone policy, in insisting on keeping her phone in the staff room in the centre of the nursery in which she worked, despite being given an instruction to the contrary by senior staff, and the incidents on 24 January 2018 referred to above.

57. The Claimant appealed by letter 9 February 2018 [pages 117 to 121]. The appeal hearing was heard on 15 February 2018 by GO, a former director of the Respondent. Minutes of the appeal hearing appeared at page 126 to 129 (with the Claimant's version of her minutes being pages 129A to 129D). There was no oral evidence given by GO at the hearing, although a signed statement was provided.

58. It was not entirely clear to the Tribunal, and the unsworn evidence of GO in her witness statement also did not make particularly clear, the grounds upon which the decision to dismiss was upheld. However, we considered that it appeared to have been upheld solely on the ground that the Claimant had breached the mobile phone policy (as confirmed at page 129D of the Claimant's minutes and 129 of the Respondent's minutes). The appeal outcome letter [page 133] stated:

"*having given the matter full consideration, I am now writing to confirm that the original decision taken by Gabrielle Oh stands for the following reasons:*

For ease of reference I will refer to each point in turn.

- You believe you did breach safeguarding initially however apologised - You admitted storing your phone in the staff room when it should be locked in the office."

59. The Claimant was informed that the decision was final.

Submissions

60. The Respondent had prepared written submissions and was given the opportunity to expand on them orally. The Claimant gave oral submissions assisted during the latter part of her submissions by Mr Leonard. However a request was made that the Claimant be permitted to submit written submissions prior to the Panel's deliberations. It was agreed that the Claimant would be afforded this opportunity. It was therefore agreed that the Claimant would present her written submissions to the Tribunal by 5pm Monday 7 October and that the Respondent would provide any response to those submissions (should it consider it necessary) by 9 October 2019. These dates were agreed by both parties due to the Respondent's representative leaving his role on Friday 11 October.
61. We considered the further written submissions provided by the Claimant and the short counter-submissions from the Respondent, which were provided in accordance with the agreement reached.
62. The Respondent's submissions in brief were that the Claimant's disciplinary proceedings and subsequent dismissal related to the Claimant's misconduct, which occurred on 24 January 2018. As regards the allegations of detriment for having made protected disclosures, there was a distinct lack of detriment following any such disclosures, some of which were denied in any event.
63. The age discrimination allegation showed empathy between TV and the Claimant, and no discrimination.
64. The race discrimination complaint (which only related to the removal of the Claimant's photograph) was unfounded, since the photograph was removed for a valid reason.
65. Finally, the Claimant had provided no evidence of having undergone a thyroidectomy in relation to her disability discrimination complaint. She had not raised dyslexia as an

impairment for her disability discrimination complaint until the Claimant's written submissions were received. She was dismissed for her conduct which was not attributable to her alleged disability.

66. The Claimant's submissions were that the Claimant had been dismissed for making protected disclosures, as evidenced by the lack of explanation for the reasons given for the Claimant's dismissal.

67. The Claimant's discrimination complaints should be viewed holistically (from the case of X v Y [2013] UKEAT 0322).

68. The Claimant's claim for disability discrimination were stated to stem from "anaemia and dyslexia". Having not pleaded nor given evidence about the dyslexia condition, we took this as an error and considered that the Claimant was referring to her fibroids.

69. Finally, the Claimant considered that there had been age discrimination due to the comments of the Claimant's line manager.

Law

70. We had regard to the Employment Rights Act 1996 ('the 1996 Act') section 43B, which stipulates:

"**Disclosures qualifying for protection**.

(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—

….

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

….

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

"(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

…."

71. Qualifying disclosures are protected if made in accordance with ss.43C to 43H. By s.43C, it is provided that:

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer…"

72. The ERA provides no guidance on who a worker should make a protected disclosure to within a company or organisation in order for it to be classed as "to his employer".

73. By s.47B(1) ERA, a worker has the right not to suffer a detriment (which may take the form of an act or a deliberate failure to act) done on the ground that she has made a public interest disclosure. A 'detriment' arises where, by reason of the acts complained of, a reasonable worker would or might take the view that she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

74. The necessary link between a protected disclosure and any detriment relied upon is established if the former was a material influence upon the latter: Fecitt v NHS Manchester [2012] ICR 372 CA. By virtue of s48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

75. Further, a dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure as provided by s.103A ERA which states:

"**103A. Protected disclosure**.

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."

76. Where, as in this case, the Claimant does not have the necessary two years' qualifying service to claim 'ordinary' unfair dismissal, she bears the burden of proving the 'automatic' ground relied upon.

Discrimination complaints

77. The Claimant claims direct race, age and disability discrimination, together with discrimination arising from her disability. The Tribunal therefore had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a tribunal could decide in the absence of another explanation that the employer contravened the provision of the EqA, the Tribunal must hold that the contravention occurred (section 136(2) EqA).

78. It is necessary for the Tribunal to consider whether the Claimant was disabled at all material times. Section 6 EqA states:

"6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

79. An impairment is 'long-term' if it has lasted for at least 12 months or is likely to last for at least 12 months or for the rest of the life of the person affected (schedule 1, para 2)

80. The Claimant claims that she was directly discriminated against because of her age, race and disability. Section 13 EqA provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

81. By s.23(1) and (2)(a) EqA it is provided that there must be no material difference between the circumstances of the Claimant's case and that of her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

82. The Claimant claimed that she had been treated unfavourably because of something arising as a consequence of a disability. The protection is laid out in Section 15 EqA which states:

"(1) A person (A) discriminates against disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability and,

(b) A cannot show the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection 1 does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability."

83. No comparator is required for this assessment. In order for this to apply, the employer must have treated the Claimant unfavourably. As the EHRC Employment Code ("the Code") explains at paragraph 5.6, it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must, therefore, be a link between the unfavourable treatment and the Claimant's disability.

84. The Code states, "often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably" [paragraph 5.7 of the Code].

85. The employer may seek to rely upon an objective justification for the unfavourable treatment where it was a proportionate means of achieving a legitimate aim.

Conclusion

86. We are satisfied that the Claimant made the following three protected disclosures during her employment with the Respondent:

    i. Her complaint to Naziya about there being no injury forms completed when a child was hit by another child on the head in January 2018;

    ii. Her complaint about a child being given vegetarian food which had been in contact with meat in December 2017 or January 2018; and

    iii. Her complaint about being told to put a baby to sleep without being properly winded in November/ December 2017.

87. We did not accept that the Claimant had made disclosures concerning the lack of risk assessments for the garden, due to the clear evidence that these were regularly carried out.

88. We consider that the Claimant had a reasonable belief that the disclosures referred to in paragraph 86 tended to show that the failures were a potential breach of a legal obligation and/or that the health and safety of children was being put at risk. Further, that the disclosures were made in the public interest.

89. We considered that the disclosures numbered 86.ii and 86.iii were clearly made to the Claimant's employer, being made to her superiors within the Respondent organisation. We considered whether the disclosure made by the Claimant to her colleague, Naziya, being the same level as the Claimant, constituted disclosure to the Claimant's employer. Whilst there appeared to be no clear definition, we interpreted this widely, and therefore accepted that the disclosure referred to in 86.i was also made to the Claimant's employer.

90. However, we do not accept that the Claimant was subjected to any detriment as a result of having raised these concerns with her employer. There was no evidence to suggest that Naziya passed the Claimant's concerns on. Further, the Claimant's complaint about the child being given vegetables which had been cooked with meat was resolved with the parents, who had not provided the necessary dietary preference information relating to their child. Therefore, we feel it highly unlikely that the Claimant was subjected a detriment for raising this.

91. Whilst we note that there was not a good working relationship between the Claimant and her team, we do not find that this was for making the protected disclosures we found to have been made. The Claimant was not a team player, and caused friction within the team in which she worked.

92. Finally, it was clear to us that the Claimant's concerns about the baby being put down to sleep without being properly winded was taken seriously by the Respondent. We have found that training was given to every person working with the baby to ensure that this was properly carried out. We do not consider that the Claimant was subjected to any detriment for having made a valid complaint which was acted upon.

93. We therefore dismiss the Claimant's claim for being subjected to a detriment for having made protected disclosures.

94. We also find that the Claimant's dismissal was in no way linked to her having made protected disclosures. We believe that the reason for the Claimant's dismissal was her behaviour on 24 January 2018, her failure to follow the Respondent's policies and procedures and her late attendances for work. We did not consider that the Respondent's dismissal letter or the statement of TV provided a clear rationale for the dismissal, but we are satisfied that the reason was not linked in any way to the protected disclosures.

95. The appeal against dismissal was upheld by GO and the reason was for storing the mobile phone in the staff room when it should have been stored in the office. Again, we thought that there was insufficient rationale provided in the appeal outcome letter dated 19 February 2018, but this did not prevent us from finding that the reason for the dismissal being upheld was not linked in any way to the protected disclosures.

96. We therefore find that the Claimant has failed in proving that the reason, or the principal reason, for the dismissal was the protected disclosures. Therefore, the claim for automatic unfair dismissal fails and is dismissed.

97. Turning to the discrimination complaints, we firstly considered whether the Claimant was disabled at all material times, in accordance with the Equality Act 2010. The Claimant, in written submissions, suggested dyslexia as one of the conditions causing her to be disabled under the Equality Act, but as this had not been pleaded, nor was there evidence before the Tribunal relating to this condition, this did not form the basis of our decision.

98. However, we were satisfied that the Claimant was disabled as a result of her fibroids, anaemia and hypothyroidism. We consider that the Claimant was suffering from these physical impairments throughout her employment with the Respondent; that these were long term (having lasted 12 months or more at the material times). Whilst the Claimant took medication for her hypothyroidism and anaemia, without this medication we are satisfied that they would have had a substantial adverse effect on her ability to carry out normal day to day activities.

99. The Claimant's claim for direct disability discrimination relates solely to her dismissal. We are satisfied that a hypothetical comparator, being an employee working within the Respondent's organisation in a similar role, without the Claimant's conditions, would have also been dismissed in the same circumstances. Therefore, her complaint of direct disability discrimination fails and is dismissed.

100. The Claimant complains that her dismissal was also discriminatory, since it was unfavourable treatment as "something arising in consequence of the Claimant's disability". She asserts that the reason for her dismissal being lateness was because the aches and cramps in her body delayed her attending on time and that this was a consequence of her disability.

101. One of the three reasons cited in the dismissal letter by TV was "persistent lateness despite allowances". However, we found that the real reason for dismissal was the Claimant's lateness and behaviour on 24 January 2018 and her failure to follow the Respondent's procedures concerning the safekeeping of her mobile phone. In any event, on appeal, the reason for the dismissal being upheld related solely to the Claimant's failure to follow procedures relating to the mobile phone policy.

102. The Claimant gave many reasons for her lateness, as evidenced above, and provided no medical evidence to support her assertion that this was caused by cramps and aches. Further, she was late back from lunch on the 24 January 2018, which was the catalyst for the suspension of the Claimant and her subsequent dismissal following a disciplinary procedure. Her lateness on this day was not in any way related to her disability. Therefore, we do not consider that the dismissal of the Claimant was as a result of something arising in consequence of the Claimant's disability.

103. Therefore, we dismiss this complaint.

104. We do not accept that the Claimant was told "we are not young anymore" and therefore do not find that the Claimant was subjected to less favourable treatment in relation to the conversation between herself and TV concerning her cramps and body aches. As we accepted the evidence of TV that she was generally commenting on the

effects of getting older, we do not consider this to have been discriminatory. The Claimant's claim of direct age discrimination is therefore dismissed.

105. Finally, we considered the Claimant's claim of direct race discrimination relating to the removal of her picture. We accept that the removal of a photograph could constitute less favourable treatment. However, we accepted the Respondent's explanation for the removal of the photograph due to incorrect information about the Claimant's qualifications being on the sheet with the photograph. We considered that any of the Respondent's other employees within the nursery, who were not black, would have had their photographs removed should the description of their qualifications have been incorrect.

106. We are satisfied that the Claimant has not proved primary facts from which the Tribunal could properly and fairly conclude the difference in treatment was because of the Claimant's race. Therefore the burden of proof did not shift to the Respondent.

107. Therefore, we do not consider that the removal of the Claimant's photograph was an act of direct race discrimination and her claim in this respect is therefore dismissed.

108. The Claimant's claims having been dismissed in their entirety, there is no requirement for a remedy hearing.

Employment Judge Welch

19/12/2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

03/01/2020

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FOR THE TRIBUNAL OFFICE