EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs J Woods	v	Cracker Jacks Day Nursery Limited (1) Mrs F Lewis (2)

Heard at: Reading **On:** 3 August 2020 and 14 August 2020 (in chambers)

Before: Employment Judge Anstis
Mrs A Brown
Ms H Edwards

Appearances
For the Claimant: Mrs K Liebert (solicitor)
For the Respondent: Written representations

JUDGMENT

The claimant's claims are dismissed.

REASONS

A. INTRODUCTION

Introduction

1. The claimant's claim was originally submitted as a claim of unfair dismissal and unlawful deduction from wages against the first respondent. On 10 December 2018 the first respondent went into administration. At a preliminary hearing on 11 September 2019 Employment Judge Wyeth accepted an application by the claimant to amend her claim to include a claim of detriment on account of public interest disclosures against the second respondent, Fiona Lewis, who was a director of the first respondent. The detriment in question is the claimant's dismissal.

2. The protected disclosures relied upon are set out in the order of Employment Judge Wyeth in the following terms:

> *"The claimant told* [the person in charge of her nursery room, who we will identify as "CL"] *and other nursery practitioners had failed to comply with*

their duty of care towards the children because they were not being signed in and out and told Ms Lewis that this was a safeguarding issue that could get the nursery into trouble with OFSTED.

The claimant told [CL] *that there was not enough drinking water for the children and that this was a failure to comply with their duty of care towards the children and their health and safety was being endangered.*

The claimant told [CL] *that children did not have enough activities, got bored and were biting each other."*

3. The first respondent was dissolved on 12 March 2020 and is no longer in existence. At the hearing before us no claim was advanced by the claimant against the first respondent. It is inevitable in such circumstances that the claimant's claims against the first respondent will be dismissed, leaving just the claim of public interest detriment against the second respondent.

4. The second respondent has not played an active part in these proceedings. She did not attend the preliminary hearing before Employment Judge Wyeth, but submitted written representations opposing the application to amend and stating that "*I will not be attending* [tribunal hearings] *if this matter is taken against me personally.*"

5. The tribunal (and, it seems Mrs Liebert) heard nothing more from the second respondent until she sent an email on 30 July 2020 saying she would not be able to attend the hearing listed for 3 and 4 August 2020 and making an application to postpone the hearing. That application was refused by Employment Judge Vowles.

6. On 2 August 2020 the second respondent sent a further email restating and developing the reasons she had set out in her email of 30 July 2020 for not being able to attend. She did not, however, make a further request for an adjournment. Instead, she said "*I am not attending … and I … do not have legal representation to attend in my place. So I would appreciate that the ET takes these facts contained within this email* [and the email of 25 February 2019] *into account … and for this to stand as my witness statement to be read in my absence please.*" We take it, therefore, that that email, along with its attachments and the email of 25 February 2019 are intended by the second respondent as her written representations for the purposes of this hearing. We accept them as such.

7. The addition of the claim of public interest disclosure detriment meant that the claim required a full panel to hear it. However, this was not reflected in the tribunal's coding of the claim, which remained as if it were simply an unfair dismissal and unpaid wages claim (which could be dealt with by an employment judge sitting alone). Accordingly, the listing staff of the tribunal had set it down to be heard by a judge sitting alone. The fact that it needed a full panel was only identified on the morning of the hearing. Fortunately, two non-legal members were due to sit on a case beginning in the afternoon. They arrived early and were able to sit on this case in the morning to enable it to be heard. However, this left no time for consideration of our decision so we had to reserve our decision to a later chambers day.

Preliminary matters

8. At the outset of the hearing Mrs Liebert made an application to strike out the second respondent's response on the basis of non-compliance with various tribunal orders. We refused this for reasons given orally at the time and for which written reasons will not be given unless requested within 14 days of this record of the decision being sent to the parties.

9. In her email of 2 August 2020 the second respondent applied to exclude an earlier employment tribunal judgment from the tribunal bundle. Mrs Liebert explained that this had been included only in relation to the original unfair dismissal claim, and she was content for it to be removed from the tribunal bundle now that we were only dealing with the public interest disclosure detriment claim. Accordingly, it was not necessary for us to rule on this point and the judgment was removed from the bundle.

10. Once the preliminary issues were dealt with, the claimant gave evidence and Mrs Liebert made submissions on her behalf.

The issues

11. The issues to be determined are:

    (a) Did the claimant make the disclosures she relies on,

    (b) If so, are they protected disclosures, and

    (c) If so, was she subject to the detriment of dismissal by the second respondent on the ground that she had made a protected disclosure?

B. THE LEGAL FRAMEWORK

12. Section 43B of the Employment Rights Act 1996 says:

> *"… 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 and safety of any individual has been, is being or is likely to be endangered."*

13. It is not in dispute that if these were qualifying disclosures, they were made to the claimant's employer and thus amount to protected disclosures.

14. Section 47B(1A) provides that:

> *"a worker ("W") has the right not to be subjected to any detriment by any act … done … by another worker of W's employer in the course of that*

> *other worker's employment … on the ground that W had made a protected disclosure"*

15. It is not disputed that (i) the claimant was a worker of the first respondent, and (ii) that the second respondent is also a worker (or alternatively agent with authority under s47B(1A)(b)) of the first respondent.

16. Timis v Osipov [2018] EWCA Civ 2321 establishes that a fellow worker (or agent) such as the second respondent can be liable for the detriment of dismissal notwithstanding the terms of s47B(2).

17. In public interest disclosure claims, "*s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the … treatment of the whistleblower*" Fecitt v NHS Manchester [2011] EWCA Civ 1190 (para 45).

18. The burden of proof is on the claimant to establish that the disclosures were made, and that they count as protected disclosures. The claimant must also establish that the detriment occurred, but "*on* [a complaint of detriment due to protected disclosures] *it is for the employer to show the ground on which any act … was done*" (s48(2)).

C. THE FACTS

Introduction

19. The claimant gave evidence by adopting her witness statement. In the absence of the second respondent we asked such questions as we felt were necessary to properly explore and understand the claimant's claim.

20. The claimant started working for the first respondent via an agency, eventually being directly employed on 20 April 2015. She worked as a nursery practitioner in the "baby room", four days a week, looking after around 17 babies aged 8-18 months, working alongside 2-3 other practitioners and a room leader. She was dismissed with immediate effect on 10 July 2017. There is a dispute as to whether the claimant was employed between September 2015 and February 2016, but that is not material for the purposes of our decision.

The disclosures

21. The claimant's witness statement sets out her disclosures in this way:

> *"*[CL] *joined in around March 2017 as Room Leader.* [SM] *had moved to Acting Manager.* [CL] *was … much less experienced than me. In around June 2017,* [SM] *returned the signing-in/out sheets because the children had not been signed out. I had seen that when* [CL] *did the handover before going on holiday, the children she had done the handover for had not been signed out. After* [SM] *returned the sheets, I said to* [CL] *and the other practitioners, "We all needed to remember to sign the children in and out" …*

> *In around June 2017, I told* [CL] *that there was not enough drinking water for the children. Babies can easily get dehydrated and I worried they were not being provided with enough water.*
>
> *In or around May or June 2017, I asked her if she was going to do any activities with the key children. When she said she wasn't I took charge and arranged an activity. I felt strongly that there was not sufficient activity or stimulation for the children and they were getting bored — with some biting others ..."*

22. The claimant's witness statement identifies similar matters being discussed in slightly different terms (and this time with specific reference to, for example, Ofsted standards) during the course of the final meeting with the second respondent in which the claimant was dismissed, but Mrs Liebert said that what occurred during that discussion were not relied upon by the claimant as being protected disclosures for the purposes of her claim. That must be right as it is apparent that the second respondent had invited the claimant to that meeting for the purposes of dismissing her. The decision to dismiss her had been made before any further disclosures during the dismissal meeting on 10 July 2017.

23. None of the written submissions from the second respondent challenge the fact of these disclosures having been made, so we readily accept that they were made in the terms described by the claimant. However, the way in which the claimant describes them in her witness statement is very different to the way they were described to Employment Judge Wyeth, and we wanted during the course of the hearing to fully understand from the claimant what she had said and whether these qualified as protected disclosures.

24. As regards the question of signing the children in and out, the claimant told us that she considered that necessary for, amongst other things, fire safety. She said that what had prompted her to raise this was one occasion in which CL had taken responsibility for handing over the children to their parents at the end of the day but had not signed the children out. CL had been on holiday immediately after that, so the signing out for that day remained incomplete until her return from holiday. She said she had also raised this point with SM (although we note that that is not suggested by her to have been a protected disclosure). She said that in saying "we need to ensure …" she had meant this as a reminder to the whole of the room staff, including herself.

25. As for the question of water for the children, she said that although the children were given water three times during the day she was concerned that it was not enough, and parents had been complaining that their children were very thirsty at the end of the day. She said that she thought the children should have continuous access to a water jug in the room, rather than simply being given water at set times. However, she accepted that there was nothing in what she said that was anything more than "*a difference of opinion between professionals*".

26. So far as the third alleged disclosure is concerned, there is nothing in what the claimant said in her witness statement to suggest that she made any disclosure (as such) about this at all. She simply says that she asked if any activities had

been arranged, and when told that there were none, took it upon herself to arrange some.

The detriment of dismissal

27. It is not in dispute that the claimant was dismissed. She has established that she was subject to a detriment.

28. The claimant's witness statement is clear that the matters she refers to as being protected disclosures were particularly cited by the second respondent at the time she was dismissed as being the reasons why she was being dismissed.

29. There is in the bundle a lengthy letter from the first respondent, signed by the second respondent, setting out the matters which it and she says led to the claimant's dismissal. The uncontradicted evidence we heard from the claimant was that although this letter is dated shortly after her dismissal it was not in fact produced until after she had lodged her tribunal claim. In those circumstances we do not see that we can properly regard that as being a contemporaneous account of why the claimant was dismissed, and as an explanation of the reasons for the dismissal it has very limited value.

Remedy

30. We will consider the facts relevant to any remedy later in this decision, if necessary.

D. CONCLUSIONS

31. The primary issue for us is whether the points made by the claimant amount to protected disclosures. We take them in reverse order, and in each case we are referring to whether the disclosures were made before the second respondent had taken the decision to dismiss the claimant (which is the relevant time for the purposes of the claim). We will consider first whether they were disclosures of information, and whether the claimant had a reasonable belief that that information tended to show that a legal obligation was not being complied with or that health and safety was being endangered.

Activities

32. As we identified above, the claimant has set out in her evidence no disclosures at all in relation to a lack of activities for the children, let alone one that we could consider to be a protected disclosure. There was no protected disclosure in relation to the children's activities.

Water

33. Plainly a disclosure that children are not receiving sufficient water could amount to a disclosure that there was a risk to the children's health and safety (or perhaps a breach of a legal obligation). However, the way in which the claimant described this to us was not in those terms. The children were receiving water. No-one, let alone the claimant, appeared to be suggesting that their health was at risk due to lack of water. This was, as the claimant described it, a professional

disagreement as the optimum amount of water the children should have. As such she could not and did not have a reasonable belief that it showed a breach of a legal obligation or that health and safety was being endangered.

Signing in and out

34. It is the disclosure in relation to signing in and out that has given us the most difficulty in considering whether it was a protected disclosure.

35. As with the other disclosures, there is a considerable difference between how the disclosure was described to Employment Judge Wyeth and how the claimant described the disclosure to us in her evidence.

36. In contrast to how the disclosure was described to Employment Judge Wyeth, it was not part of the claimant's evidence that she had ever told CL or other practitioners that they were failing to comply with a duty of care, or that children were not being signed in and out. Any further disclosure to the second respondent that this was a safeguarding or Ofsted matter could only have occurred in the dismissal meeting on 10 July and so was not now relied upon by the claimant as a disclosure.

37. As the claimant described it to us, her only disclosure in relation to this was by way of a reminder to all in the room, including herself, of the need to sign children in and out. The requirements for a protected disclosure are very specific. We do not see how simply reminding colleagues that "*we all need to remember to sign the children in and out*" can be said to be a disclosure of information at all. If it is information, we do not see how it can be considered to be information tending to show that there have been any breaches of a legal obligation or that health and safety has been endangered. There is nothing in that which tends to show that a legal obligation has been breached or health and safety has been endangered. This was not a disclosure of information, and the claimant cannot have had and did not have a reasonable belief that this was a disclosure tending to show a breach of a legal obligation or that health and safety was being endangered.

Conclusions on protected disclosures

38. For those reasons, the claimant's disclosures are not protected disclosures. It is not necessary for us to go further and address the points made by the second respondent in her written submissions as to why the claimant did not make her disclosures outside the first respondent or in another way.

39. We should add that if we had found these to be protected disclosures it would seem to us to have been inevitable given the evidence before us that we would have gone on to find that they were the cause of the detriment of dismissal, but that point does not arise, and there is also no need to address any points in relation to remedy.

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Employment Judge Anstis
Date: 14 August 2020

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office

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