EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs B Gill	AND	RAEF Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol
ON **28 to 30 September and 1 October 2**020

EMPLOYMENT JUDGE J Bax
MEMBERS Ms Luscombe-Watts
Mrs Simmonds

Representation

For the Claimant: Mr J Duffy (Counsel)
For the Respondent: Mr G Hine (Solicitor)

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The Respondent unfairly dismissed the Claimant.

2. The Respondent wrongfully dismissed the Claimant and her claim for notice pay succeeds.

3. The claims of automatically unfair dismissal and detriment for making protected disclosures are dismissed.

4. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case.

REMEDY

1. The Respondent is ordered to pay the Claimant £3,404.00 in respect of her claim of unfair dismissal.

2. No additional award is made for the claim of breach of contract on the basis that the amount is included in the compensatory award for unfair dismissal and an additional award would be double recovery.

The Claimant's award for unfair dismissal is broken down as follows:

Basic Award:	£1,088.00
Compensatory Award	
Loss of earnings from 4 December 2018 to 7 January 2019	£1,400.00
Job seeking expenses	£30.00
Loss of statutory rights	£500.00
Uplift for failing to follow the ACAS Code of Practice on Disciplinary And Grievance Procedures 2015 agreed at 20%	£386.00
Total	£3,404.00

REASONS

1. In this case the Claimant, Mrs Gill, claimed that she had been unfairly dismissed and/or automatically unfairly dismissed for making protected disclosures and that she had also been subjected to a detriment. The Respondent contended that the reason for the dismissal was misconduct and denied it subjected the Claimant to detriment.

2. The Claimant presented her claim on 22 March 2019. She notified ACAS of the dispute on 12 January 2019 and the certificate was issued on 4 February 2019. The Claimant was dismissed on 4 December 2018.

The issues

3. On 29 October 2019, Employment Judge Midgley conducted a Telephone Case Management Preliminary Hearing at which the issues to be determined at the final hearing were agreed.

4. Due to the covid 19 pandemic the original final hearing date was vacated. On 15 April 2020, Employment Judge Bax conducted a further Telephone Case Management Preliminary Hearing at which the issues to be determined were confirmed and recorded in the case management summary.

5. At the start of the hearing the Claimant confirmed that she no longer relied upon the alleged protected disclosure at 10.1.1 of the list of issues in the Case Management Summary. It was also clarified that the alleged disclosure at 10.1.5 in the list of issues, related to a text message on 11 July 2018 rather than in September, the Respondent did not object to the Claimant putting her case that way. In relation to the protected disclosures claims, the Claimant therefore relied upon 4 alleged disclosures to her employer on 8 June 2018, 26 June 2018, 11 July 2018, and 9 August 2018. She also relied upon an alleged disclosure to Ofsted on 23 October 2018. The Claimant asserted that she had been subjected to 7 detriments. The alleged disclosures and detriments are set out within the reasons below.

6. It was agreed that the issues of liability, contributory fault and if a fair procedure had not been used whether the Claimant would have been dismissed in any event, would be determined first.

The evidence

7. We heard from the Claimant and Mrs Walker on her behalf. For the Respondent we heard from the following witnesses via Cloud Video Platform; Ms Allsopp, Ms Slaiter, Ms Culverwell and Ms Amponsah and from Mr and Ms Fear in person.

8. We were provided with a bundle of 246 pages. Any reference in square brackets, in these reasons, is a reference to a page in the bundle.

9. There was a degree of conflict on the evidence.

10. The evidence of Ms Allsopp and Slaiter was inconsistent. Both of their witness statements referred to the meeting on 30 November 2018 with the Claimant as being for the purposes of suspension and when they affirmed, they both confirmed that the contents of their statements were true. During cross-examination they changed their evidence to saying that it was for the purpose of an informal meeting and denied that it was for the purpose of suspension. Ms Allsopp originally agreed that she had been given instructions to suspend the Claimant, but then immediately said it was for an informal meeting. Neither witness was able to provide an explanation for the discrepancy. Further although Ms Slaiter had been appointed to take notes, no notes were provided to the Tribunal. We found that neither of these witnesses gave compelling evidence.

11. Mr Fear was not an impressive witness and at times was evasive. He failed to answer direct questions about the possibility that the clock the Claimant and staff used to sign in and the CCTV clock having different times might be an explanation for the discrepancy. He further tried to give the impression that he had carried out further investigation, however when pressed he confirmed that he had looked at the documents used at the disciplinary hearing and spoken to Ms Fear, Ms Allsopp and Ms Slaiter and not the Claimant's colleagues.

The facts

12. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

13. The Respondent provides nursery services at two sites and under two names, Choo Choo's and Chuggers. The Claimant commenced employment with the Respondent on 3 March 2014 as a nursery supervisor, latterly titled the nursery manager. The Claimant's role involved overseeing childcare and day to day running of the nursery. Choo Choo's nursery was run by Ms Allsopp. Mr Fear and Ms Fear are father and daughter and are directors of the Respondent.

14. At the time of the Claimant's dismissal, her normal start time was 0830. In order to sign in and out, employees at Chuggers signed a register and used the clock in the main nursery room to record their entry time. The employees were required to complete separate time sheets. The Claimant used the information from the register to complete her timesheet.

15. The Claimant's contract of employment provided that her normal place of work was Chuggers. However, the Claimant might be required to work at Choo Choo's. Similar provisions were in the other employees' contracts. When either the Claimant or Ms Allsopp were absent from work, there was the potential that the other person would undertake some of the management functions of that absent person.

16. The Respondent's Employee Handbook provided that deliberate falsification of time sheets would be regarded as a disciplinary offence and might lead to summary dismissal. It was also provided that employees must comply with Ofsted rules. Staff were also required to adhere to Ofsted ratios between children and staff and were required to inform a manager if there was a problem with ratios in their room.

17. The ratio of the number of children to staff was important. At the relevant times, the ratio was tight and it was possible that it was out of ratio for one day in the week commencing 1 October 2018. We were satisfied that if the ratio dropped, Ms Fear who was super numerary would provide cover if necessary.

18. In about August 2017 the staff rota at Chuggers was rearranged by Ms Fear and Ms Allsopp, whilst the Claimant was on leave, due to staffing issues at Choo Choo's.

19. On 8 June 2018, the Claimant spoke to Ms Fear about Ms Amponsah, in that colleagues had reported to her that they were concerned about the way Ms Amponsah had brought a child in from outside the previous day. The Claimant was not working on the day in question. After the Claimant spoke to Ms Fear, they watched CCTV together. The Claimant was then asked to carry out a supervision with Ms Amponsah and Ms Fear said she would take some advice about what to do. No disciplinary action followed.

20. There was a dispute between Ms Fear and the Claimant about what happened in the alleged incident. The Claimant said that the child was dragged from outside by the hand when it was on its knees. Ms Fear said that the nursery has a policy, which we accepted, that it does not physically guide children, but gives them freedom of choice and Ms Amponsah had her hand on the child's back. We preferred Ms Fear's evidence in relation to what was on the CCTV. The Claimant's account was serious and if it had occurred was a serious safeguarding concern and it was odd that no such reference was made in her subsequent letter to Ofsted.

21. On 26 June 2018, the Claimant sent a text message to Ms Fear in which she asked for a couple of fans for upstairs. She also said that the day before was unbearably hot and they had to keep the children in for a bit as the furniture etc. was too hot to touch in the afternoon and the inside was probably hotter than out. The Claimant repeated the request for fans verbally. The Claimant thought that it was a health and safety requirement to keep the room at a temperature safe for children. Another colleague also asked for fans. The fans were provided within a week and the Respondent considered this matter was closed.

22. After the Claimant left for the day, a child became very hot and lethargic and was taken home by its mother. We rejected the evidence of Ms Walker and the Claimant that the child had heatstroke and was assessed at hospital. The subsequent letter from the parent on 5 July 2018 apologised for the course of action being taken and said they had to make the best decision for their child. However, they gave 3 weeks' notice and said that would pay for an additional week as 4 weeks was required. The staff were thanked for the care they had given the child. There was no mention of

heatstroke. We accepted Ms Fear's evidence, that if a child had been taken to hospital from nursery with heatstroke, the hospital would have contacted the nursery, and this did not happen.

23. On 11 July 2018, the Claimant sent a message to Ms Fear. She asked to catch up about Ms Amponsah and said that she was not really happy with her and the way she handled the children and that she had another word with her. No evidence was given about what had occurred. Ms Fear agreed to discuss this with the Claimant. The Claimant was then asked to do some role modelling in the room. Ms Amponsah was not subjected to any disciplinary action following the message.

24. After 19 July 2018, Ms Culverwell, a colleague and direct report of the Claimant at Chuggers and a parent of a child who was cared for at Choo Choo's after school club, spoke to the Claimant. Ms Culverwell was concerned that her son had been left on school premises on 19 July 2018 for a second time, when he should have been collected by Choo Choo's. She had spoken to Ms Allsopp after the first incident and it had happened again. Ms Culverwell was very upset and sought advice from the Claimant. The Claimant advised that she should put it in writing and inform Ms Fear.

25. On 24 July 2018, Ms Culverwell, sent an e-mail to Ms Fear and copied in the Claimant. She complained about an incident on 19 July 2018 when she was told that her son was not at Choo Choo's after attending to collect him. Her son should have been collected by Choo Choo's from school and taken to the Choo Choo's after school club. Her son had approached a Choo Choo's staff member and was told that he was not her list and then walked away. A friend of Ms Culverwell had seen this and checked the position and was told that he was not on the list and then taken him to her home. Both Ms Culverwell and her son were upset; her son was sleep talking and asked her whether she would ever leave him.

26. We accepted Ms Culverwell's evidence that on 27 July 2018 she had a meeting with Ms Fear. Ms Fear had investigated her concerns and explained the policy for when a child was not on the register. The policy was for the staff member to take the child to the school office. The child remained in the school's care until they left the playground and the teacher had responsibility to ensure the child left with the correct people. She was told that her friend had stepped in too early and had not let Choo Choo's staff follow the policy. Although Ms Culverwell's e-mail came across as being more serious than her oral evidence, in relation to what happened, we accepted that the conversation on 27 July 2018 had reassured her and that steps had been put into place, namely a reaffirmation of the policy and walkie talkies were given to the Choo Choo's staff. Ms Culverwell also continued to use the service. This was also supported by her actions in the later incident in September.

27. In August 2018, the Respondent started using CCTV on the ground floor of Chuggers. The CCTV was linked to the internet for the purposes of its internal clock.

28. On 8 August 2018, Ms Allsopp e-mailed the Claimant and said that several staff had left and she would need all available staff working at Choo Choo's. She was aware that the Claimant had completed staff rotas, but they would need to be subject to change on a weekly basis due to staff needs.

29. On 9 August 2018, the Claimant sent an e-mail to Ms Fear. The Claimant said that she had planned the Chuggers' rota for the school summer holidays. Ms Allsopp had called her and said it should not be done that way and would be changing them. The Claimant said that she was unaware of staff shortages and holiday requests at Choo Choo's and suggested that they might need a different system. The Claimant said that when you work in a small team like at Chuggers and you are bang on ratio or working out of ratio it was harder for her to send cover to Choo Choo's as she usually needed all the staff she had. The Claimant said that on some days they were working dangerously out of ratio. The Claimant was upset about the changes to her rotas and that she did not appreciate Ms Allsopp contacting her staff when she was on leave. She felt that there could be better communication. The e-mail did not state it was a grievance. The Claimant considered that the ratio between children and adults at Chuggers was sometimes short and that this was a legal requirement. This related to the safety of the children.

30. Ms Fear denied receiving the e-mail and had no recollection of its contents. There was no evidence that Ms Fear was having problems with her e-mail at that time. It is more likely than not that the e-mail was received and that Ms Fear did not appreciate it was a grievance at the time, given the difficulties arranging staffing and that she was focusing on resolving those difficulties. The Claimant did not chase for a response to her e-mail.

31. In early September 2018, the Claimant was sent a rota leaving Chuggers out of ratio on the Tuesday of the week commencing 3 September 2018. The Claimant was not scheduled to work that week. On 3 September 2018, Ms Fear sent the Claimant a text message asking whether she could come in the following day, because otherwise they would be 6 preschool over. i.e. the ratio was not being met. We accepted Ms Allsopp's and Ms Fear's evidence that Ms Fear attended the nursery on the Tuesday.

32. During September 2018, Ms Fear was working at Chuggers and noticed that the Claimant had arrived after 0830. On the Claimant's arrival she mentioned that she was late. We did not accept that improvement of timekeeping was mentioned by Ms Fear. Following the conversation, Ms

Fear reviewed all employees' times of entry on the CCTV and compared them to the time sheets submitted.

33. The staff rota for the week commencing 1 October 2018, suggested that Chuggers was out of ratio on the Tuesday. We heard no evidence as to whether this day did or did not have sufficient cover arranged after the rota was produced.

34. The Claimant gave evidence, which we accepted, that at the beginning of October 2018 Ms Culverwell reported to her that, in September, she had seen a similar incident to that of her child. The child in question was not on the list, but Ms Culverwell had waited with the child whilst a check was made with Choo Choo's, following which the child went to the after-school club.

35. The Claimant also alleged that Ms Culverwell said that her complaint about collecting her son had not been investigated and nothing was being done. Ms Culverwell, in evidence accepted that she had seen the incident in September but denied that she told the Claimant that the concern she had raised in July had not been addressed. She also said, which we accepted that Walkie Talkies had been introduced by this stage. We preferred the evidence of Ms Culverwell. Ms Culverwell told the Claimant about the incident in September and how she had helped with it despite being on her day off, which accorded with the policy she had been told about in July by Ms Fear. We rejected the Claimant's evidence that Ms Culverwell told her that nothing had been done about her complaint.

36. On 23 October 2018, the Claimant sent an anonymous letter to Ofsted, dated 1 October 2018. She raised a safeguarding concern about Ms Culverwell's child not being collected on two occasions, just before the summer holidays. She said that she knew that the concern had been raised, but it still not been concluded. There was no reference to an incident in September.

37. The Claimant's evidence was that she thought that there was a safeguarding concern that related to the safety of children being collected for the after school club and she wrote the letter to Ofsted due to the conversation she had with Ms Culverwell that her complaint was not being investigated by the Respondent and that there had been a further incident in September.

38. The Respondent received a letter from Ofsted on 26 October 2018, in which the concern was set out. It was suggested some action was taken. The Respondent was asked to make a record of the action, but it did not need to write to Ofsted to say what it had done. The record made would then be reviewed at the next inspection.

39. Ms Fear considered that she had already dealt with the complaint. The Claimant gave evidence that Ms Culverwell told her that she had been questioned about this by Ms Fear. Ms Culverwell was cross-examined on this issue and appeared uncomfortable in answering these questions and was evasive in her answers. Ms Fear denied asking Ms Culverwell about whether she had made the complaint. It was likely that Ms Fear asked Ms Culverwell whether she had sent it, so that she could make an appropriate record in the log after having thought she had dealt with it in July. Ms Fear was not cross-examined on whether she said to Ms Culverwell, as alleged by the Claimant, that she thought it was the Claimant who had sent the complaint and we rejected that evidence of the Claimant. Ms Fear, having seen that the Claimant was copied in on Ms Culverwell's e-mail dated 24 July 2018, suspected that the Claimant might have sent the complaint to Ofsted.

40. During the week commencing 29 October 2018, all staff, including the Claimant were asked whether they would agree to vary their contracts of employment to include restrictive covenants in relation to setting up businesses and confidentiality clause. The Claimant agreed to the confidentiality clause and not the restrictive covenant.

41. At the beginning of November 2018, Ms Fear received the October time sheets for all employees and reviewed them against the CCTV footage. The Claimant suggested that the time sheets were taken early on 26 October 2018, we rejected that evidence. We accepted Ms Fear's evidence that she needed to send off payroll details by the 3rd of the month and that to take the timesheets before the previous month had been completed would increase the amount of work she had to do. The Claimant had not completed her time sheet for 30 and 31 October 2018 and was asked to provide the details, which she did.

42. Ms Fear noted that the times on the Claimant's time sheets did not always match the times on the CCTV. The time sheet for October 2018 [p162] had arrows put on it by the Claimant suggesting that the times for 1 and 2 October should be switched over and the times for 8 and 9 October should also be switched. Ms Fear took stills from 9 days of entry times of the Claimant for the months of September and October. The stills did not include 9 October 2018.

43. On 19 November 2018, Ms Aquilina was appointed as deputy manager of Chuggers and started work shortly after. She spent the first week at Choo Choo's.

44. On 28 November 2018, the Claimant alleged that Ms Fear asked her for the CCTV password. This seemed very unlikely given that Ms Fear was a

director and had been looking at the CCTV already. We rejected the Claimant's evidence.

45. On 30 November 2018, Ms Fear asked the Claimant for her e-mail password to do a mail merge. Later that afternoon the Claimant could not access her account. She later discovered that her admin access had been removed at 0636 that day.

46. At about 1600 on 30 November 2018, Ms Allsopp and Ms Slaiter attended Chuggers with the intention of suspending the Claimant. The Claimant was asked to attend an informal meeting upstairs. The Claimant asked what it was about and Ms Allsopp would not say. The Claimant then asked why Ms Fear was not present and was told that if she had been, she could not do the meeting on Monday. The Claimant asked if Ms Slaiter were attending and when it was confirmed she was, she said that she would not go upstairs. Ms Allsopp then spoke to Ms Fear, who after speaking to Peninsula confirmed that the Claimant should still be suspended. The Claimant went into the downstairs office. She refused to go upstairs and was told that she was suspended and then left the building. Ms Allsopp, Ms Slaiter and Ms Fear all said in their witness statements said that the purpose of the meeting was to suspend the Claimant, but in oral evidence said that it was for an informal meeting and suspension was not necessarily going to follow. We rejected the Respondent's oral evidence; it was completely at odds with the witness statements and no explanation for the change could be provided.

47. Ms Fear then spoke to the Claimant on the telephone and confirmed that there would be a meeting on Monday and more information would follow.

48. On 1 December 2018, the Claimant received an e-mail at 1200 from Ms Fear. Attached was a letter inviting her to attend a disciplinary hearing on 3 December 2018 [p141 – 141A]. The letter explained that the suspension was a holding measure and not a disciplinary action. The allegation to be discussed was alleged falsification of time sheets and that she had commenced her shifts at different times to those stated. If proven this would represent a gross breach of trust and would be regarded as gross misconduct. The letter said that the CCTV footage, time sheets and time schedule were attached, however there was only one attachment to the e-mail. The Claimant was asked not to contact colleagues, but if she wanted someone to give evidence the Respondent would arrange for them to be interviewed. The Claimant was informed of her right to be accompanied. The Claimant did not receive a copy of the CCTV or timesheets ahead of the meeting.

49. The Claimant responded by an e-mail on 2 December 2018 and said that although she was willing to attend the meeting, it would not allow her sufficient time to take advice and suggested holding the meeting on 5

December. She asked for Ms Amatiello to be a witness at the hearing and asked for all of the Chuggers staff to be interviewed about the allegation. Ms Fear responded by bringing the meeting forward to 12pm, because the Monday was the most convenient day for her.

50. On 3 December 2018, the Claimant attended the disciplinary meeting. The meeting notes recorded that the Claimant said that she had not deliberately done it to gain a few minutes. She accepted that sometimes the girls signed her in. She also said that she did not get a break due to being too busy. She also raised that she wished Ms Fear had spoken to her, to which there was no response by Ms Fear. For the purposes of contributory fault, we accepted that the Claimant had not intentionally record incorrect times.

51. The Claimant disputed the accuracy of the notes in her witness statement and said that she had asked if the CCTV timing clock had been calibrated against the clock they used to sign in and out. It was also asked whether other staff timesheets were going to be investigated and she was told yes. The Claimant also said that she explained that the girls would sign her in if she was caught with a parent or on the telephone, this was not challenged in cross-examination. Ms Slaiter and Ms Fear agreed in oral evidence, that Ms Amatiello had raised whether the signing in and out clock had been calibrated with the CCTV, but that it was not in Ms Slaiter's notes. We therefore accepted the Claimant's evidence that the notes were inaccurate and that she had raised the additional matters referred to above. Ms Fear suggested that she had checked the clock and said it was fine, however this was not referred to in any document and we did not accept this evidence.

52. After the meeting, the Claimant took 20 minutes to consider the notes of the meeting and asked for a correction to be made.

53. Ms Fear e-mailed the Claimant at 1849, informing her that HR had not concluded their review and that she did not have a final decision for the Claimant that evening.

54. On 4 December 2018, the Claimant was sent an e-mail dismissing her with immediate effect. In support of the finding that the allegation had been proved, Ms Fear referred to that the Claimant had said other members of the team completed the time sheet for her from time to time, she did not always complete it each day and sometimes did it retrospectively at the end of the month. It was the Claimant's duty to be honest about when she started working. Ms Fear gave evidence that the mis-recording of the arrival times was a theft of time. Further it was important that people started on time because children can have accidents in a very short space of time and if the ratio was inadequate their insurance policy might be avoided. Further the Claimant was the manager and therefore supposed to be in charge of the nursery.

55. Ms Aquilina became Chugger's manager on 5 December 2018. Ms Walker's evidence was that in the first week of Ms Aquilina's employment, Ms Aquilina changed the clock in the main room, by bringing it forwards by 5 minutes. Ms Walker was not challenged on this evidence and we accepted it.

56. On 6 December 2018, the Claimant sent a letter of appeal. The Claimant said that she had requested that Ms Fear interviewed the Chuggers team about the allegations against her, but she had not. Issues with arranging the disciplinary meeting were raised. She said that she had used the clock in the main room when she signed in and that she believed there was a genuine mistake regarding the 20-minute discrepancy. [p149-151]

57. On 19 December 2018, the Claimant received a letter sent by e-mail at 1344 from Mr Fear, inviting her to attend an appeal on 20 December 2018 at 1400, however she did not receive it until 1900.

58. On 20 December 2018, the Claimant told Mr Fear she was unable to attend due to childcare issues. The date was changed to 21 December 2018. Mr Fear said that this was with the agreement of the Claimant, however it was not put to her and we did not accept that it was the Claimant's suggestion. Mr Fear said that the meeting would take place at 1130. The Claimant then sent an e-mail at 1241, in which she said that she had an appointment at 1030 outside of Taunton and that she would not make it back in time. She said she could meet at 1400.

59. Mr Fear responded by saying he had reconvened the meeting to 21 December and she since had advised that she could not attend at 1130. 1400 was not suitable for him and he offered 1200 noon. It was said that the Respondent had complied with its statutory obligations by reconvening twice and if she failed to attend without good prior explanation or reason it would be considered in her absence. Mr Fear accepted in evidence that he could have convened the hearing after his 1400 appointment.

60. The Claimant replied at 2348 on 20 December 2018. She explained her appointment was an hour outside of Taunton and 1200 would not allow her enough time. She said she was available on 3 and 4 January as she was aware the nursery was closed over Christmas.

61. Mr Fear's evidence was that he considered 24 hours' notice was reasonable because time was of the essence. Mr Fear said that the Claimant wanted the matter resolved before Christmas, but that was not put to her and was contradicted by her e-mail of 20 December, we did not accept that evidence.

62. There was a record of a meeting on 20 December 2018 [p172 to 178] at which Mr Fear accepted that the Claimant did not attend. The record of meeting was effectively the notes of Mr Fear's decision. In the Claimant's letter of appeal, she had challenged the accuracy of the minutes, Mr Fear relied on the minutes taken and that the Claimant had signed them as being correct. In the notes Mr Fear said, in relation to interviewing the Claimant's colleagues, that it was not a requirement in the circumstances as evidence was collected from the CCTV and questioned how she was aware that they had not been interviewed when she had been asked not to contact staff. In cross examination Mr Fear's evidence became unclear, he said that this conclusion was based on his investigation, however when pressed he accepted that his investigation was looking at the documents he had been provided with and speaking to Ms Fear and Ms Allsopp and Ms Slaiter. He did not speak to the Claimant's colleagues at Chuggers. In the notes Mr Fear referred to the Claimant having said that she did not intend to sign in at the wrong time and said she got mixed up and referred to the arrows the Claimant had put on the October 2018 timesheet. It was put to Mr Fear in cross-examination that this showed that times for the 8th and 9th of October should be reversed, which when compared with CCTV time for the 8th could be explained by mixing up the days, Mr Fear did not answer the question. Mr Fear did not have a CCTV still for 9 October 2018 and did not check whether the time for that date would correspond with the that recorded for the 8th. When questioned about this Mr Fear did not provide an explanation. Mr Fear also accepted in cross examination that there might be a discrepancy between the clock in the room with the register and the CCTV clock of an order of a few minutes either way. When questioned about the possibility of a time discrepancy being an explanation, he said that the Clamant tended to use her phone. There was no evidence that the Claimant had said at any point that she tended to use her phone to sign in and it was not put to her in cross-examination, we did not accept that evidence. The Claimant's evidence, which we accepted, was that she used the clock in the room with the register, further this was not put to the Claimant that this was incorrect. Mr Fear did not investigate the possibility of a discrepancy between the clocks or view the CCTV footage/stills for the whole period under consideration.

63. On 24 December 2018, the Claimant was sent an e-mail informing her that her dismissal was final. Mr Fear said that the Claimant had not provided an explanation for her non-attendance or give a reasonable reason. He made no reference to the Claimant's e-mail on 20 December 2018. In the outcome letter the same matters referred to in the notes were repeated [p180-183].

64. We also heard evidence, which we accepted, that Ms Amponsah had made errors on her time sheets in that she had not deducted her lunch break from her time sheets, however she was not disciplined.

The law

65. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

66. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

67. Under Section 43F (Disclosure to prescribed person): (1) A qualifying disclosure is made in accordance with this section if the worker—
(a) makes the disclosure . . . to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
(b) reasonably believes—
(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

68. Ofsted is listed within the Public Interest Disclosure (Prescribed Persons) Order 2014, as a prescribed person under Her Majesty's Chief Inspector of Education, Children's services, and Skills. The Respondent accepted this.

69. Under Section 47B 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. This

provision does not apply to employees where the alleged detriment amounts to dismissal.

70. Section 48(1) and (1A) of the Act state that an employee may present a claim that he has been subjected to detriment contrary to s. 44 and 47B of the Act. Under section 48(2) of the Act, on a complaint to an employment tribunal, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

71. Under section 103A of the Act, an employee is to be regarded 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.

72. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").

73. We considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

74. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

75. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

76. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Protected disclosures

77. The tests were most recently stated by the Court of Appeal in Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73.

78. First, we had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of Geduld-v-Cavendish-Munro [2010] ICR 325 in light of the caution urged by the Court of Appeal in Kilraine-v-Wandsworth BC [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances. A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

79. Next, we had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (Western Union-v-Anastasiou UKEAT/0135/13/LA).

80. We also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(a), (b) or (d) had been or were likely to have been covered at the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that she held it (Babula-v-Waltham Forest College [2007] IRLR 3412 and Korashi-v-Abertawe University Local Health Board [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the

existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in Kraus-v-Penna [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979; [2017] IRLR 837, para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

81. 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (Ibrahim-v-HCA UKEAT/0105/18).

82. Next, we had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see Babula and Korashi above). That test required us to consider her personal circumstances and ask ourselves the question; was it reasonable for her to have believed that the disclosures were made in the public interest when they were made.

83. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Nurmohamed* [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

84. The Court of Appeal dismissed the appeal in Chesterton. At paragraph 31, Underhill LJ said that he did not think "there is much value in adding a

general gloss to the phrase 'in the public interest. … The relevant context here is the legislative history explained at paragraphs 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest."

85. Further at paragraphs 36 and 37:

"36. …The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

37. Against that background, in my view the correct approach is as follows. In a whistle-blower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character [5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case… "

86. Underhill LJ referred to relevant factors, which are:

(a) the numbers in the group whose interests the disclosure served;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) The nature of the wrongdoing disclosed; and
(d) The identity of the alleged wrongdoer.

87. In order to qualify for protection, the disclosure must be to an appropriate person. There are two types of disclosure relevant to this case: disclosure to the employer under section 43C and a disclosure to a prescribed person (typically a regulator) pursuant to section 43F. The threshold justifying a disclosure becomes more rigorous where the worker is raising his concerns or allegations beyond the employer. For a section 43C disclosure to the employer, the only constraint on the worker is that his disclosure satisfies the test of a qualifying disclosure in section 43B. No doubt he must at least genuinely suspect that the information is or may be true, otherwise he could not reasonably believe that it tends to show any of the matters identified in section 43B(1). By contrast, the second type of disclosure to a prescribed person (which means prescribed by an order of the Secretary of State)

specifically requires that the worker must "reasonably believe that the information disclosed, and any allegation contained within it, are substantially true" (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73).

88. The Claimant must believe that the information contained in the disclosure to Ofsted is substantially true. In other words that the Claimant believes on a rational basis that the majority of the information and/or allegations contained within the disclosure are true. In an obiter remark in Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4*,* the *EAT* said *"*On a simple reading of the words in the Statute, the information is in reference to all the information and the allegation must be in reference to the allegations, if any, and not one out of a number."

Detriment (s. 47B)

89. The next question to determine was whether or not the Claimant suffered detriment as a result of the disclosure. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made.

90. Section 48 (2) was also relevant, in that, "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

91. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah 1980 ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice".

92. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73).

93. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 in Harrow London Borough Council-v-Knight [2002] UKEAT 80/0790/01). It will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower (NHS Manchester-v-Fecitt [2012] IRLR 64 and International Petroleum Ltd v Osipov UKEAT 0229/16).

94. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in NHS Manchester-v-Fecitt [2012] IRLR 64). It was important to remember, however, if there was a failure on the part of the Respondent to show the ground on which the act was done, the Claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (International Petroleum Ltd v Osipov EAT 0058/17).

95. As observed in (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

"30. *As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Kahn [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:*

> *"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

31. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B."

Dismissal (s. 103A)

96. We considered the test in Kuzel-v-Roche [2008] IRLR 530;
    (a) whether the Claimant and had showed that there was a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;
    (b) if so, had the employer showed its reason for dismissal;
    (c) if not, it is open to the tribunal to find that the reason was as asserted by the employee, but that reason does not have to be accepted. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not one advanced by either side.

Unfair Dismissal (s. 98)

97. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

98. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements as set out in the three stage test in BHS-v-Burchell [1980] ICR 303 (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that

belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. Crucially, it is not for the tribunal to decide whether the employee actually committed the act complained of.

99. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd [2006] ICR 1602 CA. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14).

100. We also took into account the ACAS code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

Polkey

101. The decision in Polkey-v-AE Dayton Services [1988] ICR 142 introduced an approach which requires a tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (Singh-v-Glass Express Midlands Ltd UKEAT/0071/18/DM).

102. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (Software 2000 Ltd. v Andrews [2007] ICR 825 and Contract Bottling Ltd v Cave [2014] UKEAT/0100/14).

Contribution

103. We have been invited to consider whether the Claimant's dismissal was caused by or contributed to by her own conduct within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under these sections the conduct needs to have been culpable or blameworthy in the

sense that it was foolish, perverse, or unreasonable. It did not have to have been in breach of contract or tortious (Nelson v BBC [1980] ICR 110).

104. We have applied the test recommended in Steen v ASP Packaging Ltd [2014] ICR 56; we have had to;
(i) Identify the conduct;
(ii) Consider whether it was blameworthy;
(iii) Consider whether it caused or contributed to the dismissal;
(iv) Determine whether it was just and equitable to reduce compensation;
(v) Determine by what level such a reduction was just and equitable.

105. We have also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to her dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

Conclusions

Did the Claimant make protected disclosures?

106. Alleged disclosures were either made to the Claimant's employer or Ofsted, which the Respondent accepted was a prescribed person within the meaning of s. 43F.

On 8 June 2018, the Claimant disclosed verbally to India Fear that Emmanuella Amponsah had mishandled a child on 7 June 2018 (health and safety and breach of legal of obligation);

Did the Claimant disclose information?

107. The Claimant said that colleagues were concerned about the way in which Ms Amponsah had brought a child in. The Claimant provided information in relation to the incident.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been, was being or was likely to be endangered, or that the Respondent was in breach of its legal obligations in respect of looking after children?

108. The Claimant had been informed of the information by colleagues and was sufficiently concerned to bring it to the attention of Ms Fear. The information which the Claimant was given tended to show that physical contact had been made with the child, although she had not seen the incident. The Respondent has a policy that children are not physically guided and the Claimant's understanding was that at the very least the

policy had been breached. The Claimant, at the stage she reported the matter, believed that the health and safety of the child had been endangered or that the Respondent's legal obligations to the child had been breached and that belief was reasonable.

Did the Claimant reasonably believe the disclosure was made in the public interest?

109. The incident involved a young child in the care of a nursery. Actual parents and potential parents would be interested parties, as they would naturally be concerned that children are properly looked after. Further the nursery sector is heavily regulated. The Claimant believed that the disclosure was in the public interest and that belief was reasonable.

110. The information was provided to the Claimant's employer and was a protected disclosure.

<u>On 26 June 2018, the Claimant disclosed by text to India Fear that the nursery premises were too hot and that fans were required (health and safety)</u>

Did the Claimant disclose information?

111. The Claimant provided information that the nursery had been unbearably hot and asked for fans.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been, was being or was likely to be endangered?

112. The Claimant considered that the temperature was unbearably hot, which was supported by other witnesses. The children at the nursery were very young. It was sufficiently hot for the Claimant and a colleague to separately request fans. The Claimant believed that it was a health and safety requirement to keep the room at a reasonable temperature and there was a danger to health and safety. That belief was reasonable.

Did the Claimant reasonably believe the disclosure was made in the public interest?

113. Actual parents and potential parents would be interested parties, as they would naturally be concerned that children are properly looked after in a safe environment. Further the nursery sector is heavily regulated. The Claimant believed that the disclosure was in the public interest and that belief was reasonable.

114. The information was provided to the Claimant's employer and was a protected disclosure.

On 11 July 2018, the Claimant disclosed to India Fear by text reiterating the concerns at 10.1.2 in the Case Management Summary (health and safety and breach of legal of obligation)

Did the Claimant disclose information?

115. The Claimant provided information that she was not happy with the way that Ms Amponsah handled children.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been, was being or was likely to be endangered, or that the Respondent was in breach of its legal obligations in respect of looking after children?

116. No evidence was provided as to what had happened in the incident. It was therefore not possible to ascertain whether the Claimant had a belief that the health and safety of the child was endangered or that there had been a breach of legal obligation. We were not satisfied that the Claimant had such a belief. In any event because there was no evidence as to what happened in the incident, we would not have been satisfied that any such belief was reasonable. This, therefore, was not a protected disclosure.

Did the Claimant reasonably believe the disclosure was made in the public interest?

117. This element of test was also not satisfied on the basis that no evidence was provided as to what happened. We were not satisfied that the Claimant believed that the disclosure was made in the public interest

On 9 August 2018 the Claimant disclosed in a written grievance to India Fear, concerning Leann Allsopp, that the child staff ratio had been breached as a result of Ms Allsopp reallocating the Claimant's staff to her premises (health and safety and breach of legal of obligation)

Did the Claimant disclose information?

118. The Claimant said that when you work in a small team like at Chuggers and you are bang on ratio or working out of ratio it was harder for her to send cover to Choo Choo's as she usually needed all the staff she had. The Claimant said that at on some days at Chuggers they were working dangerously out of ratio. This was information.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been, was being or was likely to be endangered, or that the Respondent was in breach or was likely to be in breach of its legal obligations in respect of the ratio of children to staff?

119. It was accepted by all parties that there are strict ratios of children to staff that must be maintained. There were difficulties in maintaining the ratios at both Choo Choo's and Chuggers at this time, Choo Choo's having lost members of staff. The rotas showed that on some days during this period that they were a staff member short. We accepted on the examples drawn to our attention that Ms Fear worked in the nurseries to maintain the ratio, however there was one day on which we heard no evidence about how the problem was resolved. It was significant that the Claimant did not refer to this in her letter to Ofsted, because if they were working dangerously out of ratio that was something that would be a concern of at least the same significance as not collecting the child. No documentary evidence was provided to show that the nursery had been out of ratio before the Claimant sent the e-mail, however she did say that it was harder to send cover when they were "bang on ratio or working out of ratio", although she did not provide specific examples of such incidents in 2018. The Claimant believed that she had worked out of ratio on occasions and there was risk it could occur in the future and that it was a breach of legal obligation and danger to health and safety. Although we were not provided with rotas and timesheets for every week at this time, the Claimant was explaining the problems she was facing and she reasonably believed that she had worked out of ratio on occasions and there was a risk of a future incident.

Did the Claimant reasonably believe the disclosure was made in the public interest?

120. Ratios are an important legal requirement and their maintenance is important to ensure the health and safety of the children. For this reason, the Claimant believed that the disclosure was in the public interest.

121. The e-mail from the Claimant came in response to an e-mail from Ms Allsopp who had said she had several staff leave and that she would need all available staff to work at Choo Choo's. Although staff might be assigned to one nursery, they were contractually obliged and expected to be able to work at the sister nursery in the event that there were staff shortages due to sickness, holidays or other reasons. The Claimant's e-mail was concerned with the way in which Ms Allsopp had sought to rearrange the Claimant's rota plans for the school summer holidays and how she did not appreciate Ms Allsopp contacting her staff when she was on leave. If the Claimant was on leave, Ms Allsopp potentially had the responsibility of day to day management of Chuggers. It was notable that the Claimant sent the letter to Ofsted about safeguarding concerns in relation to Ms Culverwell's

child, but made no mention of problems with ratios at the nurseries. The Claimant relied upon the rota in September that showed there was a day when there had been a problem with the ratio, however this post-dated the e-mail. We accepted the Respondent's submission that the Claimant was motivated by self-interest in preventing her rotas from being changed when Choo Choo's were facing ratio difficulties, however the Claimant was concerned to maintain the ratios at Chuggers and she believed that there had been occasions when the ratio had dropped. Although there was a personal element the Claimant reasonably believed that it was in the public interest to make the disclosure in order to ensure that the Chugger's ratio was maintained.

122. The disclosure was made to the Claimant's employer and was a protected disclosure on 9 August 2018.

Was information disclosed by the Claimant which tended to show the health or safety of an individual was being put at risk, that there had been a breach of legal obligation?

On 23 October 2018 in writing to Ofsted about the child who had been dropped off and refused access to the nursery (health and safety and breach of legal of obligation)

Did the Claimant disclose information?

123. The Claimant provided information that a child had not been collected from school on two occasions and that she knew that the concern had been raised and that it had not been concluded.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been, was being or was likely to be endangered, or that the Respondent was in breach of its legal obligations in respect of looking after children?

124. The Claimant had advised Ms Culverwell to put her concerns in writing to Ms Fear. The circumstances were such that the Claimant believed that there had been a breach of legal obligation and the health and safety of the child had been endangered. The belief was reasonable.

Did the Claimant reasonably believe the disclosure was made in the public interest?

125. The Claimant believed that there had been a breach of legal obligation and a danger to health and safety and that because parents would be interested and concerned about what happened that it would be

something that was in the public interest. However, the Claimant's evidence was that she raised the concern because Ms Culverwell had told her that there had been another incident in September and that her complaint had not been addressed. We found that Ms Culverwell had not told the Claimant her complaint had not been addressed and that the complaint had been addressed within days of her e-mail in July. The Claimant did not have any evidence that the complaint had not been addressed, further she made no mention of the September incident to Ofsted. In the circumstances the Claimant did not believe that the disclosure was in the public interest.

Did the Claimant reasonably believe that the information disclosed and any allegation contained within it are substantially true?

126. The complaint to Ofsted was that there had been a failure to collect a child from school on two occasions and that a complaint had been raised and it had not been concluded. The complaint involved an allegation of failing to address the concern. The only evidence the Claimant relied upon in relation to the failure to address the concern was the conversation with Ms Culverwell in September. We found that Ms Culverwell's did not tell the Claimant that her complaint had not been addressed or that it had not been concluded. We had to consider the whole of the complaint. The allegation of failing to address the complaint was at least as serious as the initial alleged failing and was a substantial part of the complaint. We were not satisfied that the Claimant believed her complaint was substantially true. Even if we are wrong, in relation to that belief, the Claimant was not in the possession of any evidence or informed that the complaint had not been addressed. There was no information on which she could have based her belief and she did not reasonably believe that her complaint was substantially true.

127. Accordingly, this was not a protected disclosure.

Detriment

<u>Was the Claimant subjected to a detriment by the Respondent on the ground that she had made a protected disclosure on 8 June 2018 in relation to Ms Amponsah, on 26 June 2018 in relation to the temperature and the e-mail on 9 August 2018 by:</u>

128. In relation to the disclosures made on 8 and 26 June 2018, these were matters in which the Claimant raised concerns in relation to a colleague and the temperature of the room. The Respondent addressed those concerns promptly. These were matters that the Claimant, as a manager, would be expected to raise. We were satisfied that Respondent had considered those matters closed and that they had no influence on any subsequent treatment of the Claimant.

The Respondent failed to investigate her grievance dated 9 August 2018

129. We accept that failing to address a grievance is to someone's disadvantage and a detriment. Ms Fear had received the e-mail, but had not appreciated that it was a grievance, particularly because the Claimant had not chased her for a response, and at the time she was focusing on trying to resolve the staffing issues. We were satisfied that the protected disclosure did not have any influence on the failure to investigate the grievance.

Other alleged detriments

130. The other alleged detriments are all related to the subsequent disciplinary process and are addressed together. The alleged detriments are:

Her administrator's access to the Respondent's nursery Facebook was removed on 30 November 2018

131. The removal of administrative access was to the Claimant's disadvantage and was a detriment.

The Claimant was suspended without being informed of the reasons for the suspension on 30 November 2018

132. Suspension of an employee is to an employee's disadvantage and therefore this was a detriment.

The Claimant was not provided with documents obtained during the investigation prior to any disciplinary hearing taking place

133. Failing to provide documents from the investigation was to the Claimant's disadvantage and was a detriment.

The Claimant was required to sign notes at the disciplinary hearing on 3 December 2018 without being provided with an opportunity to read and consider their accuracy first

134. The Claimant was given an opportunity to consider the notes and therefore this was not a detriment.

The points raised by the Claimant during the disciplinary hearing were not investigated prior to a decision being taken in the disciplinary hearing, namely that the CCTV time was not calibrated with the clock used by the staff to sign in

135. The calibration of the clocks was not investigated by the Respondent, which was to the Claimant's disadvantage and a detriment.

The Respondent failed to engage with the Claimant's arguments raised during the appeal and/or grievance prior to rejecting the disciplinary appeal, namely the CCTV time was not calibrated with the clock used by the staff to sign in.

136. This argument was not considered by the Respondent, which was to the Claimant's disadvantage and was a detriment.

Whether the detriments were on the ground that the Claimant made a protected disclosure.

137. At the time the e-mail was sent the Respondent was attempting to address the staffing issues across both nurseries and in particular at Choo Choo's. Ms Fear was already aware that there were problems involving ratios, particularly during the school summer holiday. Ms Allsopp was also raising concerns about the ratio at her nursery, hence the need to take surplus staff from Chuggers. Therefore, the problem with ratios was already known about and steps were being taken to address it, including by recruiting more staff. The timescale between the e-mail and the events from 30 November 2018 were almost 4 months apart, making it even less likely that this was a reason for subjecting the Claimant to a detriment. We were satisfied that the raising of ratios in the Claimant's e-mail on 9 August 2018 had no influence as to why she was subjected to the above detriments.

Conclusion

138. The Claimant was not subjected to a detriment because she had made a protected disclosure and those claims were dismissed.

Dismissal

What was the principal reason for the Claimant's dismissal?

139. The Claimant had raised protected disclosures and was disciplined for falsifying her timesheets, however for the reasons set out below the investigation was lacking and the process was rushed, not giving the Claimant sufficient time to prepare. The Claimant had shown that there was a real issue as to whether the reason of gross misconduct was the true reason for dismissal.

140. The Respondent said that the reason for the Claimant's dismissal was gross misconduct.

141. We did not accept either position. As with the alleged detriments, the matters the Claimant raised as protected disclosures were matters that Ms Fear was aware of and other employees had raised similar concerns. In relation to the ratios, Ms Allsopp was also raising similar concerns that they would not be met and we repeat our reasons above that they were not the reason for the dismissal.

142. Although Ms Fear mentioned to the Claimant that she had been late in September, no formal action or record was made of it. After the Claimant wrote to Ofsted, Ms Fear started to investigate the timesheets, but did nothing about it until she had recruited an additional deputy manager. The majority of the timing discrepancies were within a few minutes of the time on the CCTV clock and it was accepted that clocks could vary by a few minutes. The largest discrepancy could be explained by making a mistake, but this was not investigated. Further, none of the Claimant's colleagues were spoken to about what the Claimant did, which might have provided evidence either way. The process was rushed and the Claimant was not given all documentation. We found that the Respondent suspected that the Claimant had written to Ofsted and that thereafter it looked for a reason for dismiss her, as supported by the review of the timesheets taking place at the beginning of November, about a week after the Respondent had been notified of the complaint by Ofsted. The reason for the dismissal was that the Claimant had complained to Ofsted, however that complaint was not a protected disclosure.

143. Therefore, the Claimant was not dismissed because she had made a protected disclosure and this claim was dismissed.

Unfair dismissal

<u>What was the principal reason for the Claimant's dismissal? Was it a potentially fair reason? In particular, has the Respondent proved that it had a genuine belief in the Claimant's misconduct and that this was the reason for her dismissal?</u>

144. The principle reason for the Claimant's dismissal was gross misconduct, which was a potentially fair reason for dismissal.

Did the Respondent hold a genuine belief in the Claimant's misconduct?

145. The allegation that the Respondent found proven was that the Claimant had deliberately falsified her time sheets. We did not accept that the Respondent had a genuine belief that the Claimant had deliberately falsified the timesheets. The justification for the decision at the Tribunal was that on occasions the Claimant's colleagues had signed her in and that the Claimant would complete the time sheet at the end of the month, however that did not go to the question of deliberate falsification. The Claimant had

said that it was not intentional to record incorrect times. We found that the reason for initiating the disciplinary proceedings and the dismissal was that the Claimant had written to Ofsted, rather than the Respondent believing that she had committed gross misconduct. We accepted that they believed that there was a mismatch between the timesheets and CCTV, however we were not satisfied that the Respondent had a genuine belief that it was gross misconduct.

146. If we were incorrect in that conclusion, we went on to address the other parts of the test.

<u>If yes, did the Respondent hold that belief on reasonable grounds, following a reasonable investigation?</u>

147. In any event, the Respondent did not obtain stills from the CCTV footage for each day of the timesheets in question, particularly after the Claimant had said she had made a mistake and put the time in for the wrong day on 8 October 2018. Mr Fear, even though he was aware of this, did not obtain the still for the 9 October 2018. A reasonable employer would have followed this up and would have checked the stills for all of the days during the period in question.

148. Further the Claimant asked for her colleagues to be interviewed, which did not occur. The Claimant's colleagues would have been able to give evidence as so what the Claimant did regarding signing in and would have given evidence which could inform the Respondent as to whether the Claimant was deliberately falsifying her time sheets. A reasonable employer would have conducted these further investigations, particularly when it had been requested by the employee.

149. Further the Claimant's companion in the disciplinary hearing raised issues as to whether the CCTV clock time accorded with the clock in the main nursery room. This was not investigated. It was accepted by Mr Fear that a discrepancy between the clocks might account for some of the some of the time differences. It was striking that this was not included in the notes of the meeting. A reasonable employer, who was relying on a CCTV clock only, would check that the time it showed corresponded with the clock by the registers as part of the initial investigation and certainly once the issue was raised during the disciplinary hearing.

150. A reasonable employer would have carried out further investigation. A reasonable employer would not have concluded that it had reasonable grounds to dismiss the Claimant based on the information that the Respondent had.

Was the dismissal fair or unfair in accordance with S. 98(4) ERA? Was the sanction of dismissal within the band of reasonable responses open to a reasonable employer?

151. The e-mail sending the Claimant the letter inviting her to the disciplinary hearing did not contain all of the information, in that the CCTV and time sheets were not attached. Given the short notice of the hearing a reasonable employer would have ensured that the employee had all of the documents in advance.

152. The Respondent suspended the Claimant on Friday 30 November 2018. On 1 December 2018 it invited the Claimant to attend a meeting on Monday 3 December 2018. The Claimant told the Respondent that she had insufficient time to prepare and said she could not attend at the time provided. The Respondent brought the time forward giving the Claimant less time. Ms Fear said this was because Monday was more convenient for her. The Claimant did not have all of the documents at this time. Under the ACAS code an employer should give an employee a reasonable time to prepare her case. A reasonable employer, in these circumstances would not have insisted that the disciplinary hearing took place at an earlier time when an employee had expressed that they had insufficient time to prepare.

153. A similar issue occurred with the appeal. The Claimant was not notified of the appeal date until 13 days after she had appealed and was told that the hearing would be the following day, giving her 24 hours' notice. When rearranging the appeal hearing Mr Fear knew that the Claimant had an appointment at 1030 an hour outside of Taunton, which was why she could not attend at 1130. He accepted in evidence that the hearing could have been after his appointment at 1400 but instead only changed the time by making it 30 minutes later at 1200. Mr Fear also did not take into account the Claimant's later e-mail saying that she could still not attend. A reasonable employer would have considered that if the Claimant had an appointment at 1030 an hour away that taking into account the time that an appointment might take, it was unlikely that delaying the meeting by 30 minutes to 1200 would enable her to attend. A reasonable employer would not have given such short notice of the hearing. Even if a reasonable employer would have given short notice of the appeal hearing, it would not have heard the appeal in the Claimant's absence on 21 December 2018. The Claimant was denied the opportunity to put forward her appeal.

154. Further the Claimant was not provided with all of the information, relied upon by the Respondent, before the disciplinary hearing.

155. The Respondent failed to carry out a reasonable investigation or operate a fair procedure.

156. Bearing in mind the size and administrative resources of the Respondent, a reasonable employer would not have concluded that it was reasonable to dismiss the Claimant.

157. The Claimant was unfairly dismissed.

If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

158. We found that the reason for the Claimant's dismissal was that she complained to Ofsted, rather than gross misconduct. The Respondent failed to undertake some key investigations and rushed the process. The clock in the main room was subsequently changed by putting it forward by 5 minutes. This might have had the effect of the Claimant being signed in earlier and the majority of the discrepancies might have fallen away. The failings in the investigation were such that an assessment as to whether the Claimant would have been fairly dismissed, if a fair procedure had been used, would have been wholly speculative and had so much uncertainty that it was not possible to sensibly predict the chance that the Claimant would have been fairly dismissed in any event. Therefore, we were not satisfied that if a fair procedure had been followed that the Claimant would have been fairly dismissed or that there was such a chance of a fair dismissal.

Did the Claimant's conduct contribute to the dismissal?

159. The burden is on the Respondent to prove that the Claimant actually committed the gross misconduct alleged. The evidence against the Claimant was significantly lacking in that many of the investigations that should have been undertaken were not. The other conduct relied upon was the discrepancy between the timings between the CCTV and the time sheets, the lack of calibration between the CCTV clock and the clock by the registers was significant. There did appear to be entries which were incorrect, however we were not satisfied that the Respondent proved that the Claimant deliberately falsified records. The reason for dismissal was that the Claimant had written to Ofsted and we did not find that this alleged conduct had any bearing on the dismissal and therefore we did not find that the Claimant contributed to her dismissal.

Breach of contract in respect of notice pay

160. The Respondent did not dismiss the Claimant for a fair reason and did not give her any notice of her dismissal. As set out above the Respondent failed to prove that the Claimant had been guilty of conduct which would have justified a summary dismissal. Accordingly, the Respondent was in breach of contract by failing to give the Claimant notice

of her dismissal. The Claimant had been employed for four whole years and therefore was entitled to four weeks' notice under s. 86 of the Employment Rights Act 1996.

Conclusion on liability

161. The Claimant was unfairly dismissed and was dismissed in breach of contract in that she was not given notice. The claims of automatically unfair dismissal and detriment were dismissed.

Remedy

162. After Judgment was given on liability, the Respondent confirmed that it could not gainsay what was being claimed as losses in the Schedule of Loss and did not require the Claimant to give evidence. The parties agreed that a gross weeks' pay was £272 and that the Claimant had worked for the Respondent for 4 complete years and that the basic award was £1,088. The parties also agreed that the time between the Claimant's dismissal and starting her new job on 7 January 2019 was 5 weeks 3 days and that her net pay was £1,083.23 per month, which equated to £50 per day and that therefore her loss of earnings were £1,400. The claim for loss of statutory rights was agreed in the sum of £500 and the claim for job seeking expenses was agreed in the sum of £30. The Claimant sought a 20% uplift for failing to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, which the Respondent did not argue against and agreed that 20% of the compensatory award was £386. It was also agreed that no separate award should be made in relation to her claim for notice pay.

163. The Claimant confirmed that she had not been in receipt of any benefits.

164. Accordingly, the parties agreed that the Claimant was awarded a basic award of £1,088 and a compensatory award of £2,316, including the ACAS uplift, a total of £3,404.

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Employment Judge J Bax
Dated 16 November 2020