



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4118429/18

Held in Aberdeen on 8, 9, 10 & 11 July and 26 November 2019

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Employment Judge
Tribunal Member
Tribunal Member

J. M. Hendry
A. Sillars
F. Parr

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Mrs L McNicholas

Claimant
Represented by
Mr Menon
Counsel

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Care and Learning Alliance

1st Respondent
Represented by
Mr C Robertson
Solicitor

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CALA Staffbank

2nd Respondent
Represented by
Mr C Robertson
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous decision of the Tribunal is as follows:

(One) The claimant made the following protected disclosures:

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- (i) On the 25 of April 2018 the claimant made a protected interest disclosure in terms of section 43B(1)(b) of the Employment Rights Act

E.T. Z4 (WR)

to Ms J D. and Ms N. W. that the nursery was in breach of it's legal obligations by failing to comply with Z's child plan and in terms of section 43B(1)(c) of the Act that she reasonably believed that there was a likely danger to the health and safety of Z and other children and further, in terms of section 43B(1)(f) that there was a likelihood of such information being concealed.

(ii) On the 1 May 2018 the claimant disclosed to the First Respondent's staff the aforementioned disclosures.

(iii) On the 2 May the claimant disclosed to the First Respondent staff a disclosure in terms of section 43B(1) of the Employment Rights Act in relation to areas of Z's child plan not being applied and this causing unnecessary stress to him.

(iv) On the 2 May 2018 the claimant repeated the aforementioned earlier disclosures (i), (ii) and (iii) to Kelly Sutherland.

(v) On the 3 May 2018 the claimant made protected interest disclosures to Bill Couston of Highland Council in terms of section 43B(1) of the Employment Rights Act in relation to the following matters:

(a) the nursery compelling Z to engage in large peer group activities, being physically obstructed, told 'No' and later shouted at;

(b) Z having problems with transitions changing from one activity to another contrary to the child's plan and not being supported in these;

(c) A repeated failure to allow Z food and water except at set times;

- (d) On the 28 of March 2018 refusing to admit Z to the nursery despite this being prearranged;
- 5 (e) The refusal of nursery staff to share information in relation to the conditions of other children to allow the claimant to assess any impact this might have on Z's needs, advising that Z's allocated key worker at the nursery claimed to have never seen Z's child plan and that another child J had been left in outdoor clothes with harness reins on throughout a day;
- 10 (f) That areas of Z's care plan were not being applied;
- (g) That Z was not receiving one to one support and was left unattended for long periods as was another autistic child.
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(Two). The claimant was subject to the following detriments by the First and Second Respondents as a consequence of her disclosures:

- 20 (i). On the 1 May the First Respondent removed the claimant from the care of Z and banned her from any contact with the family.
- (ii). On 4 May the First Respondent extended the claimant's probationary period.
- (iii). The First Respondent forced the claimant to resign.
- 25 (iv). The Second Respondent dismissed the claimant and that dismissal was automatically unfair in terms of section 47B and s.103A of the Employment Rights Act 1996.
- (v). The claimant was reported to the General Teaching Council by the First and Second Respondents.

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Reasons

1. The claimant in her ET1 sought findings in relation to whistleblowing detriments (in terms of section 47B and 103A of the Employment Rights Act 1996) against the first respondents (CALA) and unfair dismissal against the second respondents CALA Staffbank ('Staffbank').

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2. The claims were opposed. Mr Robertson appeared for both companies. Their position essentially was that they had acted in the way they had because they had good reason to. Accordingly, the claimant had not suffered any detriment or detriments and that the claimant was dismissed for reasons other than those relating to whistleblowing.

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The Issues

3. It was accepted by the respondents that the concerns about the treatment of Z raised by the claimant were capable of constituting protected disclosures. It was for the Tribunal to determine whether the claimant had been dismissed and had suffered detriments though making these protected disclosures. There were disputes as to the facts and motivation of parties and the Tribunal had to ascertain what had actually happened and whether or not the managers at Cala or Cala Staffbank acted the way they did because of the claimant's whistleblowing allegations or if her actions alone were the cause. The Tribunal also had to consider if the claimant had been automatically unfairly dismissed by Staffbank. The claims were advanced under Section 47B(1) and 103A of the Employment Rights Act 1996 ('the Act')

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Evidence

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4. The Tribunal had the assistance of witness statements, a Joint Bundle of Productions which included detailed pleadings and a schedule containing of the public interest disclosures which the claimant was alleged to have made. Given the sensitive background of the subject matter the Tribunal has at places sought to anonymise certain persons and places. The Tribunal noted that parties had taken steps in the documentation to ensure that the first child

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the claimant was providing support to is referred throughout as “Z” and to his school as A.

5. Witness statements were provided by:

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- The claimant;
- MM (the father of Z);
- Sadie Kevill, Family Support Manager (CALA);
- Donalda McLean, Operations Manager (CALA);
- 10 • Debbie Campbell, Office Manager (Staffbank);
- Darren Zuckert, Administrator (Staffbank).

Facts

15 *Background*

6. The claimant is an experienced teacher with 33 years’ service having worked in secondary schools in England as a teacher of physical education from September 1986 until 2016. She has an Honours degree and became a Director of Learning in her previous full-time position. In that role she was responsible for planning and implementing intervention programmes to assist students at GCSE level including students with additional support needs (ASN). She received a certificate of excellence from Ofsted for achieving two outstanding judgments within one Ofsted inspection.

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7. In April 2016 the claimant resigned from her position and moved to Inverness in Scotland. She applied for a position and became registered as a supply teacher with Highland Council. However, she wanted to change her career path and work with early years children. She had an interest in autism.

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8. The claimant began working for CALA Staffbank (‘Staffbank’), the second respondent as a Relief Childcare Practitioner in December 2016 after signing

aa Agreement for Casual Work (JBp.52). There were no fixed hours. The hourly rate was £7.85. In this role the claimant was employed to provide relief staffing and support in early years childcare as well as one-to-one support for children with ASN ('Autism Spectrum Disorder') on an 'as and when basis'. The company supplied staff to a number of clients including the local authority, Highland Council, private day care centres, playgroups, out of hours clubs and a nursery schools. Their principal client and revenue provider was Highland Council.

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10 9. Staffbank paperwork was 'branded' as 'Care and Learning Alliance Staffbank' It was a wholly owned subsidiary of Care and Learning Alliance or 'Cala' the First Respondent.

15 10. After about a year the claimant was successful in obtaining a role with 'Cala' (the first respondents) as a Family Support Practitioner. She was given a contract of employment. (JBp.53-60). CALA were referred to in the contract as the "main company". The contract contained a confidentiality clause in the following terms:

20 *"You shall not at any time during your employment (in so far as necessary and is proper in the course of your employment) or at any time after termination of your employment disclose to any person any information as to the practice, business dealings or affairs of the Company or any of the Company's customers or Clients or as to any other matters which become to*
25 *your knowledge by reason of your employment."*

11. The claimant began work for Cala on 24 October 2017. The contract provided for a sixteen working week probationary period. The salary was £8000 per annum.

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12. The claimant was also provided with a document setting out her remit as a Family Support Practitioner (JBp.61-62). It stated that her duties would include:

“3. Provide child led sessions within the child’s home and local environment....

5 1. *To visit families in their own home, deliver a support service that meets the individual needs for the parents and children in line with the agreed child’s plan.....*

6. Liaise with other support services as and when required.”

10 13. The claimant worked both with Cala and as a relief practitioner role with Staffbank. Her new role with Cala included supporting eligible two year old children who had been allocated funding for such support. The support was given on a one to one basis by providing sessions at the child’s home and taking them to toddler groups. The claimant was responsible for planning her own diary and recording the support given.

15 14. The two respondents were separate incorporated companies. They shared premises and had common senior management. The offices they shared were open plan. They worked together in providing services principally for Highland Council.

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Involvement with Z

25 15. The claimant came to provide support to a child Z through her role with Staffbank. She had been told was told that it would be a long term assignment. It was arranged by Darren Zuckert who was an administrator employed by Staffbank.

30 16. Z was a three year old boy with a serious form of autism. A child plan was drawn up with involvement from Highland Council and NHS Highland (JBp.63-73). In part this plan recorded his needs and gave information about those needs to those professionals who would interact with him.

17. The child attended a nursery run by Cala at ‘K’.

18. The lead professional for the child was a NHS public health nurse called Ms N. W.

19. Under the heading “Why does this child need a plan?” the following was noted in Z’s plan:

“This plan is required to support Z with regards to his communication and social development and ensure that all professionals work together to enable Z to reach his full potential within the home and nursery setting.”

20. It was also noted that the child was under the care of a Community Paediatrician and had been given a diagnosis of autism and assessed as having complex needs. He had the highest level of score, 4, for Autism Spectrum Condition or ‘ASC’. He would easily become frustrated and upset. When upset he was prone to self-harming behaviours.

21. The plan recorded that Z was a *“happy and affectionate little boy who settled in well”* to his nurse. The primary school that he would be expected to go to after nurse was A Primary School.

22. The plan also noted the following:

“Z can have some meltdowns in some situations i.e. getting his haircut proves to be an extremely challenging activity. Distraction works well for Z”

“Routine is paramount for Z and he thrives on routine with for everything. He has a heightened sensory nature – he can be picky with his food – enjoys more crisps/dry food and is not very keen on fruit. He takes multivitamins.”

“He can get quite frustrated at times, although distraction can be effective”.

23. It was also noted that Z struggled with group activities and that when frustrated he would slap his head and he had to be closely supervised and his attention distracted in order to reduce his frustration.

24. It was correct professional practice for professionals such as teachers or nursery staff who interacted with Z to be aware of and follow the plan. If they did not do so Z was likely to become upset and ultimately withdrawn. The claimant read the plan carefully and was conscious of Z's needs.

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25. The plan set out in some detail how Z should be treated and supported. It was hoped that he could be integrated into the nursery attached to the primary school at A as this would ultimately be to his advantage as he would get to know the peer group there that would then progress with him to primary school.

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26. The claimant formed a good relationship with Z and his parents. His father was a graduate and senior professional in Industry. His mother did not keep good health and was unable to look after his children including Z except for short periods. He family had no one else in the area that could look after their children in their absence.

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First Assignment with CALA

27. Funding had been obtained from Highland Council to provide support for Z to integrate into a new nurse at A. The claimant had been recommended to take on this assignment because she had worked successfully with Z at his nursery from April 2017 to June 2018. She had provided two sessions of four hours each per week to him over the period. The claimant had formed a good relationship with him and his parents. She would speak to them at the end of each session updating them on their son's progress. Z was comfortable in her presence.

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28. A feature of autism such as Z's is that he finds new people and new situations difficult to cope with. The support provided by the claimant to Z had been successful and Z's anxiety had reduced considerable.

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29. In around November 2017 the claimant was told by the Senior Speech Therapist, Shona McPherson, that the support was going well and that Z was responding to the claimant. By April 2018 it was decided that he no longer required to be monitored by the Speech and Language therapy team.

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30. Z's progress was regularly reviewed by the professionals involved in his support. These were called 'Child's Plan Meetings' The claimant had been asked to attend the meetings but no funding was available for this so she attended in her own time. It was at the meeting that took place on the 9 February that there was a discussion about Z's progression to Primary School. It was expected that he would attend the local authority Primary School at A. It was suggested that the claimant should support Z with this transition if funding was obtained through the Family Support scheme from Highland Council.

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31. The meeting was also attended by Ms J.D. the Deputy Head at A. She was the line manager for nurse staff at A. The claimant provided her with Z's personal profile and a document headed 'Strengths, Motivators and Challenges' which was a completed developmental analysis of Z. It was agreed that the documents would be circulated to the nurse staff along with Z's Plan. She also asked the claimant to email her a copy of a personal profile 'This is me' which the claimant had designed and completed as she wanted to use it as a template. It was agreed that the claimant would in due course step back from caring for Z which would be taken over by a nurse staff member, Ms McL. It was agreed that the claimant would come to the nurse on the 19 February to familiarise herself with the nurse and the staff.

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32. Z's father met Ms McL and found her both nervous and seemingly lacking in confidence about assisting Z.

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33. Following the meeting Ms N.W. told the claimant that there was another child at the nurse called J who she was concerned about. The child did not get the same level of support as Z and she hoped that the claimant's observations

and presence might help as staff could see the way the claimant interacted with Z and follow her lead with Z and J. She warned the claimant that the staff at the nursery could be 'quite difficult'. There was also a discussion about further family support as Z's mother was expecting another child.

5 **Support at A.**

10 34. The claimant was given confirmation by Ms Kevill a Manager at Cala that funding had been approved by Highland Council (JBp76). It was proposed that Z would be integrated slowly with his sessions at the nurse building up to allow him to become independent or supported by a member of the nurse staff.

15 35. The assignment the claimant had in supporting Z did not have an agreed end point. That point would depend on whether Z integrated quickly or not. It was hoped that if things went well the support could be ended at some point after the Easter holiday in 2018 at which time the claimant's assignment would end.

20 36. The claimant met Ms Kevill and Kelly Sutherland the Family Support Co-ordinator on the 27 February to discuss the assignment. The claimant's line manager whilst working at Cala was Ms Kelly Sutherland. The claimant formed a good relationship with Ms Sutherland.

25 37. The claimant required to work a probationary period with Cala and her review was due to take place on 12 March 2018. However, she was absent through sickness and the probationary review was rearranged for 2 May 2018. There was no indication given to the claimant that there was any difficulty with her work or that the probationary period would be extended. Her line manager and other professionals had on more than one occasion indicated to her that they were very happy with her work. The family of Z also expressed satisfaction with the claimant's work and the significant progress that Z was making with her help.

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Support given to Z at Nursery

5 38. The claimant began working at the pre-school nursery as planned on 19 February 2018. She met Ms McL who took her to the nursery area where she was introduced to other staff.

10 39. At one point during this session the children, including Z, moved outside. The claimant was with the child J who attempted to climb over the edge of a wooden gazebo. The claimant noticed that the child still had their outdoor coat on and toddler reins over the top of the coat. It was warm in the nursery and the claimant asked Ms McL why no one had taken the child's coat off. She was told that "*we never take his reins and coat off because he sometimes attempts to strip and so it was better to leave them on*".

15 40. The claimant was concerned about this practice as the child was encumbered by his coat and the harness. It was warm in the classroom and the reins appeared to her to be a health and safety issue as they restricted him and could catch on objects. This concerned her. The child did not want to return
20 to the class-room and the claimant observed a member staff lift the child off the ground using the toddler reins to carry him back inside. Again, the claimant was concerned about this practice.

25 41. The claimant was unable to find any policies or procedures in the Nursery to guide practitioners working there. She was surprised that none of the staff asked her questions about Z and how he should be supported. She saw that the staff were busy and they explained to her that they were understaffed.

30 42. On 26 February 2018 Z had his first transition session at A. He was excited and apprehensive. The claimant had arrived early to prepare a visual timetable for him as recommended in his child plan (JBp.68). The first activity involved all the children. This was potentially difficult for Z as highlighted in

the plan. The claimant explained to staff that Z might not be able to engage given that it was a new environment for him. She was told that he would have to participate or the other children would think that *"it's also ok to wander off"*.

5 43. The claimant was also surprised that no member of staff had come over to encourage Z who was on his own at this point to join in the activity or be encouraged to do so. At a later point in the session there was another organised activity with all the children where they were asked to form a circle. Z stood up and attempted to leave. Ms McL reacted sharply and loudly said
10 'No!' to Z . She also put out her arms to block his exit. Z became visibly distressed at this. The claimant believed that acting in this manner was both insensitive to Z's needs, unprofessional and not in accordance with the recommended treatment set out in the child plan.

15 44. Later on during another session at the nursery a member of staff again said 'No!' to Z and took plastic beakers from him explaining that it was a building exercise and he was supposed to build a tower. Z did not understand this instruction and became frustrated. The claimant was concerned that he would have a "meltdown". At about this time Z asked for a drink and something to eat.
20 One of the nursery staff told the claimant that it wasn't snack time and their policy was that no food or drink was allowed outside snack time. She also indicated to the claimant that Z could not be treated differently or other children would expect the same treatment. The claimant was surprised at this as Z had different needs from the other children. He repeated that he
25 was hungry and wanted a drink. The claimant managed to distract him until snack time when he was given milk to drink by one of the nursery practitioners. This was despite the fact that in the child plan it was noted that he was lactose intolerant.

30 45. The claimant was concerned that a number of aspects of his child plan did not appear to be recognised by the practitioners looking after Z and that they did not seem to have any understanding of how to interact/manage Z. She also concluded that the nursery staff appeared unaware of many of the basic

professional strategies which are normally applied when caring for a child with autism.

46. In the same session the claimant asked practitioners if there were other children she should be aware of who had ASN or other behavioural issues. She believed that this was necessary information for her in order that she was aware of whether the behaviour of others might have an impact on Z. She believed that as she was in the nurse's room for a lengthy placement this information should be shared with her. The information would also allow her to try and prevent situations arising where Z could become upset. She also understood that it was important to know about children's allergies, hearing or visual impairments, epileptic or diabetic conditions and so forth.
47. The claimant was aware that information about children should be shared on a need-to-know basis between professionals. This did not seem to be the understanding of staff. She was aware of the GIFREC policies and believed she was entitled to ask. The claimant asked Ms McL who replied: *"I can't discuss any other children with you"* and walked away terminating the conversation. The claimant was surprised at this response especially given that she was assigned to the nursery on a long-term basis. She believed that she had a proper professional 'need to know'. This attitude was also held by others in the nurse's room including Ms J.D.
48. Over the next few weeks a number of other similar incidents occurred which caused the claimant concern about the treatment of Z and the failure of the staff to adhere both to the child plan of which they seemed unaware, and good professional practice when dealing with Z as a child with complex and special needs. During this period an incident occurred when Z was shouted at by a member of staff. On that occasion the claimant was later contacted by Z's mother who wondered if something had upset him that day at nursery as he had been upset that evening. She told the claimant that in the evening he had been agitated and distressed and he had pulled out a small amount of his hair.

49. As a home-visiting practitioner the claimant was required to produce reports for managers and accordingly in the week after the incident in which Z was shouted at she worked on such a document (Progress Report) which was a diary of events describing the 'positives' and 'challenges' in the first couple of sessions (JBp80). The claimant e-mailed the report to Kelly Sutherland, Sadie Kevill, N.W and Ms. J.D. She also discussed the terms of the report and the difficulties she had encountered with another professional involved in Z's care, his speech and language therapist, who indicated that she was happy with what had been said by the claimant and the overall tone of the document. The claimant's purpose was to diplomatically bring about improvements in the care of Z by highlighting her concerns. She explained to Kelly Sutherland that there were some areas not going well in the nursery.
50. The claimant later came to understand that Ms J.D claimed that the report prepared by the claimant which included suggestions about staff behaviour was 'shared' by her with staff. The claimant noted no improvements in staff behaviour nor any reference or discussion of the plan. Despite prompting by the clamant no small group activities were set up to assist Z. The rule about Z not eating or drinking outwith snack time was maintained. She observed J being left isolated in the nursely for periods of time and no one to one activities were arranged for Z or J. The claimant on occasion had to intervene to guide J back to activities. The claimant did not believe that any steps had been taken to address concerns in her report.
51. The claimant expected that her concerns would be addressed either formally or informally by Ms J.D but this did not happen. She noted no change in the attitude or behaviour of staff or in the way they treated Z or J. On a number of occasions she became concerned about Z's treatment and about the way staff interacted with J. He was sometimes left on his own for considerable lengths of time without any attempt being made by staff to engage with him. The claimant had occasion to have to brush sand out of his hair and eyes after having been left in the sandpit on his own.

28 March incident

52. On the 28 March the claimant arrived at A as previously arranged to support
5 Z. One of the staff told the claimant that the staff were not expecting z nor
were they prepared for him. The claimant explained that the date had been
identified in the transition plan and that Ms J.D had told her that any changes
had to be agreed by her or the Head Teacher. The claimant went to find Ms
10 J.D who told her that it was best that Z did not attend as ‘ the staff were
stressed out bearing in mind the number of assessed children they have’.
The claimant explained that Z and his mother were already in reception Ms
J.D asked the claimant to tell Z’s mother of the school’s decision.
53. The claimant was concerned at this turn of events and the possible impact
15 the cancellation might have on Z as his routine was being disrupted. She was
worried at the seeming inability of staff to engage with Z’s child plan and found
the last- minute cancellation worrying. It seemed to have been cancelled
solely for the benefit of Highland Council staff with no regard to Z’s needs.
- 20 54. The claimant explained the situation to Z’s mother. Z became distressed at
not being able to ‘go to school’. At this point the claimant met Ms N.W who
was visiting. She explained the situation to her and she commented on the
lack of flexibility at the nurse’s and once more that they (the staff) could be
difficult. She reminded the claimant that the next meeting to discuss Z’s
25 progress was the 25 April. She suggested that the issue should be raised with
Ms J.D at the meeting. It was later agreed by Ms Kevill that the claimant could
attend and she was informed of this by Ms Sutherland.

Further Concerns

55. Over the next three planned sessions the claimant noted further concerns about the staff's interactions with Z. In particular despite the terms of Z's child plan the claimant was not allowed to give him a drink outside snack time. At this point the plan referred to the fact that Z was drinking a lot of water and the possibility of him having diabetes which was being investigated (JBp69). This situation occurred on a number of occasions. It caused him distress. Ms D, a staff member, reiterated to the claimant that he could not be treated differently. In addition, despite the requirements of the plan the child was not assisted to transition between activities. On one occasion Z was carrying a small toy between activities which was physically removed from him without warning by Ms D causing him to become agitated and upset. The claimant had earlier agreed with Ms J.D that he should be allowed to carry this toy. The claimant noted that Z was more agitated and upset than he had been at the other nurse's. She was concerned for his wellbeing but decided to wait until the scheduled meeting before taking any further action.

Overnight Stay

56. The claimant had formed a good relationship with Z's parents. She was contacted by Z's mother who was in the latter stages of pregnancy. She told the claimant that she was to be admitted to hospital for three nights prior having the baby by caesarean section. She explained that the family had no close friends or relatives that they could leave Z with the night before the operation. Things were made more difficult as he would become upset if he did not stay with someone he was familiar with. She asked the claimant if she would look after him. The claimant considered the request. She understood that as a Family Support Worker she was expected to look after Z on her own at times and that her role encompassed home visits. She was unaware of any policy governing the matter. Given the unusual circumstances and the urgency of the situation she agreed. When it was discovered that the operation was arranged for 9am on the 25 April Z's father asked the claimant if she could look after Z's sister as well. She agreed and as a result she looked after Z and his sister the night before the operation.

57. The claimant told Ms N.W about the situation as the date of the next meeting to discuss Z was on the same date as the operation. Ms N.W suggested that the meeting proceed given the issues that had arisen about Z's care. The claimant told her that she would be looking after the children the night before the operation and during the following day. N.W responded that it would be a 'big relief' to Z's mother having him looked after by someone who knew him. The claimant did not consider that she might be crossing professional boundaries and intended informing her managers about the situation at their next meeting.
58. On the 24 April the claimant was scheduled to support Z at K nursery. On arrival she was told by the that the nursery had already been informed that she would be taking Z home after nursery by the parents. Mrs McK at the nursery advised her that the handover had been registered. She expressed her excitement over the forthcoming birth. She expressed no concerns about the arrangement and the claimant's role.

25 April Meeting

59. The meeting to discuss Z 's progress took place on the 25 April. Ms N.W attended with an Early Years practitioner. Aspects of the child plan were discussed. The claimant raised concerns about Ms McL namely that she did not engage with Z and had reprimanded him. She expressed concerns about what she saw as a relatively inexperienced practitioner taking over from her in supporting Z. She detailed the various incidents that she had observed. She pointed to the plan and to the issue of Z's drinking. Ms J.D defended her staff and said that there was a structure in place and that Z could not '*just munch his way through the day*' The claimant was shocked at the comment. She went on to discuss activities and the fact that there had been no smaller group activities and it was difficult for Z to participate in large group activities such as 'circle time' She described the incident when Ms McL prevented Z from leaving such an activity and the issue over the toy being taken from him.

60. In response Ms J.D said that her staff had been critical of the claimant and she seemed to have no disciplinary role over Z and was ignoring potentially dangerous situations. The claimant explained that if she had to deal with an issue she would do it quietly and encourage the correct course of action and not raise her voice or reprimand Z. She told Ms J.D that no issues had been raised with her or Z's by staff about potentially dangerous situations as she would have expected to have occurred at the time. Ms J.D then said that she was fed up with the particular group of staff and all their '*complaints and bitching*'. In relation to Ms McL she explained that there was little she could do about it. She said Ms McL felt intimidated by her and the staff had lost confidence. She asked if the claimant could meet Ms McL to help her engage more effectively with Z. The claimant agreed to do this. Ms J.D volunteered that the staff needed refresher training about autism.

61. During the meeting the claimant received a text message from Z's mother that she had given birth and wanted the claimant to tell Z about the new baby. She attached a photograph of the baby to the message. At the end of the meeting the claimant showed Z the photograph. He was keen to show Ms N.W. who was also the Health Visitor and lead professional. Ms N.W. agreed that this was fine and took the phone. Ms J.D also asked to see the photograph. Z was holding the phone so she guided Z's hand round to show her the screen. Ms N.W. was stooping and at Z's level and during this Z unexpectedly kissed her cheek. She responded by saying: "And a kiss too!"

62. The claimant returned the children to the family home at 6pm that evening.

Aftermath of Meeting and Involvement of Highland Council

63. As agreed at the meeting the claimant met Ms McL on the 30 April to discuss future support for Z. The claimant was shocked to discover that she said that she had not seen a copy of the child plan despite the transition having started nine weeks earlier. The claimant showed her the plan and she responded

that she did not think she was allowed to see it. It was apparent that Ms McL was wholly unaware of Z's needs and behaviours. She said that she did not feel confident to provide one to one support to Z. The claimant did her best to explain what was required. She gave Ms McL some toys that Z liked and explained how to use them to build up a relationship with him.

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64. Following the meeting the claimant emailed Ms J.D advising her that the meeting seemed to go well and that if staff had any queries then they could contact her (JBp96B). The claimant hoped that things would improve. The claimant intended raising these matter with Kelly Sutherland when they were due to meet later in the week.

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65. The claimant's probationary period had now expired. The review meeting had been put off but Ms Sutherland had advised the claimant that it was now a formality.

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66. Ms J.D responded to the claimant's email (JBp90) and despite the claimant's attempt to explain Z's need to eat and drink she reiterated that there had to be a strict snack time. She also reiterated that the claimant could not ask about other children in the nursely. In addition, the email also contained an allegation that the claimant had encouraged Z to kiss other children. The claimant had no idea what this could relate to. Ms J.D wrote that her staff: *"don't want children being encouraged to kiss each other ..they are of course aware that Z is a very physical child who enjoys physical contact but would prefer this be encouraged to be a hi-five or equivalent"*.

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67. The claimant was upset at the terms of the email. She felt that there was still no full understanding of Z's needs and the requirement to be flexible about eating and drinking. She was upset at the allegation being made about her. She had received no feedback from staff about such an allegation and did not know how it could have arisen. She would have expected some issue to be raised at the time. The claimant contacted Ms Kevill and Ms Sutherland about the allegation and gave them the detailed background to the various issues

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concerning Z. She told them that Ms McL had said that she had not seen Z's care plan. She told them that she was concerned at the allegations and the risk of further false allegations being made. The claimant wanted the matter addressed.

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68. Ms Kevill seemed to the claimant to be more concerned at the possibility of a complaint being received from the school than over any issues around Z's care. She told the claimant that they could not afford to get a formal complaint from the school. She instructed the claimant to email Ms J.D and tell her that the support was being withdrawn and that she should contact their Head Office for further information. The claimant was also told to contact Z's parents and advise them of the situation. The claimant set out her concerns in an email to Ms Kevill and Ms Sutherland (JBp98/99).

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Probationary Review Meeting

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69. The claimant met Ms Sutherland on the 2 May. No probationary matters or issues were discussed. No concerns were discussed about the claimant's practice. The meeting concentrated on the extent of the issues the claimant had experienced at A which she outlined fully including the failure to adhere to the care plan and the various incidents of unprofessional behaviour witnessed by her in relation to Z and J. In relation to the allegation made about the claimant Ms Sutherland told the claimant that Ms Kevill would speak to her about it. The meeting lasted three hours.

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70. Later, on the 2 May the claimant was contacted by Z's mother who told her that she was not comfortable taking Z back to the nursery at A.

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Contact with Highland Council

71. On the 3 May the claimant decided to telephone the Highland Centre for Autism Support. She asked to speak to Shona McPherson but was told that she was not available. She spoke confidentiality to someone else about the

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issues and was told that the child plan had to be carefully followed. That person suggested that the claimant contact Bill Couston of Highland Council as he was the designated ASN Manager for Highland Council.

5 72. The claimant contacted Mr Couston. She told him that Z's parents were taking him out of the nurse. She gave him a detailed account of the incidents she had witnessed, the failures of staff to implement the child plan and the difficulties experienced by Z and J. She told him that despite being lactose intolerant and this being recorded Z had been given milk. The claimant raised
10 the issue of staff refusing to discuss other children's needs with her and the possible impact on Z. She told him about J being left isolated and having to remove sand from his hair and eyes. The claimant referred to the incidents where J had been left in his outdoor clothes with a harness and reins that in her view this raised health and safety concerns.

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73. The claimant also mentioned the allegation of her allegedly encouraging kissing between the children. He asked if the claimant wanted to give her name to these concerns. She said that if she did not it would lessen the weight of the information she was giving but she did not expect her name to be given
20 to the Head Teacher Mrs S. The claimant had a reasonable belief at this time that it was in the public interest for her to make the disclosures she had made to the school, her employers and Mr Couston as they directly affected the health and safety of Z and other children particularly J.

25 74. Mr Couston contacted Ms S the Head Teacher and told her about the issues raised by the claimant. In turn Ms S contacted Ms Kevill and told her that she wanted to put forward a possible child protection concern about the claimant's behaviour and that she was interviewing staff in this regard. Ms S suggested that the claimant was lying about her staff (JBp376).

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75. In the late afternoon the claimant received an email from Ms Kevill asking her to meet on the 9 May to discuss the email from Ms J.D (JBp105). The

claimant was disappointed that the matter was not being dealt with more urgently given the serious concerns that she had raised.

5 76. At about 6pm the claimant received a call from Ms Kevill advising that the meeting had been brought forward to the following morning at 4pm. Later in the evening the claimant received an email from Ms Sutherland attaching notes of the probation meeting. The notes were different from the claimant's recollection of what had happened at the meeting. The first respondent now proposed that her probation period would be extended and reviewed again in 10 August (JB P100-2). The claimant was upset at the respondent's change of position. She queried this and Ms Sutherland stated that the 'issues' with the nursery were un-resolved. The claimant was confused as she was the person who had raised issues with about the nursery which had not yet been discussed or investigated. She did not appreciate that she was now the focus 15 of concerns or that it was alleged she was lying.

Meeting 4 May involving Claimant, Ms Kevill and Ms Sutherland

20 77. The claimant arrived at Kintail House the respondent's offices at 8.50.am. She met Ms Sutherland in the reception and asked why she had failed her probation. She was told that this was because of concerns raised by the Head Teacher at A, Ms S. and that the review had to reflect that. Ms Kevill joined the conversation later. The claimant was upset and confused at the turn of events. Ms Kevill repeated what Ms Sutherland had said about reasons for the extension of the probation. The claimant asked about her concerns which 25 she had communicated to both Ms Sutherland and Ms Kevill. Ms Kevill asked Ms Sutherland to take the claimant to the boardroom to wait for Donalda Johnson to arrive. This was the first indication the claimant had that Ms Johnson, who was a senior HR adviser, was to be involved. Ms Sutherland, who was the claimant's line manager was told that she need not stay as it 30 would be 'stressful enough' for the claimant without having three managers in the meeting.

78. The meeting started with Ms Johnson advising the claimant that she would be taking minutes. The claimant had no prior warning that the meeting would be formal or disciplinary in nature. Ms Kevill said that the meeting had been brought forward as an email had been received from Ms J.D. The email had in fact only been received that morning but was following up previous contact. Ms Kevill did not show the claimant the email and said that it contained a 'long list of complaints' The claimant was asked whether she had looked after the children when Z's mother went into hospital for the elective birth. Ms Johnson said that she had crossed professional boundaries. The claimant admitted that she had looked after the children and explained that she had been open about the matter and had spoken to Ms N.W who had not seen a difficulty with the arrangement. She had not realised it posed a difficulty. This had been the claimant's first home visiting assignment. The claimant accepted what she was being told.
79. The claimant was then asked if she had a photograph of Z on her phone. She confirmed that Z's mother had sent her a photograph of the new baby to show Z. She explained that Ms N.W. and Ms J.D. were present at the time. Ms Johnson told the claimant that she was not permitted to have a parent's mobile number. The claimant had been given no advice about this matter nor had she been referred to any policies guiding her on the issue. The claimant was confused about this assertion as without such contact details she could not arrange visits or keep in touch with Z's parents.
80. The claimant was then told that the email contained an allegation that she had been encouraging Z to kiss other children. The suggestion was made that the claimant hadn't disclosed this. The claimant reminded Ms Kevill that she had raised this matter with her four days earlier.
81. The claimant as asked if she had asked staff about the needs of other children at the school. The claimant accepted that she had asked about support for other children and that this was to safeguard Z's welfare. It was made clear that this was disapproved of.

82. Ms Kevill asked if the claimant had telephoned Bill Couston. She confirmed that she had and reminded Ms Kevill that she had mentioned him in her email the evening before. Ms Kevill told the claimant that after the call the Mr Couston had contacted the school. Ms Johnson described Ms J.D 's actions as her having 'retaliated' against the claimant for contacting Mr Couston by sending the complaint. Ms Kevill indicated that the previous agreement with the school to deal with any concerns about the claimant 'inhouse' had changed because she had contacted Mr Couston. Ms Johnson told the claimant that she had brought the situation on herself and that they would no longer be supporting her as she had gone above their heads. Ms Kevill said that the Head Teacher was considering a Child Protection referral. The claimant was unaware at that time that Ms Kevill had on the 3 May had a call from Highland Council that the school was thinking about this action (JBp532).

83. The claimant believed the meeting was akin to a disciplinary meeting and asked if she was going to be dismissed. Ms Johnson advised her that she would be given the opportunity to resign. She was told that it was against the law to write a 'bad reference' but they would give a factual reference. Ms Johnson and Ms Kevill left the room briefly and returned to advise the claimant that there was one possible option namely for her to sign a declaration to have no further involvement in family support and no further contact with Z and his family. The claimant asked what would happen if they met by chance on the street. She was upset that virtually her whole role would disappear as it would mean the end of support for Z even support not connected with the school. Ms Johnston said that this was a matter for Staffbank.

84. The claimant felt that she was in an impossible position. She had been told that she would not be supported. Her future career in child support looked to be in the balance. She believed that her concerns were not treated seriously and that the respondents were acting this way to appease the school and the

Council. She felt she had no option but to resign or face disciplinary action. She resigned by email (JBp109) It was acknowledged by Ms Sutherland who wrote: "*I hope you are ok! Your groups will miss you as I will.xxx*".

5 85. On the 8 May the claimant was asked by Ms Sutherland if Ms Kevill had been in touch. The claimant confirmed that she had been removed from Staffbank assignments meantime. She also informed her where some work was kept on her portal that Ms Sutherland had claimed was not done. This was untrue. (JBp92). The claimant was told by Ms Sutherland that she had been
10 instructed to tell the claimant's Toddler Groups that she would not be returning. The claimant was surprised that there was no handover process for Z. Later on the 8 May the claimant was advised that she did not have to work her notice. In a conversation with Ms Kevill the claimant advised her that some of her supervision documents had been modified and a meeting
15 recorded that did not take place (JB 327).

86. On the 10 May following discussions between Mr Couston and Ms S, he recorded that the main issues about the claimant's behaviour were the potential relationship damage with Z's family caused by the claimant and what
20 seemed to be '*an unhealthy level of control she had*' (JBpP475).

87. On the 14 May the claimant was contacted by Ms Johnston enquiring if she had decided what to do. The claimant responded by re-sending her resignation to her. She also wrote raising concerns about what she regarded
25 as a disciplinary meeting. She wrote that she had been given two options namely to agree to no further involvement in Family Support or to resign. Ms Johnston responded denying that the meeting was disciplinary or that she had been dismissed rather she had been encouraged to remain working with Cala.

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88. On the 17 May the claimant received an email from Ms Kevill stating that the probation review process had not been handled correctly (JB p126/127). She

stated that as the claimant had been off ill when the last review meeting had been re-scheduled for the 8 May and that as the concerns from the school arose after the probationary period ended they should not have been taken into account and that to do so was 'an error of judgment' The claimant continued to raise matters with the first respondents and to seek a meeting with the Chief Executive. The Chief Executive was also the Chief Executive of Staffbank. Ms Johnston emailed on the 21 May that as the claimant had resigned she saw 'no benefit' in further email correspondence. (JBp129).

10 **Staffbank**

89. The claimant had by 9 May been removed from current contracts with Staffbank. She attended a meeting with Debbie Campbell and Darren Zuckert It was minuted (JBp114/117). At the outset it was confirmed that the issues to be discussed were a potential conflict of interest/crossing of professional boundaries in relation to Z's overnight stay. There was no discussion of the 'kissing' allegations or advice about the level of physical contact expected between a practitioner and young child. The claimant was told that they could only look at issues relating to her role with Staffbank. Any conversation about the issues she had encountered in the nurse's office were shut down. Ms Campbell stated that she had no issues with the claimant's work and had received no concerns. The claimant was told that she had to work strictly within the Staffbank role. She was at pains to tell the claimant that Staffbank were a separate company and that it was not within her role to raise concerns about the practices of others. The claimant was cautioned that having a child in her home would breach her remit with Staffbank and SSSC guidelines. The claimant was then immediately assigned to provide support to a three year old girl E who had severe ADHD.

30 90. On the 15 May Mr Zuckert confirmed the assignment with E.

91. The claimant attended E's nursery on the 21 May. She was told that it was a 'highly challenging assignment'. E required intense one to one monitoring. The claimant was later told that she had been assigned the role by Ms Johnston. The claimant asked the Nursery Leader, Ms C, if she would be available to work with them the following year.
92. On the 7 June the claimant was looking after E. She spoke to the child's mother about how well the day had gone. The claimant decided to give E a reward sticker. She crouched down to do this and E ran over and put her arms around the claimant's neck almost knocking her off balance. E hugged her and the claimant made a 'mwah' sound and kissed the air.
93. On the 8 June the claimant met the Head Teacher of A Primary to discuss her concerns about Z's care. The Head Teacher apologised for Ms J.D 's email of 1 May and confirmed that it should not have contained an allegation of encouraging Z to kiss other children. This allegation was accepted as being untrue. A discussion of Z initiating physical contact then led to a discussion on whether there was any policy on the issue. The Head Teacher agreed to check with the Council and forward any policy to the claimant. She advised the claimant that information on other children could not be disclosed as the Council had a strict policy about this. She also apologised to the claimant about the behaviour of other staff and acknowledged that a 'refresher' was required. The claimant was told that Ms McL had resigned from the role. Minutes were prepared and agreed by both parties (JBp512) . The claimant was unaware that the Head Teacher had spoken to Mr Couston and their Child Protection Team about the allegations. These issues were not raised.
94. The claimant returned to her nursery on the 11 June. During the day she had a conversation with Ms C who commented that while it was sweet that she had given E a goodbye kiss the previous week it was best not to do this. She said that they were advised not to touch children even if they were upset. The claimant said that she had not kissed E but had made a kissing sound and there was no contact with her face. Ms C explained that no one had said

anything before but that she had been told that new guidance was coming out. The claimant asked for a copy of the guidance. She also asked if the Nursey had its own policy but was told, after a search, that there was no specific policy.

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95. On the 12 June a worker, F, raised with her manager, Ms H a concern that the claimant had kissed a child on the cheek when saying goodbye. She in turn raised the matter with Fiona Morrison (JBp140) of Cala.

10 96. The claimant contacted Staffbank's head office and asked about new guidance. She spoke to an administrative assistant as she understood Mr Zuckert was out of the office and Ms Campbell was in a meeting. The claimant also asked for any policy of information sharing between professionals. She later received a txt response from Mr Zuckert stating that the policies would
15 depend on the individual centre or organisation (JB114/115).

97. On the 13 June the claimant was working at the nursey. Ms C seemed to be spending a long time on the telephone and was preoccupied. The claimant noted a missed call from Mr Zuckert. She telephoned him back and was told
20 to immediately come to the office. The claimant was told that she could not attend her afternoon session. She was told that there was an allegation that she had kissed a child.

98. The claimant attended the office. She was told that there had been a
25 complaint by the nursery that she had kissed a child's cheek. This seemed to be the allegation made some time earlier by F . The claimant demonstrated what had occurred and was told : "That is not what was shared with us". Ms Campbell said that the claimant had contacted the office to find out about policies 'out of curiosity' but had not mentioned any incident. She was
30 reminded that at the meeting on the 9 May she had been asked to refer issues of practice to them. The claimant indicated that she was confused that this matter had been raised at all as she had explained the situation to Ms C. In effect the claimant was not aware that any issue was being made of the

situation. She was told that Ms C had not had a chance to speak to the claimant until the following Monday. The claimant found it difficult to set out her understanding of as Ms Campbell repeatedly spoke over her. She was told by Ms Campbell that because she had made a clear admission to Mr. Zuckert, which the claimant denied, she had to dismiss the claimant with immediate effect.

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99. The claimant was upset and devastated by the dismissal which removed her source of income. The claimant submitted grievances (JB P167-172) detailing her position and complaining about the way she was treated. On the 10 3 July she was notified that a complaint had been made to the GTC her professional regulatory body by the respondents about her fitness to practice. This included the allegation of encouraging Z to kiss other children which had been accepted some time earlier as being unwarranted. It was also 15 alleged that the claimant had formed 'an inappropriate 'relationship with Z's parents.
100. As a consequence of these events the claimant's health suffered and she was prescribed medication for stress and depression. She was referred by 20 her GP for counselling. She was required to move back to England as she could no longer afford to live in the Highlands on her own.

Witnesses

- 25 101. We found the claimant to be a truthful witness who was generally credible and reliable. Our only concern was that these events had proven traumatic for her and at points we wondered if her detailed recollection of events matched her confidence in that recollection. However, we concluded that where there was a conflict of evidence between the claimant and the 30 respondent's witnesses her evidence should be preferred as being likely to be the more accurate.

102. The Tribunal was somewhat concerned to find that the evidence of the respondent's witnesses, particularly of Ms Kevill and Ms Sutherland was unimpressive. They gave every impression that their focus was appeasing the Council and that matters which previously had been of no consequence in their eyes were now much more serious. They showed every sign of having lost any objectivity.

103. The Tribunal did not find evidence of Mr Zuckert particularly persuasive. He indicated that when he had asked the claimant to come in for a meeting she effectively admitted kissing a child. Under cross examination it became clear that she had done no more than refer to making a 'Mwah' sound which, given that he knew at that point about the allegation, he interpreted as an admission of guilt. The claimant's position was consistent that her action had been misinterpreted. This 'admission' was then used by his colleague Ms Campbell as being the main reason for dismissal.

104. Ms Campbell was an evasive and truculent witness whose evidence unfortunately led the Tribunal to the conclusion that she was completely unreliable. Her insistence that there would be no way that any information about the difficulties that the claimant experienced in the Cala placement would be known to her and others in Staffbank stretched credibility and appeared at points rehearsed. We reminded ourselves that her role straddled both respondent companies, the Chief Executive of both had become aware of the controversy, there was an open plan office and even more compellingly there good reason to share information especially if it related to apparently serious concerns over the claimant's conduct impacting as it was alleged on the welfare of children. Even if this was not enough there were commercial reasons for sharing the information about the complaints given how upset their main clients the Highland Council appeared to be.

30 Submissions

Claimant's Submissions

105. The Claimant's Counsel, Mr Menon, addressed the Tribunal at the close of the evidence. He began by reminding the Tribunal of the relevant law contained in and to the cases which parties had referred the Tribunal. The claims against Cala were for detriments set out in the Scot Schedule and for unfair dismissal against Staffbank. He referred the Tribunal to paragraph 30 of the **Kuzel** case and the necessary elements for a protected disclosure. He submitted that the evidence strongly pointed to the disclosure being the reason for the two respondent's action rather than misconduct as they now claimed. He accepted that there was no 'automatic inference' that could be drawn but the facts pointed clearly to the respondent's motivation.
106. Mr Menon then considered the relationship between Cala and Staffbank. Despite what he called the strenuous efforts of their representative to cast them as separate entities the Tribunal should have regard to the form and substance of the relationship in other words to the reality of the situation rather than to their legal identities. They were intertwined and existed solely for the benefit each other. They had the same paymaster namely Highland Council. He referred to the discussion that had taken place at an earlier Preliminary Hearing about the matter. It was he suggested fanciful to believe that there really were 'Chinese Walls' nor indeed should there be where the alleged safety of children was an issue.
107. Turning to the witnesses that gave evidence for the respondents Mr Menon characterised the evidence of the first, second and third witness as 'wholly dishonest'. In his submission the claimant gave honest evidence was both credible and reliable and where evidence conflicted we should prefer that of the claimant's. Mr Menon then took the Tribunal through the evidence in more detail. Ms Kevill's evidence foundered was incorrect when she said that Z's placement was coming to an end. This was a fiction that had to be maintained to justify terminating it. She was unable to explain why the headteacher at A was content to leave concerns she had with the claimant until these concerns became elevated following the claimant's call to Mr Couson. She was unable

to explain how major changes to Z's plan could be made without consultation with his parent or the nominated responsible person.

108. It was not credible that if there was any real concern about the claimant's practice that this would not have been disclosed to Staffbank, a wholly owned subsidiary, not least because that company's interests align so closely with those of Cala. Mr Menon also asked the Tribunal to consider why did Ms Kevill instruct information to be put in the claimant's Probation Report when she was not her line manager. She sought to suggest that the concerns about Z were only raised after Z left A. This could only be to try and suggest that the allegation made by the claimant were made to deflect attention from the concerns over her own practice. This position was he suggested unsustainable. It was notable that all the changes to Z's plan were implemented with no thought to his needs although those needs do not exist in a vacuum.

109. Mr Menon then explored the arguments advanced by the respondents around the separate nature of the two respondent companies. He pointed to the evidence that there were no serious concerns ultimately expressed about the claimant's practice but the matter was nevertheless referred to the GTC 'as a joint effort'. He then took the Tribunal though the evidence of alleged concerns including the evidence which he characterised as having been 'recanted' by Ms S. This was done purely to punish the claimant in his submission and was not carried out with any *bona fide* intention. He then took the Tribunal through the various allegations. Allegation (p367) displayed a fundamental misunderstanding both of confidentiality issues and the needs of Z which required the claimant to know the dangers posed by his environment. Counsel described the evidence of Mrs Campbell as being belligerent and evasive. Mr Zuckert was untruthful about the alleged admission. The evidence he submitted disclosed the escalation of matters once Mr Coulson became involved. The respondents showed no loyalty to the claimant as one of their staff and took no steps to defend her. It was noteworthy that the lead professional expressed no concerns at the time over

the 'kissing' incident. The claimant resigned by email having been given no choice and having been relieved of her responsibilities.

- 5 110. Mr Menon then turned to consider the position of Staffbank and their role in the matter and reviewing the evidence submitting that the dismissal was a clear detriment occasion by a chain of events leading from the initial whistleblowing.

Respondent's Submissions

- 10 111. The respondent's solicitor made submissions on behalf of the respondents and also lodged a written copy of those submissions for the Tribunal. He set out the respective positions of the two respondents accepting that a protected disclosure had been made by the claimant about the treatment of Z to the first respondent and not to the second.

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112. He then set out the position from the perspective of Cala and the email they had received on the 1 May about the claimant's practice. On the same day the claimant had raised concerns with Sadie Kevill about the care of Z. Ms S indicated that she did not want to a "make a big deal" about the situation as the claimant's care for Z was coming to a close. The claimant contacted Bill Couston on the 3 May to reiterate her concerns. Mr Robertson suggested that rather than becoming angry as the claimant suggested he was simply concerned at an "*inappropriate level of control*" being exercised by the claimant. The claimant's probation was extended because the concerns from the nurse had not been resolved. These concerns were 'elevated' by Mrs Sim on the 3 May. These were the events that led to the meeting between the claimant and Ms Kevill and Donalda McLean and to the claimant intimating an intention to resign.

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- 25 113. Turning to the position of Cala Staffbank this begins on the 9 May in Mr Robertson's view when the claimant contacted Mr Zuckert asking for written clarification of her role. The second respondent could see no reason why the
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claimant could not continue in her role with them irrespective of the issues that had blown up with Cala. On the 13 June the claimant was asked to attend a meeting to discuss a complaint made by a worker at E Playgroup. It was following this that the claimant's contract was terminated.

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114. Mr Robertson then went on to summarise the legal position as he saw it referring to section 47B(1) and 103A of the Act. In relation to Cala the position was that they denied any detriment had occurred. He took the Tribunal though the disputed evidence in relation to the claimant's allegations that Z had been removed from her care and that the probationary period had been extended, she had been forced to resign and the GTC referral. In relation to Staffbank the position was that no protected disclosure had been made to them and consequently no claim could arise. Finally, there was he said no cynical or sinister plot to out the claimant from her position.

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Discussion and Decision

Legal Framework

20 115. We first of all reminded ourselves of the statutory basis for the claims contained in sections 47B(1) and 103A of the Act.

"47B Protected disclosures.

25 (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.*

103 A Protected disclosure.

30 *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."*

116. The parties agreed that the correct approach to the claims for unfair dismissal was set out in the case of ***Kuzel v. Roche Products Ltd*** [2018] WCA Civ380 which referred with approval to the earlier EAT analysis in the case of **Maund**

v. **Penwith District Council** [1984] ICR. In **Kuzel** the Court of Appeal held that it is for the employer to prove that they had a potentially fair reason for dismissing an employee, or to prove that the reason advanced by the claimant was not the true reason. When an claimant maintains that they were
5 dismissed for a different reason the burden of proof does not pass to them. The employee must produce some evidence supporting their assertion but will not bear the burden of proving that the dismissal was for that reason.

117. In the case **Shamoon v Chief Constable of the Royal Ulster
10 Constabulary** [2003] IRLR 285 it was confirmed that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work but that an ‘unjustified sense of grievance’ is not enough. Although the word ‘detriment’ is not defined it is a wide concept encompassing being treated
15 adversely and differently and in some way being put at a disadvantage by an employer. In deciding whether the claimant has suffered a disadvantage because of the protected disclosure it must be shown to materially influence the employer’s treatment of the whistleblower. As the EAT observed in the case of London Borough of Harrow v Knight (2002) UKEAT 0790-01: *“It is
20 thus necessary in a claim under s. 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that “but for” the disclosure the act or omission would not have occurred is not enough”*.

25 **General Observations**

118. We do not in any way underestimate the considerable responsibilities and difficulties involved in providing the sort of services that the respondents staff provide and the sensitivities that attend such services and their delivery. It
30 was disappointing therefore to hear evidence that was often contradictory and which displayed confusion about the principles that underly much of the work being done here principally around the duties of confidentiality. That concept

was used both to criticise the claimant and to justify the alleged inaction by Cala in making concerns about the claimant's practice known to the sister company Staffbank.

5 119. This issue was also highlighted by the discussion around the claimant showing a photograph of Z's new sibling. It did not seem to be appreciated that the duty of confidentiality was owed to Z's parents who had waived that obligation by sending the photograph to the claimant to show to Z and other staff the new baby. If there had been a clear policy guiding staff for example
10 on the need to delete such a photograph after it being shown or indeed that staff should not agree to do this then the criticism of the claimant could be justified as breaching a particular policy but there was clearly no breach of confidentiality in these particular circumstances. It is surprising that in an era where social media forms such a large part on many lives there appears to
15 be no policy addressing its use.

120. It seems clear to us and should have also been clear to the professionals here that confidentiality applies in different ways depending on the situation at issue and it can be subservient in the situation where the needs of the
20 client or the welfare of other children require it to be. The advice titled 'Information Sharing' prepared by HM Government which was lodged and referred to in evidence (p257-294) makes this abundantly clear. In the first of the so called 'Golden Rules' it states that Data Protection laws and human rights laws 'are not barriers to justified information sharing'.

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121. The Scottish Government reflect this concept in the 'GIFREC' policy (Getting it Right for Every Child) where they enjoin professionals to work in partnership with each other and that means that relevant information is imparted to other professionals. The professionals in this case often had to had to contort and
30 bend the principles to fit whatever position they were taking.

122. The issue of the claimant knowing about other children who had for example autism themselves and the effect this might have when interacting with Z was

an issue that straddled both the nurse's refusal to discuss other children with the claimant and Ms Kevill believing that this was a valid complaint being made against the claimant promoting her to take advice on this matter. It was a complaint that should within her own professional knowledge have been quickly dismissed by her. It would only be in a situation where the claimant was asking for unnecessary extraneous information that a boundary might be crossed. The apparent blanket policy of the Council not to share information is the sort of policy that the GIFREC policies were meant to address. The apparent failure to understand this principle both by school staff, including a Depute Head Teacher, a Head Teacher, Ms Kevill and Ms Sutherland was deeply worrying.

123. At a number of points the Tribunal struggled with the language used by the respondent's witnesses. Behaviour was often rather lazily characterised as "inappropriate" but in what way it was inappropriate remained obscure as if describing it as such was a sufficient explanation. It was certainly not clear to us why witnesses believed some behavior was 'inappropriate' and when something that was to be discouraged then escalated from matters that could be dealt with through advice (or in house as it was described) to a referral to the GTC. There appeared to be no clear guidance given, including guidance to the claimant, for example in training, policies or professional practice as to the expected boundaries of physical contact with young children such as Z who are physical and tactile as the child plan describes him. To make some prescriptive list would of course be difficult but if a particular type of contact was clearly forbidden then it would be obviously 'inappropriate'. However, human interactions are complex and can depend on many factors such as here on the age of the child and the relationship of the adult to the child etc. Viewing and judging any interaction in this sphere can be subjective as the evidence here tended to show with differing acceptance as to what level of contact was permitted.

124. We noted that Z's father was described by the respondents as being 'vulnerable'. He did not strike the Tribunal as to being anything other than an

intelligent, capable and robust person. It is true that he was theoretically in a potentially vulnerable position as Z's father. That did not in any way appear to be the situation here but it was interesting to note that someone who was potentially vulnerable was referred to as if he was. Mr M was not cross
5 examined and it was not suggested to him that in any way the claimant had some 'inappropriate level of control' over him or his family.

Disclosures

125. It was accepted by the respondents that what the claimant said to the nurse
10 staff, her employers and to Mr Couston were capable of amounting to qualifying protected disclosures. We found as a fact that the claimant did make disclosures of information about the way Z and J were being treated at the nursery and failure to comply with the obligations set out in the child plan. These can be broadly stated as all having been made by the claimant who
15 had a reasonable belief that the health and safety of Z and J was likely to be endangered if the situation persisted. In addition, the failure to adhere to the child plan was also a breach of legal obligations in our view. There was also a clear public interest element underlying the disclosures to highlight perceived problems with the public service (education) being provided. We
20 therefore accepted in whole the schedule of disclosures prepared by the claimant's representative.

Discussion of Evidence

126. Whilst we will examine the various detriments individually the Tribunal was
25 drawn firmly to the conclusion after considering the evidence that the disclosures made to Highland Council did, as Mr Menon submitted led immediately to the elevation of incidents that both the first and second respondents themselves had earlier thought of as minor to a much more serious level because of the nature of the disclosures she had made and the
30 need to pacify their principal clients. They seemed to ignore the timing of the criticisms made against the claimant.

127. There is no doubt that the claimant's contact with Mr Couston drew what seemed to be a furious response from the school who concluded that all the allegations were false, that the claimant was emotionally abusing the child and the family, that she had too much control over them and so forth. This is despite the fact that Ms. J.D. had at least engaged with some of the issues and asked the claimant to assist Ms McL.
128. There were numerous inconsistencies in the position which the respondents were hearing from Highland Council. If as the Council say the claimant was lying about these events then why was she not picked up on what they came to consider as serious matters at the time the allegations were made she made. Similarly if there was a genuine concern about 'emotional abuse' why was it not raised? Why was the family not spoken to? It seems that if for example the Depute Head Teacher thought the initial allegations about the claimant were in any way serious it is quite extraordinary that she did not deal with the matters immediately by correcting the behavior complained about, at the very least by counselling the claimant, or reporting matters formally to her employers or the first respondents.
129. The compelling impression we were left with was that the 'deal' that seemed to be done was that if the claimant was taken off working with Z then no further action would be taken. This militates against there being any real or genuine substance to these complaints as does the fact that the claimant continued to work for Staffbank with the same type of child. The complaints from the school only became characterised as serious after Mr Couston became involved. The claimant was then made out to be a liar who had invented her concerns. The claimant's employers were correct that this was as they described at the time "retaliation" against her. The first respondent's staff could on the one hand see the minor nature of the complaints and the timing of their escalation. Those complaints were, however, formally taken at face value by the first respondent and were not in any way challenged. It was noted by us that despite the position now taken by the first respondents as to their

serious concerns Ms Johnston claimed in her email of the 14 May (JBp121) that the claimant had been encouraged to stay with the company. We found this position impossible to reconcile with the evidence we were now hearing from her.

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130. We also noted that once the claimant did resign her line manager emailed her in terms that did not sit well with the later suggestions that her practice was so bad that it had to be referred to the GTC.

10 131. It was also somewhat difficult to understand that if genuine and against this background the claimant was given another assignment with Staffbank with the concerns over her practice unresolved. At the meeting of the 9 May with Ms Campbell the claimant was counselled that having a child overnight would in their view be beyond her remit and crossing a professional boundary. The claimant readily accepted this advice. But it is also a reflection on how seriously the second respondents actually treated the allegations (for example the overnight stay) in that they immediately assigned the claimant to another autistic child. It is perhaps understandable that the claimant felt she was getting somewhat “mixed messages” as this certainly was the Tribunal’s view of the evidence.

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132. We also did not accept that there were likely to be in reality ‘Chinese Walls’ between the two organisations nor should there be where the sharing of information relates to concerns. The fact that staff shared the same premises, higher management all militated against there being any effective barrier and while we accepted a poor knowledge of confidentiality issues existed it could not have been so poor or so deficient as to seek to prevent concerns about a mutual employee such as the claimant being disclosed to the other organisation especially given the clients. Indeed, to fail to do so would be wholly reprehensible and in a case where the concerns were of a more serious nature and contrary to the GIFREC principles which witnesses accepted applied.

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Detriments

133. The detriments claimed for were set out in a Scot Schedule (p38T-38AA).
The first followed the claimant's disclosure about the poor practices at the
5 nursery at A relating to the failure to comply with Z's care plan and their
breach of duty of care towards him.

134. The first detriment alleged was that on the 1 May the claimant was told that
she was being removed from the care of Z. We rejected that this was a point
10 where her care of Z would have naturally ended. The natural end point
namely that he had fully settled in had not yet come about. We were left in no
doubt that this occurred because of the disclosures she had made and the
reaction to those both by CALA who did not want to 'rock the boat' with the
Council and from the reaction of the Council to any perceived criticism. We
15 concluded that this was in fact a detriment. The claimant was considerably
upset at losing this assignment which was brought prematurely to an end.
The claimant lost the opportunity of bringing the assignment to a successful
close and the experience this would have brought to her so early in her new
career.

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135. Mr. Robertson argued that the first respondents change of position over the
claimant's probation was not a detriment. It did not alter the legal position that
the claimant had insufficient service to make a claim for unfair dismissal. We
do not accept that submission and are of the view that it is simply too narrow.
25 Indeed, the respondents could have left the position as indicated to the
claimant, namely she had passed her probation, and this would not have
prejudiced their right to have investigated the concerns. That said if they had
discovered some previously unknown concern then this might well have
justified the reversal of the original decision.

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136. The evidence before led us to conclude that the decision was hasty,
unnecessary, and a 'knee jerk' reaction caused by the claimant's disclosures.

We believe that it was a real detriment. It may not have altered the underlying rights of parties around 'ordinary' unfair dismissal but the claimant, the respondents and possibly any future employer might query why her probation period had been extended. Extending someone's probation is not usually a sign of confidence in their abilities rather it is the reverse.

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137. The claimant's probation period was also extended in our estimation for the same reasons. We rejected the notion that it was in some way an error or that there was no impact or consequences for her. It meant that her probation period was extended and there was implied criticism of her in that occurring at all.

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138. We also concluded that there was considerable pressure put on the claimant to resign and that it was not in any sense a voluntary act. In coming to this view, we rejected the evidence of the respondent's witnesses.

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139. We then considered the loss of the claimant's post with Staffbank. We have no doubt that the dismissal was materially influenced by the earlier disclosures. We simply could not accept that it somehow took place in a vacuum. It is very difficult to conceive that after the issues raised by Highland Council and fraught atmosphere this created that no one in CALA told the senior staff at Staffbank, with whom they work closely of these issues. The evidence was that they not only shared premises but these were 'open plan'. In addition, the complaint seems to have been raised with Cala (JBp140). It is interesting to note the terms of Ms. Heneghan's email that a child should experience kindness and compassion including physical comfort, such as a cuddle, but kissing the child on the cheek would be disapproved of.

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140. The knowledge of the earlier disclosures would explain the rather artificial attempt by their witnesses to paint the fact that the claimant enquired about policies over physical contact as being evidence of wrongdoing and somehow underhand. It also sheds light on the decision to dismiss for what was, according to earlier evidence, something that would have been likely to have

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lead simply advice being given to the claimant. It was also notable that what actually happened was disputed by the claimant. There was no formal disciplinary hearing to allow the claimant to consider the statements obtained by Ms Campbell and we regret that we formed the impression that Ms Campbell did not approach the meeting with the claimant with an open mind. The complaints were the catalyst for immediate dismissal. That evidence does not ring true to the Tribunal that a member of staff would be dismissed on such a disputed allegation and leads us to believe that the earlier protected disclosures to Highland Council were the true driving factor in dismissal. This renders the dismissal unfair.

141. The Tribunal found that the suggestion by the respondent's witnesses that there was something sinister in the claimant seeking to get copies of policies in relation to physical contact and how those applied was something the Tribunal had considerable difficulty in understanding. If the claimant had spoken to staff it was likely that any such request would get back to Ms Campbell as indeed it did. Rather than seek to understand the reason why the claimant felt it necessary to look for such policies to resolve in her mind the ambiguities that seemed to exist her actions were characterised as being evidence of wrongdoing.

142. We then considered the reference to the GTC. The evidence that we heard led us to the conclusion that the reference itself was driven by the disclosures. There was considerable evidence available that showed that the concerns about the claimant's practice would in ordinary circumstances be addressed through discussion and additional training or clarification of policies. If these concerns had been as serious as they were now painted to be then we would have expected a much earlier referral to the GTC or to formal disciplinary proceedings. We do not go so far as Counsel for the claimant to suggest that the reference was a deliberate attempt to end the claimant's career. If there is such a ruling by the GTC then that is a matter for them and we do not seek to usurp their authority in this matter. This gives us a quandary in Assessing the matter as we do not know the outcome of that process. We have no doubt

that there was a joint decision taken to make this referral and that it was not done in good faith but as a consequence of the disclosures made and as an attempt to pacify the Council and discredit the claimant's observations of the practices she found at the nursesey which we found wholly credible.

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143. We have made findings on the merits of the case. Remedy is complex and we have reserved that matter. It may be that remedy can be dealt with out any further hearing. The Tribunal has made an assessment of the impact of these matters on the claimant but the financial consequences are not wholly clear to us.

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144. Finally, we would observe that despite the statutory protections that exist for Whistleblowers the situation that the claimant finds herself in is sadly not uncommon in the Tribunal's experience. It is a warning to anyone who raises genuine concerns. It is clear to us that the various parties involved reacted aggressively to the concerns that the claimant raised (involving as they did the proper care of vulnerable children) showing little regard to determining whether they were justified or not or seeking to learn from the situation that had developed and that in all this further the interests of Z were lost sight of.

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Employment Judge Hendry

Dated: 9th December 2019

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Date sent to parties: 10th December 2019