EMPLOYMENT TRIBUNALS

Claimant: Mr J Fite

Respondent: First 4 Care Limited

Heard at: Leeds **On:** 17 to 21 February 2020

Before:

Employment Judge JM Wade

Mr G Harker

Mr DW Fields

Representation:

Claimant: Mr Batsch (consultant)

Respondent: Mr J Gilbert (consultant)

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 21 February 2020, the written record of which was sent to the parties on 24 February 2020. A written request for written reasons was received from the claimant on 26 February 2020. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 21 February 2020 are repeated below:

JUDGMENT

The claimant's first two complaints of protected disclosure detriment succeed; his third complaint, concerning pay, is dismissed.

REASONS

1. Introduction

1.1. This is the decision of the employment tribunal sitting in Leeds from 17 February to 21 February, Employment Judge Wade, Mr Harker and Mr Fields. This is a unanimous decision.

1.2. During the course of the day we have made comprehensive findings of fact across a reasonably lengthy chain of events, to enable us to determine the issues in this case.

1.3. The claimant was a deputy manager working in homes for children operated by the respondent. He alleged that on 7 May 2019 he had made protected disclosures. The three matters about which he complained were:

1.3.1. being suspended;

1.3.2. being referred to the LADO (local authority designated officer for safeguarding);

1.3.3. and having his pay stopped in September and October 2019.

1.4. The claimant said these three matters were because of or influenced by his making of disclosures. The respondent's case was that he did not make protected disclosures and if he did, the matters were not because he had made them.

2. The law

2.1. It is convenient to set out the relevant law – the parties' list of issues broadly reflected the key provisions and principles, but we identify them with precision here.

2.2. Section 43B of the Employment Rights Act 1996 relevantly provides as follows: "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 –

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

2.4. *Bolton School v Evans* *[2006] EWCA Civ 1653*, *[2007] IRLR 140* held that the ordinary meaning of a disclosure of information is, conveying facts.

2.5. Bolton provides further guidance that there is no need to identify the actual legal obligation on which the employee is relying if what the employee is talking about is obvious to all.

2.6. In *Kilraine v London Borough of Wandsworth* *[2018] EWCA Civ 1436*, *[2018] IRLR 846* (upholding the view of the EAT) it was held that care may be needed [here] because *Cavendish Munro* is not to be construed as establishing a bright line divide between 'information' and 'allegation'; instead, there is a spectrum of possibilities and the question is whether the putative disclosure contains *sufficient* information in all the circumstances to qualify.

2.7. Section 43C relevantly provides (1) "a qualifying disclosure is made in accordance with this section if the worker makes the disclosure – (a) to his employer…"

2.8. Section 47B relevantly provides: (1) "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

2.9. Fecitt v NHS Manchester *[2012] IRLR 64, [2012] ICR 372*, CA. established that "on the ground that" requires the disclosure to have materially influenced the employer's treatment.

3. The Issues

3.1. By submissions, the issues had become focussed on: did the claimant make a qualifying disclosure on 7 May 2019? Had he proven that he provided any information, that is conveyed any facts, at all, rather than simply making the respondent aware that there was "a rumour". If he did so, did he reasonably believe that he was doing so in the public interest and that the information tended to show that the health and safety of any individual "has been, is being or is likely to be endangered".

3.2. It was not in dispute that the claimant was suspended on 7 May 2019, referred to the LADO on 8 May in connection with events on 19 April 2019, and not paid on or around 28 September and 28 October 2019, as detailed in his payslip, during his suspension.
3.3. The claimant's case was that these things were done by the respondent to punish him, and to retaliate for his whistleblowing. The respondent's case was that the pay issues were inadvertent bank failures, and the other two matters were because of the claimant's conduct on 19 April 2019. The Tribunal had to address the reason or reasons why these things happened.

4. Evidence
   4.1. We heard oral evidence from Mr Fite on his own behalf. He was cross-examined at length by Mr Gilbert and we considered his evidence generally reliable and consistent with the contemporaneous documents, albeit on two relevant matters we consider he was not reliable or mistaken (whether he told Mr Allen that his access to his own child could be affected by the events on 5 May; whether he had secured Ms Lunn's agreement to work half a day on 19 April).
   4.2. We also heard from Mr Board, the claimant's union representative, and to whom he went for advice on 8 May. Mr Board, having been a social worker himself, could help us with context, and the chain of events within his knowledge on and after 8 May. He straightforwardly accepted he was not present on 7 May, and was speaking only on the basis of the information relayed to him by the claimant.
   4.3. In the claimant's case we finally heard from his partner, Ms Longfield, who at the material times also worked for the respondent, but had resigned to take up another management position elsewhere. We assessed her evidence to be generally straightforward and truthful, but understandably reflecting her concern for the impact of these events on the claimant.
   4.4. We heard oral evidence from six witnesses on behalf the respondent. Ms Carol Dodds, its owner and managing director (referred to in these reasons as Ms Dodds); Ms Natalie Lunn, a registered manager and the respondent's safeguarding officer; Mr Allen, Mr Davies and Mrs Bishop, all of whom were front line staff working with children in the relevant homes at the time; and Ms K Dodds (Ms Dodds' daughter in law). The latter undertook HR administration, banking and general administration, from the respondent's office at one of the homes, from Tuesdays to Thursdays.
   4.5. If these reasons come to be published we will refer to the principal parties who have appeared as witnesses. We will avoid using any names or locations which might lead to the identification of the children involved in these events (by the use of "Home A" etc).
   4.6. As to the quality of the respondent's oral evidence, it will be apparent that we found Mr Davies, Mr Allen, Ms K Dodds, and Mrs Bishop to be straight forward: they were seeking to do their best to tell the truth to the best of their abilities. The tribunal's assessment of Mr Allen was that some unguarded evidence on matters not within his statement, was compelling and instructive, albeit he appeared nervous and affected by the difficult situation in which he found himself.
   4.7. We have also had a bundle of documents of around 500 pages, in respect of which we had to make additional disclosure orders of clearly relevant matters, the most significant of which was an independent investigator's conclusions in relation to events on 5 May (which was critical of Ms Dodds).

It was requested by the claimant some weeks before this hearing. The Tribunal gave directions to ensure the report was before us: the first document provided was not the report itself, but notes of a meeting where it was discussed. The claimant had not seen the report until it was brought to this hearing after he had been released. The gist of his evidence about his concerns was consistent with the concerns upheld in the report.

4.8. Unusually, amongst documents in a hearing bundle, it has been very difficult to establish with any certainty the dates on which particular respondent documents may or may not have been created (with the exception of one document where the respondent disclosed the underlying "properties" or metadata).

4.9. We often consider contemporaneous communications concerning events as the most reliable evidence, and much more reliable than oral evidence informed through the lens of hindsight. Similarly we treat with caution documents created afterwards, informed with hindsight. That caution takes into account that memory is a reconstructive process. When people repeat to themselves a chain of events they wish had happened, or a particular chain of events is suggested to them, they can come to genuinely believe that chain of events. When they then come to write witness statements or reports, such evidence has become unreliable. Some of the material before us on behalf of the respondent appeared of that quality. Similarly, the claimant's recollection of not being scheduled to work on 19 April, and to having secured Ms Lunn's agreement to him working only half a day on 19 April, for one specific purpose, appeared to us to be unreliable in light of the contemporaneous messaging that day.

4.10. In fact the most compelling material before us has been the contemporaneous messaging that has gone on between all manner of members of staff in this case. That has given us the best insight into what was in their minds at the time. Whether those messages are unkind or unguarded is not the issue: they convey a chronology of events which is most likely, in our judgment, to be reliable.

5. <u>The outline facts found, many of which were undisputed</u>

<u>Background and context</u>

5.1. The claimant had previously worked in health and safety in the rail sector, with autistic adults, and for another household name employer. He came to work for the respondent in February 2018.

5.2. The respondent operates homes for children looked after by the local authority, and has done so since 2008. The respondent has won awards for its provision in the past.

5.3. The claimant began as a support worker, but by September 2018, he had become a deputy manager, responsible for two homes: "A" and "B", located next door to each other and accommodating three young people each. Typical staff ratios were two care workers to one young person during the day and two care workers sleeping in at night.

5.4. Typically, the manager or deputy manager worked during the week, Monday to Friday day shifts, and provided general supervision and liaison with social workers and others, and were responsible for significant paperwork and meetings and decision-making in connection with the children.

5.5. On bank holidays falling on Mondays and Fridays, a manager or deputy manager would be on duty to support staff at A and B.

5.6. The claimant's line manager, and the registered manager of A and B, was Ms Lunn. She had a wealth of experience in supporting children and was the respondent's designated safeguarding officer (DSO).
5.7. The claimant and Ms Lunn had a good working relationship and were in regular contact by mobile phone message and telephone as the need arose. The overarching impression of their contemporaneous communications in 2019 was that they had a shared and diligent concern for the welfare of the children in their care.
5.8. The claimant's partner, Ms Longfield, had joined the respondent in May 2016, long before the claimant, and had become the registered manager of two further homes operated by the respondent, C and D.
5.9. Ms Dodds was the managing director of the respondent, and had been assessed by the regulators as a fit person to be the "responsible individual", following interview before first opening in 2008. She was ultimately responsible for the safe operation of the respondent's homes and the care of the children in them.
5.10. The claimant was contracted to work forty hours per week, or 173.33 hours per month. Timesheets were completed from the 23rd to the 22nd of each month. Overtime or "sleep -in" additional payments would also be submitted to Ms K. Dodds for entry in the respondent's computerised system.
5.11. That system would then produce payslips for all staff and Ms K. Dodds would email those payslips to staff in advance of payment on or before the 28th of each month.
5.12. It was obvious to all (Ms Dodds, Ms Lunn, the claimant, Ms Longfield and others) that they worked in a heavily regulated environment, which required the reporting of any incidents where a child may have been endangered. There was a specific requirement to report within 24 hours circumstances where an individual may have put a child at risk (and may therefore pose risk to other children). That report had to be made to the local authority designated officer (for safeguarding), or "LADO".
5.13. Such a report resulted in a multiagency strategy meeting, which could consider any children with whom a reported individual was likely to have contact to ensure that no children could be put at risk by someone considered a possible risk.
5.14. In the past, a child had allegedly reported such a matter about a member of staff at one of the respondent's homes, to police officers, and situations had arisen, for example, where razors had been inadvertently left in a child's bedroom overnight, meriting investigation and reporting. These sorts of matters were apparent in the ordinary day-to-day communications, often by text message between staff. It was also apparent in those communications that the reporting burden, and the consequent need to investigate, where events might seem innocuous or a simple mistake, was a source of frustration and weariness at times.
5.15. The use of restraint on children in the respondent's care was heavily regulated. Typically, a child's social worker and the local authority with responsibility for the care of that child, would need to set out the parameters and limits on any permission to use restraint techniques, or "laying hands on" a child, and these would be included in documents known as "MAPA" plans (management of actual or potential aggression). This too was a matter of common knowledge to the claimant, Ms Dodds and Ms Lunn. A child's care plan indicated what was considered and agreed to be proportionate, or useful, as a strategy in dealing with conflict, or where the child was at risk of harming themselves or others.
5.16. The different types of restraint, for example, whether seated or standing, or single person or two person, were understood and included in training. Irregular

floor restraint was neither trained nor approved for well publicised reasons including the risk of harm. Ms Lunn had a great deal of expertise in strategies in managing children with complex behavioural needs. All staff knew that children would take part in "life space" discussions to enable relationships to be repaired after interventions had been necessary, and to provide appropriate care and support through discussion.

5.17. Before March 2019 Ms Longfield had conveyed her unhappiness about her working relationship with Ms Dodds in various messages, which resulted in her seeking new employment. There was then a discussion between them about her salary, but by 12 April 2019 Ms Longfield had provided 3 months' notice to bring her employment to an end with effect from July. She had accepted a post as a registered manager with a larger employer, on a much higher salary.

The Events of 19 April

5.18. On 19 April 2019, which was Good Friday, Ms Lunn was scheduled to be on leave. This meant (we find) that the claimant was scheduled to be at work. Ms Lunn had expressed to him the day before, her concern that a child's social worker had not yet provided consent for a five-day trip to Butlins the following week and the claimant That child, X, was looking forward to that trip.

5.19. The claimant attended work on 19 April, secured the social worker consent and took X out to buy paint for the claimant's use, and went on the trampoline with A. He reported by message to Ms Lunn around 12 noon that X had sprained his ankle, and he checked with Ms Lunn which reports needed to be completed. Ms Lunn confirmed what needed to be done. Ms Lunn did not at that stage advise any incident reporting to the child's social worker. The claimant expressed the view that the ankle was not broken.

5.20. On the evening of 19 April, the children were due to attend a production at a local theatre, in which Ms Lunn's son was performing; she too was due to attend the performance, but not in a working capacity. There was much going on that day at home A, to prepare, including one young person doing makeovers for staff attending.

5.21. After 12 noon, Ms Dodds telephoned home A to inform staff that she would be calling in. The claimant then rang her to tell her that he was taking the afternoon off as it was a bank holiday and he had "time in lieu". The claimant had exceeded his contracted hours in that current month.

5.22. Taking time in lieu needed to be authorised by Ms Lunn, who in turn needed authorisation from Ms Dodds. Ms Dodds knew that Ms Lunn had not sought permission from her for the claimant to be absent that afternoon. Ms Dodds did not tell the claimant he could not take leave that afternoon, or that there must be a manager (other than her) on duty, but instead she sought to verify whether there was, in fact, time to take, "in lieu".

5.23. She messaged Ms K. Dodds, for that information, telling her that it would be "holiday" for the claimant, "as he's supposed to take TOIL in same week!!" We find she meant that the respondent would treat the afternoon off as holiday, rather than time off in lieu of extra hours worked. Miss K. Dodds messaged Ms Dodds to say, "don't text him lol". She meant that Ms Dodds should not raise it with the claimant. Ms Dodds observed that advice or instruction, and did not contact the claimant to tell him: a) he was not allowed to take holiday; or b) he was not allowed to take time off in lieu; or c) he was being treated as taking annual leave/holiday that afternoon.

5.24. By the time Ms Dodds attended at the home, the claimant had left. Finding X had not yet been taken to hospital, she took the view that X must be taken to a local emergency treatment centre, to check that his ankle was not broken. She had said to both X, and another care worker looking after X at the time, that "they did not have x-ray eyes", or words to that effect

5.25. X was taken to a local minor injuries clinic; he was given an x-ray, and the following week an email was sent to the claimant confirming there was no fracture, with advice on exercises to be undertaken. X was also issued with a protective boot that day, and had attended the show that evening, returning home for pain relief mid way through. X had then attended the holiday commencing on Monday 22 April.

After 19 April

5.26. The claimant returned to work on 22 April and telephoned the care worker who was accompanying X on holiday, to confirm there was no fracture. During that call the care worker had said that Ms Dodds had been asking questions about the trampoline injury and for the claimant to "watch his back". The claimant simply ended that call with "cheers, okay" or words to that effect. He had already let Ms Lunn know of the outcome of the x-ray and Ms Lunn was expressing no concern in their exchanges that his conduct had been in any way at fault.

5.27. Having learned of the ankle injury after she attended that afternoon, Ms Dodds took a dim view of the claimant taking leave on 19 April, in the context of she found on her arrival: having to instruct the care worker to take X to hospital straight away.

5.28. Ms Dodds did not seek to talk to the claimant about this at any stage when he was at work between 22 and 26 April. That was a week when Ms Lunn was on leave, and Ms Dodds had been advised by external HR advisers that she should not trouble Ms Lunn with work matters when she was on leave, to preserve her mental health. It was clear that Ms Lunn was happy to communicate with the claimant by text message that week, in relation to matters connected with the children, and his work communication continued with her as usual.

5.29. Nor did Ms Dodds make a risk assessment of the claimant's ongoing contact with children that week (we make that finding because although such a document was in the bundle, its properties were not disclosed, it did not appear to have been provided by the respondent to an independent investigator, nor was it mentioned in any verifiably contemporaneous communications from Ms Dodds).

5.30. The claimant continued undertaking unsupervised work with children that week.

5.31. The following week (29 April to 3 May) the claimant was on leave and Ms Lunn was back at work. That week Ms Dodds took advice from HR advisers about disciplining the claimant in relation to 19 Apri, and the advisers produced a draft letter. That letter included three disciplinary allegations: the first was of leaving work early while covering the managerial role on 19 April in breach of procedures; the second was of not sending X to hospital in breach of accident procedures, causing organisational risk (rather than risk to the child), resulting in a delay to the young person getting treatment; and the third was an unrelated matter arising from January 2019.

5.32. On or around 2 May 2019 Ms K. Dodds "cut and pasted" the advisers' letter into a new draft document and emailed it to Ms Dodds. All of this was done without Ms Dodds speaking to the claimant about these events, nor reporting him to the LADO.

5.33. The explanation for this was to be found in Ms Dodds' evidence in comparison with the letter itself. Ms Dodds told us she had sought HR advice concerning the 19 April events and had been told that because the claimant did not have two years' service, the respondent's disciplinary procedure did not have to be strictly observed. She had therefore intended to hold a disciplinary meeting without speaking to the claimant first.

5.34. It seems unlikely that was the advice given, because the draft letter included reference to a summary of the incident on Good Friday and "the follow-up conversation with me." The likely advice was, therefore, that Ms Dodds should talk to the claimant to understand his account of events, before deciding to proceed with the disciplinary matters. There had been no conversation between Ms Dodds and the claimant about this matter in the week 22 to 26 April.

5.35. The letter also referred to statements (presumably from colleagues who were there on 19 April), but when asked about this Ms Dodds said she undertook conversations with staff, but did not write things down or take statements.

5.36. The draft letter also referred to the respondent's policy on accidents and a statement from Ms Lunn about Good Friday cover. There was, in fact, at that stage, no statement from Ms Lunn about what had been agreed in relation to Good Friday.

5.37. The speed with which Ms K. Dodds was able to produce this draft letter and email it to Ms Dodds was because Ms K. Dodds' only activity was to create a new document and cut-and-paste the text from the advisers.

5.38. Considering all these matters, we have concluded that Ms Dodds intended to discipline and possibly dismiss the claimant in relation to these matters, knowing that he had less than two years' service, and she had formed that view before she had heard his side of events at all.

5.39. Further the letter made no reference to the need to report the matter to the LADO, or that that was a step which Ms Dodds had already taken or would take in connection with the Good Friday allegations. The Tribunal deploys its industrial knowledge in care environments where neglect allegations are raised. We consider it likely that if Ms Dodds considered the matters required a report to LADO, she would have reported the claimant to LADO within 24 hours, and first, before any internal procedures, as she was required to do. There was no good explanation from Ms Dodds for this failure. She had the direct knowledge of matters having had the exchanges and seen staff on the day, to enable any allegation or incident of neglect on 19 April to be reported to LADO at the time.

5.40. The absence of Ms Lunn on leave was only marginally relevant to a neglect allegation, if it were later to transpire that she had told the claimant to direct the care worker not to take X to hospital (which is highly unlikely in any event). Significantly, the statement envisaged by the draft letter from Ms Lunn was not "a statement from Natalie about her advice as to the need to take [x] to hospital", but, a "statement from Natalie about Good Friday cover". Similarly we consider that if Ms Dodds had considered neglect of a child had occurred, when the need to report within 24 hours was known and understood by Ms Lunn, her safeguarding lead, it is simply inconceivable that she would not have made that enquiry by telephone, or that evening, when they saw each other at the theatre.

<u>The events of 5 May 2019 and subsequently</u>

5.41. On Sunday 5 May, five staff members were on duty in home A. They included Ms Dodds' daughter and Mrs Bishop's daughter. In the evening there were behaviour incidents where restraints were used on X and Y after Ms Dodds attended the home (she was not a member of staff on duty).

5.42. At around 9 pm, after several restraint incidents, Ms Dodds completed her own account (page 141c) of an incident where she had engaged with X, which at some point involved them both being on the floor. Young person Y had then escalated her behaviour and subsequently Y was subject to restraint by other staff members. Ms Dodds did not complete a physical intervention form in relation to the restraints she had observed others apply to Y, nor did she ensure that those other staff members completed such forms that evening.

5.43. The claimant was due to return from leave on Monday 6 May. There had been a stomach bug affecting staff at the home and on the morning of Monday 6 May Ms Longfield messaged Ms Lunn to say that she was "on her way in", because the claimant had succumbed to the bug overnight. Ms Lunn asked her to attend home A because another staff member was also unwell and unable to attend.

5.44. On her arrival, the children were unsettled and the staff were asking her how to complete the relevant restraint forms in relation to incidents the previous evening. Ms Longfield was unwilling to complete them because she had not been there at the time of the incidents and could not tell them what to write. Ms Longfield decided to speak to each young person to understand from them what had happened. She documented brief notes of what they said.

5.45. The quality of the notes before the Tribunal not give rise to any suggestion that Ms Longfield was motivated by malice towards Ms Dodds in speaking to the young people. Whether through lack of judgement, or inexperience, she asked the children to sign the notes that she had made. That was not in accordance with guidance, or best practice, which required the presence of a social worker or other colleague for any formal interviews with children. The children had also told Ms Longfield to ask a particular staff member who had been present and seen what had happened.

5.46. Ms Longfield then returned home to collect her dogs, in order that she could take them back to Home A and then out with the children. When she met the claimant at their home, she told him what the children had told her in brief terms, which included that Ms Dodds had been involved in physical restraint with X, and others, including Ms Dodds' daughter, with Y. Ms Longfield told the claimant which staff member to speak to (as advised by the children).

5.47. The claimant was genuinely concerned that the children may have been exposed to restraints improperly. In this context and setting, it was common knowledge that improper restraint could have resulted in the health and safety of a child being endangered. The claimant therefore sent a message to Ms Lunn to say "Nat, why am I being told Carol restrained [X] on the floor yesterday when he tried to walk by her and she's claiming she fell?!" Ms Lunn's reply to that was "I wasn't there and I spoke [staff member] and Carol and they're not saying that's what happened, so I don't know." Ms Lunn sent that reply at 1:15 PM.

5.48. The claimant was then immediately in touch by telephone with the staff member identified by the child as having been present. The staff member told him what he had seen, which did not allay his concerns, but confirmed them. That was a short call, but the claimant called back within 20 minutes, and asked the staff member to document what he had seen in a statement and email it to him. In that discussion the claimant told the staff member, who had had his own difficulties in securing contact with his own child, that this matter could result in Ms Dodds, "throwing [you] under a bus", which could impact his contact with his own child. At this stage the claimant understood, with good reason, that there was a conflict in the accounts of what had happened.

5.49. That staff member completed a written statement and emailed it to the claimant, which simply recorded as accurately as possible what he had observed. He confirmed in his witness statement that this emailed account had been (and was) true and accurate. His account revealed details which have not been included by Ms Dodds in her restraint form completed on the evening of 5 May. The staff member was very worried about these events, and in particular the impact on his contact with his own child.
5.50. While the staff member was completing his statement, the claimant was also in text and telephone communication with Ms Lunn; Ms Lunn said that she felt sick and anxious. The claimant responded, "it's not good, that's for sure. What's your plan with it." Ms Lunn replied, "I never have a plan. I always say to you, what are we gonna do", followed by a "sad face". The claimant's response was: "Investigate and report it. That's what needs to be done".
5.51. During their telephone conversation that afternoon, discussing the seriousness of these events, the claimant had been clear with Ms Lunn that as the registered manager, this was a very serious matter for her.
5.52. In its cross examination of the claimant, the respondent suggested to him that he had seen the events on 5 May as a "golden ticket", and had sought to manipulate the staff member to exaggerate his statement, and portray Ms Dodds in a poor light. The Tribunal considers this suggestion without foundation. The staff member confirmed that all that was done was a record of what he had seen, and could best recall, the following day. The claimant seeking to clarify one matter with him was not manipulation.
5.53. It was further suggested to the claimant and Ms Longfield, that they were acting with ulterior purpose and, in effect, conspiring to harm Ms Dodds. We also reject this assertion. Ms Longfield had no idea what she would be told when she arrived on 6 May; she involved the claimant because she trusted him simply to collect information. The information she had gathered from the children did not appear to have been manipulated at all, but simply recorded what they said, some of which was consistent with Ms Dodds' position later. We find, contrary to the respondent's suggestion, that at this stage both the claimant and Ms Longfield were acting out of concern for the children, and with a desire that things be properly investigated. With hindsight Ms Longfield should reasonably have spoken to the staff member herself, but involving the claimant was for benign reasons, and without him having any idea that Ms Dodds planned to discipline him for the 19 April events: those events were over two weeks' old, nothing had been said, and he had no reason to think they would be revived. Ms Lunn had not mentioned in any of her unguarded text messages to him that there would be an investigation, or similar, or that she had any concerns.

5.54. On the morning of 7 May 2019, the claimant had recovered from his sickness bug and attended work. Ms Dodds, Ms Lunn and the staff member who had provided the statement were also at work that day. Ms K Dodds was present, it being a Tuesday, and other staff were on duty. The course of events on this day were, however, in dispute.
5.55. The claimant's case, both in his complaint to the LADO made the same day, his claim form, and his statement, described two occasions that day when he had sought to raise concerns of inappropriate restraint with Ms Dodds.
5.56. He described attending work and soon after, or immediately, in the office with Ms Dodds and Ms Lunn raising or attempting to raise his concerns (of inappropriate restraint), "in response to which Ms Dodds had become very angry, saying whoever had told him that information "would be fucking sacked." And "they

will see what happens if they felt with me". The claimant describes Ms K Dodds entering the office and Ms Dodds directing her that a meeting would be undertaken before any paperwork was completed to ensure that people were on the same page. The meeting would take place at 4 PM.

5.57. He then describes taking part in a meeting with the social worker of young person Y, Y, Ms Lunn, and Ms Dodds. After that meeting, Ms Lunn, directed him to complete paperwork for Y. He describes seeking to raise the issue of inappropriate restraint again, and in this 2nd meeting with Ms Lunn and Ms Dodds, having asked another staff member to leave the office, Ms Dodds said that she would suspend the claimant unless he told her which staff member had alleged the inappropriate restraint. When he refused to do so she told him he was suspended and to get out. He then left the building.

5.58. The account of interactions with the claimant from Ms Dodds (and Ms Lunn) on that day is significantly different. They do not mention any meeting with the claimant at the start of the day and before the social worker meeting. They describe that when Ms Dodds arrived the social worker was already on site and that meeting started straight away with Ms Lunn and the claimant. Ms Lunn does not mention Ms Dodds attending the social worker meeting in her witness statement and nor did Ms Dodds. Ms Dodds also did not include it in a statement she later made for a LADO investigation. Ms Lunn and Ms Dodds in their oral evidence both then described Ms Dodds being at that meeting (as the claimant had). Neither mentioned Ms K Dodds coming into the office (which on the claimant's case happened after Ms Dodds was allegedly swearing in the first meeting) and Ms Dodds directing her daughter in law that a meeting would take place with staff later.

5.59. Ms Dodds also described in her statement for the LADO investigation (but not in her statement for this Tribunal) that Ms Lunn had telephoned her that morning before she started work to tell her that the claimant had reported an allegation that she had used inappropriate restraint on the young people the previous Sunday.

5.60. Ms K Dodds' statement does not deal with the course of events on 7 May at all, even though she was present in the home throughout, and it was not in dispute that she was present at a de-brief meeting with staff about the 5 May incidents later that day.

5.61. The one meeting with the claimant, described by Ms Lunn and Ms Dodds, describes the claimant asking another member of staff to leave the office, expressing disgruntlement about completing some paperwork for Y and then saying, "we've got a serious issue, something that could bring down the company – there are rumours that you (looking at [Ms Dodds]), and your daughter have carried out an inappropriate restraint on two kids."

5.62. The next part of the meeting is not greatly in dispute. Ms Dodds then asked for the source of the information or allegation, and when the claimant said he would not disclose his sources, and that the matter was one of safeguarding and whistleblowing, Ms Dodds response, was to press for the information, in various ways and then to suspend him.

5.63. The claimant left work as instructed, passing the colleague who had witnessed the events and given him a statement. He then immediately contacted Mr Foy, the LADO. He documented his account of events that day to Mr Foy in an email (page 189), also attaching the staff member's statement.

5.64. Mr Foy was then in contact with Ms Dodds by telephone, by 2pm, and on her oral evidence to the Tribunal she was clear that neither she nor Ms Lunn could conduct further investigations about 5 May, because the LADO had been involved. Nevertheless, she went on to undertake a meeting with the staff member who

observed her 5 May restraint, and with other staff members involved in restraints and events on 5 May. The claimant also then contacted his union.

5.65. He sought the reasons for his suspension at around 3.30pm on 7 May. At 4.16pm he sent an electronic message to Ms Lunn as follows: "Nat I cannot believe what has just happened and you have said nothing. I raised an issue to my two superiors around a whistleblowing issue which is what the policy states. Instead of discussing correctly and following the right procedures I have been shouted at, sworn at, my job threatened and suspended because of whistleblowing and not telling Carol which staff member had raised this to me as she stated – "she would fucking sack them and not to fuck with me". I am honestly disgusted this is how I have been treated. On the back of that I want to raise a formal grievance as I am not willing to risk my entire career because I have questioned the incident raised involving the director and her daughter.

5.66. The claimant received a holding response to his request for reasons for his suspension from Ms Dodds at 4.22pm, indicating she was seeking advice under the contract with advisers.

5.67. That evening at 8.58pm Ms Lunn replied to the claimant's message saying she was sorry for the late reply, she had just left work having arranged a debrief for staff at 4pm to clarify what happened, and who was involved, and to conduct life space interviews with the young people, saying, "today was my first day back like you". She ended with a sad face emoticon.

5.68. In meetings earlier that day, Mr Allen, who, seeing the claimant leave having been suspended, and having had brief words with him, had become so worried that he had approached Ms Lunn to say he needed to talk. He had read out from his telephone the statement that he had emailed to the claimant about his observations of the restraint incidents. He was told by either Ms Lunn and Ms or Dodds that the claimant had "put it [his statement] on Carol's desk". That was a lie, of course, and in our judgment was a lie told to seek to put the claimant in a very bad light, and to suggest to Mr Allen that rather than protect his anonymity, the claimant had simply passed on his statement to Ms Dodds.

5.69. At 11.47 am on 8 May Ms K Dodds wrote to the claimant saying he was suspended the previous day for failing to disclose information about an allegation of inappropriate restraining a child; but was no longer suspended for that reason and instead was suspended because there was an allegation that on 19 April he failed to seek medical advice following injury to a child, and he would remain on suspension "while it is investigated". The suspension letter did not mention a LADO referral.

5.70. Later that day the claimant presented a grievance alleging whistleblowing detriment.

5.71. After receipt of the claimant's grievance about these events, Ms Dodds completed a form (the LADO referral form) to report the claimant for alleged neglect of X on 19 April. The form noted, "the accused adult must not be informed of the allegations before consideration has been given to the implications this may have on any subsequent investigation." She ticked the form's boxes, indicating that the claimant had engaged in neglect and she said this "failure to provide or failed to take steps to procure medical aid for a child in need of urgent medical assistance. JF knowing this child had seriously injured his foot, left the home without requesting the child to be taken to hospital by staff...JF failed to act to ensure access to appropriate medical care and/or treatment telling staff he was going home to paint his fence".

5.72. Ms Dodds indicated in relation to, "action taken": "consultation with HR consultants and the company are undertaking an investigation." The form also

recorded, “a full investigation could not take place until both JF, deputy manager and Natalie Lunn, registered manager, back from holidays/sickness on 7 May 2019”.
5.73. Ms Dodds said in response to “who else has been informed regarding the allegation?”: HR consultancy services; and in response to: “if necessary, has any immediate action been taken to safeguard any child or a referral made to either Children’s Social Care and or/the Police”: J. F has not been alone with any young people working only with another manager or another member of staff.
5.74. Ms Dodds further recorded that the claimant had been suspended on 8 May.

5.75. The claimant then remained on suspension while while the LADO decided through multi agency meetings how matters were to be investigated: both the allegations of restraint on 5 May, and the allegations of neglect against him on 19 April.

5.76. The ultimate findings of an independent investigator, following several stages of investigation, was that the allegation of neglect against the claimant was unsubstantiated. That was available to the respondent in September 2019, but they did not make those conclusions available to the claimant at the time, and instead appealed the investigator’s determination by producing a lengthy analysis of how the evidence had been approached by the independent investigator.
5.77. On or around 26 or 27 September 2019, the claimant and one other staff member did not receive their wages: one staff member was overpaid, and Ms K Dodds, who checked banking, asked that person repay the respondent. The other staff member who had not received wages chased them by text message.
5.78. The claimant, who had been chasing Ms Lunn for the outcome of the independent investigation concerning him, was told by Ms Dodds to direct any further correspondence to the respondent to its HR advisers. The claimant raised his wages issue to the advisers by email in late September and on 7 October, but received no reply from those advisers.
5.79. On or around 28 October 2019, Ms Dodds’ phone banking activity resulted in Ms Lunn being paid twice, and being asked to repay that overpayment; and the claimant in not being paid at all.
5.80. On 5 November after contact again from the claimant to the HR advisers, the respondent was informed about the claimant’s pay shortfalls, and the unpaid sums for September and October were paid the same day (5 November).
5.81. Human error by Ms Dodds on several occasions, affecting a variety of people, was clearly evident in the banking records disclosed and the eventual oral evidence about how, in fact, payments were made. It was also apparent that Ms K Dodds’ detection of errors depended on whether she happened to be in the office, and happened to check entries in the respondent bank account at the relevant time.
5.82. We accepted her evidence that she did not detect Ms Dodds’ errors towards the claimant because she was not there on the relevant day, and through neglect or negligence, neither Ms K Dodds, nor Ms Dodds, had detected that the claimant had not been paid.
5.83. The respondent’s system relied heavily on individuals notifying Ms K Dodds, typically by text, of any pay errors. The claimant did not do so because he’d been instructed not to contact the respondent but to contact the HR advisers.

6. <u>Conclusions, further findings of fact and applying the law to those facts</u>

Did the claimant make a protected disclosure?

6.1. The respondent had the benefit of Mr Gilbert's comprehensive and lengthy written submissions, and oral submissions. They supported his primary submission that the claimant had led no evidence of what he had said to Ms Dodds which amounted to a disclosure or disclosures on 7 May 2019 and that his case must fail for that reason.

6.2. During case management, the claimant was ordered to set out the qualifying disclosure in further particulars and did so, saying: "the claimant had the reasonable belief that the information, as set out below, fell into the category of wrongdoing in Section 43B (d) of the Act".

6.3. The claimant then went on to set out this course of events: his receipt of a phone call from Mr Allen, identifying that Ms Dodds and her daughter had been in involved in two separate restraints with two separate young people, involving a restraint causing injury, and a highly dangerous untrained restraint which has, in the past, been known to cause death due to asphyxiation.

6.4. The particulars went on to set out the claimant then receiving a statement from Mr Allen, and that he messaged Ms Lunn, and that on his return to work on 7 May. "He immediately raised these concerns with CD and NL in the office at [Home A]. He did so in line with whistleblowing policy of the respondent."

6.5. It was further said that the claimant had a reasonable belief that it was in the public interest that this disclosure would make it possible to investigate the concerns, as the behaviour and actions placed young persons at serious risk and further was in the public interest that the use of restraint within a children's home is carried out in accordance [to] the relevant health and safety guidelines.

6.6. The first issue for the Tribunal was, in making findings of fact, was what did the claimant say on 7 May to Ms Dodds, and whether that could possibly amount to a protected disclosure within the meaning of the Act.

6.7. Our task in finding what happened on 7 May, given the claimant's account on the one hand, and Ms Lunn's and Ms Dodds on the other, was helped by the frank nature of the messaging relationship between Ms Lunn and the claimant. The claimant had sent Ms Lunn a text message very promptly that afternoon, in which he recorded the comments that he had alleged had been made to him by Ms Dodds. Ms Lunn had not suggested the claimant was making things up; or that he was mistaken; or that he had lost his grip on reality – instead she indicated that matters had taken an unhappy turn (the sad face emoticon).

6.8. He had also telephoned the LADO even more promptly upon his suspension. That was his first action, and he subsequently set out matters in detail in writing to the LADO. That suggests that his first concern was for the young people's safeguarding, and for matters to be properly recorded and investigated and his second concern was for the way he had been treated. That was consistent with his approach to the use of restraint in a message to Ms Lunn the day before: "investigate it and report it". This chain of events suggests the claimant reasonably believed he was acting in the public interest throughout.

6.9. As to the different accounts of that day, 7 May, we find that there were indeed two meetings with Ms Dodds and Ms Lunn and that in the first of those meetings Ms K. Dodds had become aware of matters and joined them. She was not asked about it, but it struck us that her relative silence on matters in her witness statement reflected the very awkward position in which she found herself.

6.10. We also take into account that the claimant was cross-examined very carefully and thoroughly by Mr Gilbert about these matters. It was suggested to him time and again that there were not two meetings, and it was submitted to this Tribunal that there were not, and that the claimant sought to introduce that evidence only in cross examination. On a proper reading of his complaint to the LADO, in his pleadings to this Tribunal, and in his witness statement it is very clear that his chain of events involves two meetings and he complained about both in his text to Ms Lunn and in his complaint to the LADO the same day.

6.11. We have no such confidence about statements, or described as statements in our bundle which are undated, but which are Ms Lunn's and Ms Dodd's account of events on that day. We are clear that the most likely chain of events is that described by the claimant. We accept that account.

6.12. We then have to consider whether in the exchanges between the claimant and Ms Dodds/Ms Lunn, he made a protected disclosure, taking both meetings on that day in the round, although observing that he had already provided information by text to Ms Lunn the day before. The information that he clearly conveyed, even on the respondent's case, was that someone was saying Ms *Dodds* and her daughter had engaged in inappropriate restraint; that is, there was an eye witness or source, who observed inappropriate restraint of children on 5 May. That is information which everybody in this chain of events well understood in context.

6.13. The questions of whether, in the claimant's reasonable belief, the information was provided in the public interest and tended to show that the health or safety of any individual "has been, is being or is likely to be endangered", are also answered by the context and our findings above. The claimant was cross examined on both these questions before he had seen the conclusions of the independent assessor's report. He gave wholly cogent and striking evidence about potential emotional and physical harm to children from inappropriate restraint and the need for such allegations to be investigated; that too was consistent with his actions at the time as we describe above. Our findings above also address the allegations of the claimant acting in bad faith, acting for another purpose, for a "golden ticket", and we have rejected them. We have also rejected that by discussing the risk of Ms Dodd's throwing his colleagues under a bus, and the consequent risk to access to his own children, the claimant was acting in bad faith. Taking into account all our findings and the well known and understood context, it is clear the claimant made protected disclosures to Ms Dodds on 7 May.

Was the suspension on 7 May on the grounds of having made a protected disclosure

6.14. It follows from our findings about the chain of events that the immediate cause for the claimant's suspension was that he would not disclose the identity of the source of the information: he was the messenger only, in effect. Standing back, we can envisage circumstances where an employee's refusal to provide

information critical to an investigation, could be differentiated from their making of a disclosure, in the causation of their treatment. That might have arisen if Ms Lunn had approached the claimant in her capacity as safeguarding officer, in a considered way; but that was not the chain of events here. It was Ms Dodds who required to know the source and had pressed for it because the claimant had provided the information. The giving of the information and the refusal to provide the source are inextricably linked. Paragraph 5.68 above indicates the extent to which Ms Dodds was prepared to seek to manipulate the source by telling him that the claimant had provided his statement, when he was identified. In context and given our findings above, it is clear that the suspension was on grounds of both the giving of the information and the protection of the source from Ms Dodds. This detriment complaint succeeds.

What is the effect of the conversion of the suspension from 8 May and was the report to the LADO on grounds of having made a protected disclosure

6.15. The chain of events in this case poses difficult causation questions. We have rejected the claimant's factual case that, in effect, that there would have been no consequences of his actions on 19 April. We have concluded that Ms Dodds took a dim view of the claimant's conduct on 19 April and had in mind action on a future date.

6.16. The context of her taking that view may include that the claimant's partner was leaving in any event. Our findings include that the focus of the adviser's advice and Ms Dodds' criticism was breach of the company's procedures. It was not a charge of alleged neglect, or that the claimant posed a safeguarding risk, but that he had taken leave and had "told her what he was doing", rather than seeking permission in more clear terms.

6.17. There is reference to the potential delaying of treatment for a child in the draft letter, but there is no reference to safeguarding risk or the requirement of a report to the LADO. Ms Dodds might well have had in mind to discipline the claimant for taking leave in the circumstances, and that may have involved dismissal, and without much resort to fair procedures, because the claimant had less than two years' service: we accepted her evidence that the lack of two years' was relevant.

6.18. We have not accepted that she was advised that she did not need to conduct an investigation with the claimant, because the draft letter clearly envisaged that. The conversion of Ms Dodds dim view of events on 19 April, about which she may or may not dismiss the claimant because he had less than two years' service, into a matter and an allegation of neglect of a child with an allegation that the claimant posed a risk to the health and safety of children, in our judgment, was on the grounds of his having made a protected disclosure and refused to reveal the source – the events on 7 May.

6.19. The chronology – the lack of timely reporting of events on 19 April to LADO as a potential safeguarding matter -– is almost conclusive. It is no answer for the reasons above to say Ms Dodds did not have the full facts from Ms Lunn, where such an important matter is concerned. That delay from 19 April to 8 May, and even on 8 May, until after the claimant had himself reported to the LADO, and after he had lodged his grievance, is conclusive in our judgment. The report to the LADO was retaliatory and on the grounds of the claimant having made the protected disclosure he made. It follows, the conversion of a knee jerk suspension to a suspension for events on 19 April would not otherwise have happened, and was materially influenced by, the making of the disclosure.

Was the autumn lack of pay on grounds of having made a protected disclosure

6.20. The context is relatively clear. On the balance of probabilities, we have found that the HR advisers did not pass on the claimant's early communications about pay to the respondent. In all the circumstances, the respondent, and in particular Ms Dodds, had little to gain from delaying payment of the claimant's wages, particularly when it can be seen that there were funds in the bank at the material time to make those payments. There was also no doubt that the claimant was entitled to those sums.

6.21. There were two corroborative matters which would suggest that it was likely to be a deliberate decision by Ms Dodds to delay payment to him, rather than inadvertent neglect: firstly, an inherent unlikelihood of error affecting the same person in the same way twice; and our findings that Ms Dodds had behaved in a retaliatory and irrational manner in relation to the events above.

6.22. The claimant's case was that the timing of this neglect was related to the allegation against him being found by the independent investigator to be unsubstantiated. He said that this had provoked Ms Dodds into again punishing him by delaying payment.

6.23. That case became more arguable because the respondent's initial explanation of a bank system failure was exposed to be unlikely when the relevant documents were disclosed. The prompt rectification in November, however, is consistent with recognition of human error, as is human error affecting other staff at times.

6.24. Weighing all these matters, once the Tribunal had asked sufficient questions to understand the respondent's payment processes and inherent errors, we have concluded that, despite lightning rarely striking twice, that is what happened: inadvertent neglect by Ms Dodds, twice; undetected by Ms K Dodds. The claimant's previous making of protected disclosures had no influence on that neglect.

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Employment Judge JM Wade
Date: 29 April 2020

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE