Case Number: 1804300/2019

1805116/2019

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs D Greaves**	
Respondent: 1	**The Unity Centre Limited**	
Respondent 2:	**Mr A Bevis**	
Heard at:	**Sheffield (by CVP) On:**	**28, 29 and 30 October 2020**
		12 November 2020 (in chambers)

Before: **Employment Judge Little**

Mrs J L Hiser

Mr J Rhodes

Representation

Claimant: In person

Respondents: Ms Y Montaz, Consultant (Peninsula Business Services Ltd)

Support through Court (assisting the Claimant):

Day 1 (morning only) Mr D Forte

Day 2 Ms K Hunt

Day 3 Ms N Goulding

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant made a qualifying protected disclosure when she wrote to Ofsted on 25 March 2019.
2. The complaint of detriment on the ground of having made a protected disclosure succeeds in respect of ten detriments.
3. The claimant was constructively dismissed.
4. That dismissal was automatically unfair by virtue of the Employment Rights Act 1996, s 103A.

REASONS

1. **The complaints**

Mrs Greaves has presented two claims to the Tribunal. The first claim was presented on 7 August 2019. The complaints within that claim were detriment on the ground that a protected disclosure had been made and unauthorised deduction from wages. However subsequently the claimant withdrew the deduction from wages complaint and that was dismissed on 4 February 2020. The second claim was presented on 29 September 2019. The complaints were constructive dismissal, where the claimant contended that such a dismissal was automatically unfair because the reason for it was that she had made a protected disclosure and the claimant was also complaining of detriments because of whistleblowing. She attached to her claim form by way of details of claim what we now know to be the formal grievance which she raised with the first respondent on 12 August 2019. The details of claim for the first claim had been briefer.

In summary therefore the complaints which have been before us are as follows:-

- Alleged detriment on the ground that the claimant had made a protected disclosure – contrary to Employment Rights Act 1996, section 47B.
- Unfair dismissal (constructive) both on general principles but also on the basis that the dismissal was automatically unfair contrary to the Employment Rights Act 1996 section 103A – protected disclosure.

2. **The issues**

These were defined and agreed with the parties at a case management hearing conducted by Employment Judge Rostant on 4 February 2020. In summary those issues are as follows:-

2.1. Did the claimant make qualifying protected disclosures on the following occasions:

- On 28 February 2019, during the course of a telephone conversation with Ms Moore (nursery manager) on that date.
- On 6 March 2019, during the course of a meeting with Ms Moore on that date.
- In a letter dated 18 March 2019 which the claimant sent to Ms Moore and the second respondent.
- On 25 March 2019 when the claimant sent an email to Ofsted?

In her closing submissions Ms Montaz would indicate that the respondents conceded that the first three disclosures were protected, but not the fourth.

2.2. Did the respondents act or deliberately fail to act as per the list set out on page 3 of the 4 February 2020 case management summary and as identified as a. to q. inclusive (hereinafter 'the a to q list')? There are 17 alleged detriments therefore.

2.3. If one or more of those detriments was done, was it done on the ground that the claimant had made protected disclosures?

Constructive dismissal

2.4. Did the matters set out in the a to q list occur, or any of them?

2.5. If so, did that individually or cumulatively amount to a fundamental breach of the contract of employment by the first respondent (breaching the implied term of mutual trust and confidence)?

2.6. If so, was the claimant's resignation an acceptance of that breach and so a constructive dismissal? Alternatively, was the claimant resigning simply to go to another job?

2.7. Prior to resigning had the claimant affirmed or forgiven the breach?

2.8. If the claimant was constructively dismissed, was that dismissal automatically unfair because the reason for it or principal reason for it was that the claimant had made a protected disclosure?

2.9. Alternatively, can the first respondent show a potentially fair reason for dismissal?

We should add that at the 4 February 2020 preliminary hearing for case management the Judge noted that the claimant had confirmed that she did not wish to bring any complaint of post-termination detriment "although she might wish to refer to some matters (for example the handling of her formal grievance) for the sake of completeness".

We are not really sure what this means. The crucial legal question is relevance rather than whatever is meant by completeness. As we have explained to the claimant, things which happened after her resignation on 21 August 2019 could obviously not have influenced or brought about the resignation. A Judgment was issued by Employment Judge Rostant on 4 February 2020 dismissing "all claims of post-termination detriment" and the deduction from wages complaint. In these circumstances, at most any findings which this Tribunal made about matters which occurred post-resignation could only be relevant if they supported an inference which the Tribunal could properly draw on the issue of causation – did a pre-resignation detriment happen because of the protected disclosure?

3. Evidence

The claimant gave evidence. She had prepared a 28 page witness statement. It was printed in a very small font. As we began the hearing we assumed that that was the only evidence we were to hear from the claimant. When the respondents' representative wrote to the Tribunal on 23 October 2020 it

referred to an attachment of all the witness statements and that amounted to the claimant's statement and the two respondent witness statements.

However, at the beginning of our hearing, in discussion with the claimant, it became evident that she intended to call her husband and a Ms Atkinson to give evidence as well. Statements for those two individuals were found within the trial bundle. At pages 203 to 205 was Mr Greaves' handwritten statement and at page 192 was a brief statement from Ms Atkinson. It appeared that the claimant thought that because they were in the bundle that was good enough, although it caused a little confusion for the reasons we have set out above. In any event Ms Montaz did not take a point. We therefore heard from the claimant's husband and from Ms Atkinson as part of this CVP hearing.

The respondents' evidence was given by Ms N Moore, nursery manager and by Mr A Bevis, the second respondent and chief executive officer of the first respondent.

4. **Documents**

The Tribunal have had before them a bundle of documents running to 529 pages. From approximately page 443 onwards were documents which the claimant had wished to be added to the bundle. We do not believe that we were during the course of the hearing referred to any of the documents within that section. The claimant's documents include numerous copies of the index to the joint bundle. We did however notice that within that section of the bundle there is what is usually referred to as without prejudice correspondence and we explained to the claimant that this should not have been put in a bundle for use at this hearing. We have not read such correspondence.

In our initial discussion with the parties we sought an update on whether Orders which had recently been made by Employment Judge Shepherd had been complied with – this was in relation to extra documentation – over and above the documents referred to above. Employment Judge Shepherd conducted a telephone case management hearing on 2 October 2020, although the case management summary erroneously refers to the hearing as having been on 21 October 2019. The claimant had made an application for a specific disclosure on 3 September 2020 and there were three categories or types of document. It was noted at that hearing that category one documents did not exist, but the respondent was to search for any category two documents (correspondence with Ofsted). The third document or category was "supervision notes for Evie" as referred to in an email between the second respondent and Ms Moore on 28 March 2019. That email is at page 162 in the bundle and it transpires that Evie is a colleague of the claimant's, Evie Billington. When we raised this issue with the parties, Ms Montaz was unfortunately unaware of the existence of the Order, let alone whether or not it had been complied with. Obviously, she had not been the respondents' representative at the hearing before Employment Judge Shepherd.

However, after an adjournment Ms Montaz was able to confirm that there was no further correspondence to disclose from Ofsted nor documents about the outcome of investigations which had been provided to Ofsted. Further all supervision notes regarding or about Ms Billington had already been disclosed and were in the bundle we were told.

The claimant believed that only some general supervision notes had been disclosed and she remained of the view that there were others that were not in the bundle.

We suggested to the claimant that the best approach would be to ask Ms Moore about this when she was giving evidence. In the event the claimant did not ask Ms Moore questions about this but the Employment Judge did. Ms Moore told us that apparently in response to Judge Shepherd's Order she had sent copies of supervision notes to Peninsula and Ms Montaz confirmed that on 8 October 2020 these had been sent to the claimant. However, the claimant still thought that those were not the right ones because they were just general supervision notes and so this further disclosure has not found its way into the bundle or even the claimant's additional part of the bundle.

Ms Moore gave evidence to us that the supervision notes which had been provided to the claimant in respect of Ms Billington were all that existed. We should add that the allegation which the claimant made against Ms Billington is not central to this case. It is not the subject matter of any of the alleged protected disclosures with which we are dealing.

5. **Time allocation CVP and other matters**

The time allocation for our hearing was three days although this is a case where the Tribunal needs to determine and make findings about 17 alleged detriments. As noted, the claimant has produced a very lengthy witness statement. The interlocutory matters to which we have just referred took most of the first morning after a delay occasioned by one of the non-legal members having a difficulty with audio on the CVP. Day 1 had to be curtailed in the afternoon because of difficulties with the respondents' witness's internet connection constantly failing. Day 2 also had to be cut short because of significant audio problems at the claimant's end whilst her husband was trying to give evidence.

In these circumstances whilst fortunately we were able to finish the evidence within the allocated time, it was necessary for the Tribunal to reserve its Judgment and the parties agreed that they would provide written submissions prior to the Tribunal reconvening in chambers.

We should also add that we had before us a document headed "Draft list of questions". It transpired that this document had been prepared by the claimant. Over seven pages the claimant had prepared some 78 questions, but it was unclear who these were to be directed at. She had then raised a further 17 questions about documents allegedly not being disclosed. We asked the claimant why she had prepared this document and what its intended purpose was. The claimant told us that she believed this was what was meant by written representations. She had apparently had a conversation with a member of the Tribunal's administrative staff who, according to the claimant, had told her that written representations meant questions. We are fairly sure that this is not what the claimant was told. We explained to the claimant that if this list was to assist her in cross-examining the respondent witnesses that was fine, subject to the questions being relevant. However, if the claimant thought that these were questions which the Tribunal would in an inquisitorial fashion ask the respondents' witnesses, that was not the case. The matter

was left on that basis but as far as we could deduce the claimant did not ask all the questions from her list. That is a matter for her.

6. The Tribunal's findings of fact

6.1. The first respondent operates Bole Hill Nursery in Sheffield. It also provides a pre-school facility as part of its operation.

6.2. The claimant commenced employment with the first respondent on 24 February 2010 as a nursery assistant, although the first respondent describes her as nursery nurse bank staff. The claimant worked approximately 15 hours per week and provided cover during lunchtimes. At the material time the claimant was working in the preschool room, which the first respondent calls Snowdrops. The nursery is referred to as Stardust.

6.3. On 27 February 2019 there was an altercation between the claimant and one of her colleagues, Shannon Leggitt. We have not heard from Ms Leggitt.

6.4. The claimant's evidence is that the altercation arose because the claimant challenged Ms Leggitt about the way in which Ms Leggitt had allegedly treated Child A. At the material time Child A, along with other children, was in the outside play area and the claimant was in charge of Child A who has special educational needs. At the end of playtime, Child A was reluctant to leave the slide on which she had been playing. The claimant was trying to coax her to line up with the other children to go back inside. The claimant believed that because of Child A's special needs she did not like to be touched. Child A continued to be reluctant to leave the slide and the claimant says that it was in those circumstances that Ms Leggitt came over to the slide and according to what the claimant has set out in her witness statement "*barged over and grabbed Child A in a very angry frustrated manner and put her down rather abruptly in line with the other children*."

6.5. The claimant and Ms Leggitt began an argument as to who was supposed to be looking after Child A and who was going to take her cardigan inside. In the meantime, Child A ran back to the slide. The claimant's evidence is that this led to Ms Leggitt going over to retrieve Child A - in the claimant's words "*grabbing her but this time even worse than before*" placing her back in the line and shouting at Child A that she needed to line up. There was no further interaction between Ms Leggitt and Child A, but the argument between the claimant and Ms Leggitt continued and apparently intensified. The claimant refers to Ms Leggitt continuing to shout at her once they had gone back inside the nursery. The claimant was reduced to tears.

6.6. Shortly afterwards Ms Leggitt went to see Suzannah Lewis the deputy manager and there is a note of the discussion between those two at pages 116A to 116B. Ms Leggitt gave her account of what had just happened and said that the claimant had got right in her face whilst she

was trying to count the children. She had also pushed Child A's coat or cardigan towards Ms Leggitt saying "You can have this seeing as you have taken over". Ms Lewis reported that Ms Leggitt had come to her office very upset. Ms Lewis suggested that there should be a meeting between Ms Leggitt, the claimant and Ms Lewis, presumably so that they could sort out their differences in that way.

6.7. On the following day, 28 February 2019 the claimant was signed off sick. In the event she would never return to work. The fit note issued to her (page 154) explained that she had been signed off as not fit to work because of work stress.

6.8. Also on 28 February 2019 there was a telephone conversation between the claimant and Ms Moore. It is unclear who telephoned whom. The claimant's witness statement suggests she rang Ms Moore but the note which the claimant made at page 120 refers to Ms Moore ringing her. The claimant says that it was during this telephone conversation that she made her first protected disclosure to the respondent about Ms Leggitt's mistreatment of Child A on the preceding day.

6.9. Ms Moore does not deal with this telephone conversation in her brief witness statement, but we were taken to a note which Ms Moore made on 28 February 2019 which is at page 116b where she refers to speaking on the phone to the claimant when the claimant said that she needed to talk to her but was too upset at present. Ms Moore asked the claimant to ring her on the following Monday (6 March) to arrange a meeting. In a further note on the same page, which Ms Moore told us she made a few days after 28 February, the following is recorded: *"As Deborah had raised concerns regards Shannon and her approach with the children I asked Laura* (Laura Ball an early year's teacher*) to observe Shannon over the next few days. Laura came back to me with no concerns about Shannon's practice."*

6.10. There was a further telephone conversation between the claimant and Ms Moore on 5 March 2019. Again, Ms Moore does not deal with this in her witness statement. The claimant has referred us to a note in what appears to be an ongoing journal that she was keeping. At page 120 in the bundle there is a note that the claimant rang Ms Moore. Ms Moore was unavailable but subsequently rang the claimant back. The claimant's own note records her saying to Ms Moore "*I said I'll probably have to move room* (e.g cease to work in Snowdrops*) she (*Ms Moore*) said not necessarily."* Within these proceedings and as **detriment a.** the claimant says that she was required to move from her usual place of work. In the event that did not happen because the claimant never returned to work.

6.11. A meeting duly took place between the claimant and Ms Moore on 6 March 2019. The claimant's note of this meeting is at page 120. The claimant gave Ms Moore what she described as "*my notes*". This is the handwritten set of notes at pages 117 to 119, which includes the claimant's account of 27 February 2019 but also addresses other concerns which the claimant apparently had about safety issues. There

are few dates but there is an entry for January 2019 which reads "*Today Shannon left the children unattended in the toilets upstairs whilst she went in the kitchen next door."* Ms Moore agrees that these notes were given to her by the claimant on 6 March 2019. The claimant's note of the 6 March meeting also includes the following:

"She (Ms Moore*) told me that she will move me out of Snowdrops but may move me back in the future if I feel up to it."*

The claimant requested Ms Moore to view the CCTV footage dating from 27 February as the claimant was "really concerned about Shannon mistreating a child".

6.12. Ms Moore's brief note of this meeting is at page 114. It begins:

"Deborah Greaves came to see me in regard to her upset with a member of the team which has led to her being so very upset and now has been signed off work for a week. We discussed the situation and I said that I would look into this further and we would meet again when she returns to work. I agreed that I would move her out of pre-school and into the other room for her shifts."

As noted above, the claimant contends that she made or reiterated a protected disclosure during the course of this meeting.

6.13. After meeting with the claimant on 6 March, Ms Moore conducted an informal meeting with members of staff and her notes about that are on pages 114 through to 116. The questions put to members of staff were primarily about the relationship between the claimant and Ms Leggitt. One member of staff opined that they were both as bad as each other. They didn't get on and neither of them was able to communicate with the other. The problem may have started with a disagreement over setting out tables.

6.14. A member of staff referred to only as Natalie was asked about what she had seen on 27 February 2019. She had not seen what happened outside but reported that when back in the room both the claimant and Ms Leggitt had been upset.

6.15. Ms Leggitt was then interviewed. It is not clear whether that was a formal interview in the absence of the other members of staff. The notes are at page 115. Ms Moore is recorded as saying that she explained to Ms Leggitt that the claimant had raised some concerns about her. Ms Leggitt accepted that she and the claimant did not like each other although she tried to get on with the claimant. Ms Leggitt was asked about "the toilet situation" and she accepted that the claimant's account was correct. She was then asked about the incident on 27 February 2019. She accepted that the claimant and herself had fallen out and said that Deborah had "got in her face" several times. Ms Moore's brief note of that interview/discussion ends with the following:

"We discussed the situation and I explained that both sides were at fault and that this is unacceptable. We agreed that once Deborah is back we would discuss this further and tried to move on."

Accordingly, there is no record of Ms Leggitt being asked about the incident with Child A, but only about the aftermath. However, although Ms Moore's witness statement gives no detail about any investigation that she carried out, paragraph 14 of her witness statement reads "Also, my investigation on (p114 to 115) *(in other words the notes which we have just been referring to*) found no evidence of safeguarding concerns."

6.16. On 8 March 2019 the claimant made an anonymous approach to the Ofsted helpline expressing her concerns about what she believed had happened on 27 February with Child A. The claimant did not give the name of the nursery.

6.17. On 11 March 2019 Ms Moore saw Ms Leggitt to give her a verbal warning about the incident of children being left alone in the toilet area. The note is at page 125A and is brief. It includes the following: *"Shannon admitted this had happened and that she had stepped out of the area for a short time and she knew she was wrong. We discussed this and due to the severity of the situation she was given a verbal warning."*

The claimant would subsequently be informed by Ms Lewis that Ms Leggitt had been "disciplined" and this is something which we will return to.

6.18. Although, as we have noted, Ms Moore's witness statement refers very briefly to her investigations and her conclusion that no evidence of safeguarding concerns existed, she does not in her witness statement refer to the fact that Ms Leggitt was given a verbal warning, albeit for an earlier incident. Ms Moore does say in her witness statement that she reviewed the CCTV footage for 27 February but found that no incident involving Child A was recorded. She explained that the camera did not point in the direction of the area of the playground where the incident had allegedly occurred.

6.19. On 12 March 2019 the claimant phoned Ms Moore. She told her of the anonymous approach to Ofsted. The claimant contends that during that telephone conversation Ms Moore told her that people had raised issues about her. The claimant says that she felt that this was a "throwback comment to hurt me" and that Ms Moore did not give any details and nothing about this had been raised before she had made her alleged disclosure. Ms Moore deals with this partially in paragraph 9 of her witness statement, whilst not really giving any detail as to whether or not there was a telephone conversation. She seems to accept that she may have said this to the claimant and that it arose because of what staff members had said in the investigation which Ms Moore had carried on 6 March. In her statement Ms Moore says that informing the claimant of those matters was not a detriment. No formal complaint had been raised against her by the other members of staff, but it was something which came to light during her investigation - that staff said that the claimant was difficult to work with. As far as the claimant is concerned this is a detriment, it is **detriment b.**

6.20. On 18 March 2019 the claimant wrote a letter to the second respondent, Mr Bevis and Ms Moore. A copy is at page 127 to 129. The claimant begins the letter by saying that having made an informal complaint on 28 February 2019 she now wanted to make a formal complaint. She reiterated the alleged conduct of Ms Leggitt towards Child A on 27 February. She also reiterated her request that the CCTV footage be reviewed and she said that she had contacted Ofsted's advice line. She said that she was not satisfied with the action that had been taken following her informal complaint and was therefore requesting that the matter was dealt with formally in accordance with the first respondent's safeguarding complaints procedure (When giving evidence the claimant said that she in fact meant the whistleblowing procedure). The claimant went on to say that she believed that she was being victimised by Ms Leggitt and felt that she was disliked by the Snowdrop staff because she was left out of group chats. She concluded:

"I would like to add that it is really difficult becoming a whistle blower and I have been struggling with guilt that I have left children at risk of this happening again whilst I am off".

As we have noted, this letter is said by the claimant to be her third protected disclosure.

6.21. Ms Lewis, deputy manager, acknowledged this letter. We have not heard from Ms Lewis. Her letter is at page 130. It is dated 18 March 2019, but as the claimant's earlier letter had been posted, Ms Lewis' letter must have been written on a later date than 18 March. The letter says that:

"We are taking the matter extremely seriously. Shannon Leggitt has been disciplined. However no further comments will be made on this particular matter.

We are of a mind that on your return you and Shannon will be brought together in the presence of the nursery manager to review your differences."

Failing that there would be a formal meeting, or the matter might be referred to Mr Bevis for his decision.

6.22. We find that the reference in Ms Lewis' letter to Ms Leggitt having been disciplined would be likely to lead the claimant to believe that Ms Leggitt had been disciplined with regard to the 27 February incident. However, having seen the note of the verbal warning at page 125a, it is clear that this was only in relation to the toilet area incident. As the claimant had also raised other complaints about Ms Leggitt, including her falling asleep on a coach on the way back from a nursery school outing, the vagueness of Ms Lewis' letter becomes obvious.

6.23. On 25 March 2019 the claimant formally approached Ofsted. The claimant has referred us to pages 138 and 138(a) in the bundle in this regard. These are two emails from the claimant to a Chloe Bradbury who the claimant said was a member of staff of Ofsted. The first email

refers to the claimant enclosing "photographs of the letter that I sent to the executive director Tony Bevis and manager Nicola Moore". That the claimant told us was a photograph of her 18 March letter. We are not entirely sure that we have seen the whole of the claimant's correspondence with Ofsted, although we have also read the letters/emails at p139 and 142. As we have noted the claimant contends that this was the fourth protected disclosure which she made.

6.24. On 24 April 2019 Mr Bevis wrote to the claimant (page 167). He informed the claimant that he had received an email from Ofsted who had told him that the claimant had raised an issue with Ofsted about a child with injuries that could have been caused by cigarette burns. Mr Bevis went on to ask the claimant to provide details as to the name of the child, the date and whether or not a report had been made.

Mr Bevis went on to write that he took the allegation very seriously because the claimant alleged gross misconduct on the respondent's behalf "*and a section 18 assault by the perpetrator of this act which if proven can carry a stiff prison sentence*". Mr Bevis expressed the view that he was amazed that the claimant had reported that to Ofsted but children services had apparently not been contacted at the time.

6.25. The cigarette burn issue had not been raised by the claimant in any of her alleged protected disclosures to the respondent. It is however one of the matters which, during a series of emails, the claimant did mention to Ofsted. We should add that there is no suggestion whatsoever that Ms Leggitt was in any way responsible for any cigarette burns and we understand that eventually it was discovered that the child in question suffered from eczema and that what the claimant had thought might have been cigarette burns was in fact an eczema rash or scars. The incident had also apparently occurred a number of years ago, possibly as long ago as 2016.

6.26. The claimant replied to this letter on 25 April 2019 (pages 168 to 172). She provided further information about the cigarette burn issue but she could not remember the name of the child. However, the claimant said that she had reported it at the time to Ms Moore. The claimant also mentioned in this letter that she understood that Mr Bevis had given an instruction to the nursery that they were not to have contact with the claimant. The claimant said that she was awaiting a response from Ms Moore with regard to her sick pay. She went on to say that having spoken to ACAS she had been advised that an SSP form should have been sent to her within seven days of her first day of absence, that is a form explaining why she was apparently not entitled to sick pay. That would have enabled the claimant to make a claim for ESA. At the end of her lengthy letter the claimant again referred to the question of CCTV footage. The second respondent failed to reply to this letter and the claimant says that this too was a detriment. It is **detriment d.**

6.27. On 30 April 2019 Ms Moore prepared a document which is headed "Findings from Concerns raised by Deborah Greaves on 28/03/2019". We assume that should refer to 28 February. Ms Moore deals with this

very briefly in paragraph 13 of her witness statement, where she refers to this document (at pages 180 to 182) as her findings "which summarises my investigation of the claimant's complaints". There are in fact two documents. The one at page 180 to 181 is Ms Moore's document because her name appears at the end of it, but the document on pages 182 to 183 has some duplication of the earlier document but also further bullet points and as on page 183 it concludes "yours sincerely, Antony Bevis", we assume this is Mr Bevis' document. It is undated. Mr Bevis does not refer to the 182 to 183 documents in his witness statement. When the Employment Judge asked him about this he seemed unsure. The Judge suggested that as the document ended "yours sincerely" it was presumably a letter to somebody, but page 182 did not look like the beginning of a letter and it appeared to the Judge that a page or more might be missing. Mr Bevis thought that it was probably his response to Ofsted. However, in the answer he gave immediately prior to that Mr Bevis said that they had not been able to

find the letter they had sent to Ofsted despite having looked high and low.

6.28. The only document which the respondent has been able to disclose from Ofsted appears at page 184 to 185 which is a letter from Danielle Maffia Regulatory Professional at Ofsted to the second respondent dated 2 May 2019. It refers to "our recent contact" but does not refer to any specific correspondence from the respondent to Ofsted. The concerns which the claimant had raised including the concerns about Ms Leggitt and Child A are referred to together with an allegation that "Evie" had grabbed a child on her arm. There is also a reference to the cigarette burn issue. The letter goes on:

"You have already provided a response to each concern raised therefore no further information is needed at this stage. This letter is being sent for record purposes only, unless you feel further internal action is required."

The second respondent is advised that the first respondent needs to keep a record of the action that has been taken in response to those concerns and that this would be reviewed when Ofsted carried out their next inspection. It follows that although there is a reference to the respondent having provided a response no date is given.

6.29. We should add that in the letter/document of Mr Bevis which is apparently a response to Ofsted, at page 183 Mr Bevis concludes with the following:

"*The complainant likes to think of herself as a "whistle blower" and this is to be encouraged by staff who think a wrong has been overlooked. However, in this case the allegations do not bear flesh as to names, dates, locations etc and are in my opinion spurious, designed to gain approval by agencies other than ourselves. They also bring disrepute on those whistle blowers who have a genuine reason to bring that which is wrong to light. I ask myself what more allegations Ms Greaves will make in her endeavours to gain notoriety in this matter."*

6.30. The claimant has, whilst working for the first respondent, had a second job with an organisation known as Reach Out Childcare. The claimant would work on Saturday mornings although not every Saturday morning for that organisation. Ms Atkinson from whom we have heard is the business manager for Reach Out Childcare.

6.31. On 8 May 2019 Mr Bevis contacted Reach Out Childcare and left a message for the claimant to contact him by email. Mr Bevis did not deal with this in his witness statement, although he does refer to a subsequent phone call which he made to Reach Out Childcare. Had Mr Bevis wanted to speak to the claimant or ask her to contact him, he obviously had her contact details as Chief Executive of the claimant's first employer. Mr Bevis when questioned by the Employment Judge could not provide an answer to the question why he had felt the need to approach or try to approach the claimant via her second employer. The Judge suggested to Mr Bevis that one explanation could be that, suspecting that the claimant may be working for the second employer whilst being signed off sick, this was an attempt to trap the claimant

and/or to get her into trouble with her second employer. The only explanation which Mr Bevis could offer was that he was concerned that there could be a risk to the children at Reach Out Childcare if the claimant was looking after them at a time when she was unfit for work. Whilst that might explain why Mr Bevis subsequently contacted Reach Out Childcare direct it does not explain his approach on 8 May 2019. The claimant contends that this was a further detriment - **detriment e.**

6.32. On 16 May 2019 the claimant wrote by email to Mr Bevis and a copy is at page 191. She enquired whether Ms Moore would provide a reference for her for another pre-school who would be contacting Ms Moore. The claimant said that she understood that she could not ask Ms Moore directly because she would not be able to reply. The claimant also added that she hoped she would not be penalised because of whistle blowing. The claimant received no reply to that email and she says that this too is a detriment (**detriment h).** Mr Bevis contends in his witness statement that he did not receive this request (see paragraph 10). When asked about this request by the Employment Judge, Mr Bevis initially confirmed that he had not got it although he accepted that it had been sent to the correct email address. However, he then went on to say that he got a lot of emails including a lot of emails from the claimant herself and so it could either have been overlooked or at least not read. He suggested that it being overlooked and not read was the same thing as not getting it at all.

6.33. On 16 May 2019 Mr Bevis wrote to the claimant's GP direct. A copy of that letter is at page 193. Mr Bevis refers to the fit notes which had been issued. Mr Bevis went on to write that:

"As her employer at Bole Hill Nursery where she works for some two hours a day covering lunchtimes I am concerned that she is still working in childcare. I understand that she is also employed at Reach Out Childcare in Sheffield where she works Saturday in the Saturday club".

Mr Bevis explained that he had ascertained that the claimant had been working at Reach Out Childcare "*when according to your certificate she should be off through work stress."*

The letter goes on to say that the claimant was in the process of claiming statutory sick pay "as she states she is employed". It transpires that Mr Bevis erroneously thought that statutory sick pay could only be claimed by people who were unemployed. It seems therefore that whilst he was aware that the claimant was in the process of trying to get statutory sick pay, she had not told him, or anybody else, that that was because she was unemployed. Mr Bevis concluded his letter to the GP in these terms: *"I am sending you this letter for your information as there appears to be a misrepresentation of the truth."*

6.34. The claimant says that she was unaware that Mr Bevis had written this letter to her doctor until she went to see her doctor on 3 June 2019 and he gave her a copy. The claimant describes this as both a detriment (**detriment o)** and as the last straw in the context of her resignation.

6.35. On 20 May 2019 Mr Bevis wrote to the claimant to invite her for "an informal chat about the complaints you have made". The date offered was 24 May and the claimant was told that she could bring a friend who had to be a member of staff. (Page 196).

6.36. On 16 May, Mr Bevis had also telephoned Reach Out Childcare. The evidence of Mr Bevis is that he did this out of a duty of care which as an employer he was bound to have for all employees. Because the fit notes which had been issued to that date simply said that the claimant was not fit for work, when Mr Bevis learnt that the claimant was continuing to work for her other employer he was quite concerned. He says it had nothing to do with her making a protected disclosure. Miss Atkinson's evidence was that Mr Bevis enquired whether the claimant had worked for Reach Out on a Saturday recently and Miss Atkinson confirmed that she had but could not give precise dates. Mr Bevis told her that he had left a telephone message previously for the claimant to call him and he had concluded, he told her, that because she had called him she must have been in work to get the message. However, Miss Atkinson explained that messages received at work were passed on to staff by email or text if they were not in work when the message was received. Miss Atkinson goes on to say that Mr Bevis informed her that he was a governor at Bole Hill Nursery and that the claimant had been off work sick and was Miss Atkinson aware of that. Miss Atkinson told Mr Bevis that she could not comment. Ms Atkinson told the claimant about Mr Bevis' phone call when the claimant came in to deliver some cakes on 20 May 2019. The claimant contends that this further contact with her second employer was a detriment – **detriment j.**

6.37. The first fit note that the doctor issued after receipt of Mr Bevis' letter made a distinction between the claimant's fitness or unfitness to work for the first respondent as opposed to her second employer. A copy is at page 160. The relevant part reads:

"You may be fit for work taking account of the following advice … relating to Bole Hill Nursery only, able to work for Reach Out Childcare." Up to that time, the fit notes had simply advised that the claimant was not fit for work.

6.38. On 18 April 2019 the claimant had sent an email about Ms Moore asking her to confirm that the sick notes which she had previously provided had been sent to the first respondent's accountants. It appears that the first respondent was relying upon advice from the accountants as to whether or not the claimant was entitled to statutory sick pay. On the same date Ms Moore wrote to the claimant saying that the sick notes had been sent to the accountants and she understood the accountants would be back to work on the Wednesday and she had emailed them to check the claimant's entitlement. The claimant sent a follow up on 24 April 2019 (pages 165). The claimant said that when the accountants worked out her entitlement they should ensure that they were using full weeks rather than over the Christmas period. The claimant had no reply to that email and she says that that was a further detriment **(detriment f**). Ms Moore's evidence was that she had received the 24 April email but did not respond to it personally because

Mr Bevis had asked her to forward the claimant's future correspondence to him. Mr Bevis' evidence was that Ms Moore was being inundated with emails from the claimant at around this time, to such an extent that she could not do her own job. That was why he asked Ms Moore to forward the claimant's correspondence to him. He says that he did ask the accountants to respond to the claimant's request for statutory sick pay but says that there was a 'glitch' or problem at the accountant's end which caused the delay. The claimant has sought disclosure of the respondent's correspondence with the accountant but no documentation had been disclosed. Mr Bevis when cross-examined on this said that he did not know why, but those papers were not on the file.

6.39. The form which the claimant was waiting for was an SSP1, applicable where an employee is not entitled to statutory sick pay and a document which is necessary before a benefits claim can be progressed. The claimant received the SSP1 (at page 173) on 27 April 2019.

6.40. The meeting between the claimant, Mr Bevis and Ms Moore (the informal chat) duly took place on 24 May 2019. The claimant attended with her husband rather than a friend, but the respondent permitted this. The respondent says that no notes were taken of this meeting, although the claimant's evidence and that of her husband is that Ms Moore was taking notes. The claimant did take notes and they are at page 436. The claimant accepts that what we have is a 'neat' version which the claimant says she wrote up that evening. The claimant says that the first thing that was raised was her second employer. She believed that the purpose of the informal chat was to discuss her complaints. However, Mr Bevis pursued the second employer issue and told the claimant that he had been in telephone contact with them. The claimant raised the CCTV issue again and reiterated what her concerns were

about Ms Leggitt and Child A on 27 February. Mr Bevis then raised the issue of the allegation to Ofsted about a child having cigarette burns. The claimant noted that Mr Bevis was interrogating her about this. The claimant also records that at one-point Mr Bevis leant over the desk in what she describes as an abrupt manner and said to her "*I'm saying this to you now as an ex-police officer"* and went on to inform the claimant that because she could not remember the child's name or the date of the cigarette burn issue he was treating that complaint as malicious.

6.41. Mr Greaves' recollection of the 24 May meeting is that Mr Bevis' main interest had been his wife's second employment and that he became increasingly loud and aggressive during the meeting. Mr Greaves recollected that Mr Bevis had banged on the desk before making the reference to being an ex-police officer. He describes Mr Bevis' questioning as aggressive and that he accused the claimant of being malicious.

6.42. Curiously Ms Moore does not deal with this important meeting at all in her witness statement. When asked about this during crossexamination Ms Moore accepted that Mr Bevis had described himself as an ex-police officer but she understand that to be because he was

taking matters seriously. In any event she did not recollect him leaning over. She said he was not aggressive but "he comes across loud". She did not remember the desk being banged. Nor did she remember Mr Greaves saying to his wife, after the ex-police officer comment, that she should write that down. She did accept however that she (Ms Moore) was shocked because Mr Bevis' line of questioning was, as she described, it quite firm. She could not remember Mr Bevis' face being red. She felt that he may have repeated his questions as he was not getting the answer he was looking for. However, he had not been aggressive he was just what he described as 'old school'. She did not remember Mr Bevis describing the claimant as malicious. She understood the purpose of the meeting as being so that they could get a better understand of the cigarette burns allegation.

6.43. The claimant says that Mr Bevis' conduct towards her during this meeting was a further detriment (**detriment l)** and that Mr Bevis' subsequent denial that minutes had been taken at that meeting was also a detriment (**detriment m).**

6.44. Mr Bevis denies that he bullied and intimidated the claimant at this meeting. He accepted that he had asked the claimant some questions about the content of her complaint to Ofsted and in particular the cigarette burns issue. He said that he questioned her about that allegation because it was serious and if true warranted a full inquiry because that would have been what he described as a section 18 assault on the child. However, the claimant could not give the name of the child or any other details. When asked during the claimant's crossexamination of Mr Bevis to comment on her account of his behaviour in that meeting Mr Bevis said, "What a load of rubbish". He

denied standing up and banging on the desk and believed his face had not gone red.

6.45. On 27 May 2019 Mr Bevis wrote to the claimant (pages 206 to 207) requesting the claimant to give consent for the respondent to approach her doctor for a full medical report. During cross-examination Mr Bevis told us that he understood that such a request had to be made before an employee was dismissed. The claimant says that this letter was a further detriment (**detriment n**). In paragraph 24 of her witness statement she says that she felt that it was unfair because the respondent was aware of all the circumstances and had seen how upset the claimant had become at the 24 May meeting. As she was not getting SSP and was on what she described as a zero hours contract, she believed that her absence was not affecting the first respondent's staffing needs.

6.46. On 7 August 2019, as we have noted, the claimant presented her first claim to the Employment Tribunal.

6.47. On 12 August 2019 the claimant raised a formal grievance with the respondent and a copy is at page 229. The claimant referred to the 27 February incident and charted the history as she saw it from there onwards. She referred to the CCTV footage issue, the statutory sick pay issue and Mr Bevis' contact with her GP and second employer. She also referred to the 24 May meeting.

6.48. It appears that the first respondent did not acknowledge receipt of the grievance until it wrote to the claimant on 27 August 2019 (page 231). The claimant says that the failure to promptly to respond by acknowledging her grievance is a further detriment **(detriment q).**

6.49. In the meantime, on 21 August 2019 the claimant resigned (page 230). This is a brief letter. The claimant wrote that she felt that she was left with no choice but to resign in the light of her recent experiences regarding a number of issues which had occurred since she had raised concerns by way of whistle blowing. She summarised the unfair treatment as including discrimination on the issue of health, detriment as a result of protected disclosures, injury to feelings, harassment and bullying under the Equality Act, loss of earnings, defamation and data protection breach. She described resigning after nine years employment as being a huge step and one which she had not taken lightly. She felt that she had always acted in the best interests of Bole Hill Nursery and the safeguarding of children.

6.50. The claimant commenced new employment on the following day, 22 August 2019 with an optician's firm. She had had the successful interview for that job on 21 August.

6.51. The claimant told us that she would have resigned once she learnt on 3 June 2019, of the content of Mr Bevis' letter to her GP. However, advice which she received from a solicitor under her legal expenses insurance policy was apparently that because two weeks had elapsed since she became aware of the letter to the GP it would be difficult to prove

constructive dismissal. Clearly if that was the advice which the claimant received, it was erroneous. In any event the claimant was anxious to obtain new employment before resigning from her employment with the first respondent.

7. The parties' submissions

7.1. Claimant's submissions

We received a document from the claimant on 11 November 2020 which she describes as a summary. Essentially the claimant re-states her case, more or less as it has been put before us within the claim and the hearing. She adds some comments about questions asked and answers given during the course of the hearing.

On page 7 of the summary the claimant refers to her job description and hours worked leading to her comment that she could have been given a contract for a set number of hours and then worked more hours when required. We note that this suggestion is not and never has been part of the claimant's claim before the Tribunal.

7.2. Respondent's submissions

We received the respondent's closing submissions on the morning of our Reserved Judgment meeting. Much is said about the alleged affirmation of any fundamental breach of the contract of employment.

In terms of protected disclosures, the submissions concede that the claimant had made qualifying public interest disclosures in relation to the Child A issue on 28 February 2019, 6 March 2019, in the letter of 18 March 2019 and when making an anonymous approach to Ofsted. However, the respondent did not concede that the claimant's formal approach to Ofsted on 27 March 2019 (page 142), in so far as it related to the disclosure of alleged cigarette burns on a child, was a protected disclosure. That was because the respondent contended that the claimant had no reasonable belief in its truth.

8. The Tribunal's conclusions

8.1. What qualifying protected disclosures did the claimant make?

As we have noted, the respondents concede that the disclosures which the claimant relies upon were qualifying protected disclosures apart from the disclosure to Ofsted on 27 March 2019.

It appears that the claimant made her disclosure to Ofsted incrementally. At page 138 in the bundle we have a copy of her email of 25 March in which the claimant provides to Ofsted a copy of her 18 March 2019 disclosure to the respondents, which is about the Child A incident on 27 February 2019. The further email on page 138(a) also seems to be about the Child A issue. On 26 March 2019 the claimant sent a further email to Ofsted (page 139) and this refers to various other alleged health and safety shortcomings, including there being two toys which were broken and so unsafe.

On 27 March 2019 the claimant sent a further email to Ofsted (page 142). Here she refers to an incident "a few years ago" where the claimant had observed what she believed to be cigarette burns on a child's torso. The claimant says that at the time she reported it to a senior, but the following day she was sufficiently concerned to have also reported it to Ms Moore. The claimant felt that she had done all that was required of her as the procedure at the time only required her to report it to a senior and she had gone further than that. The claimant told Ofsted that thereafter she had heard nothing further, although she hoped that it had been investigated but had doubts that it was. Within the same email the claimant returns to the Child A issue.

The relevant law

We remind ourselves of the definition of a qualifying protected disclosure which is set out in the Employment Rights Act 1996 in Part IVA. Section 43B provides that the worker making the disclosure must have a reasonable belief that what they are disclosing tends to show the relevant matter – in this case that the health or safety of any individual has been, is being or is likely to be endangered.

Whilst normally a disclosure would be made in the first instance to the employer, it is permissible for the worker to make the disclosure to a "prescribed person" (see section 43F). Her Majesty's Chief Inspector of Education, Children's Services and Skills (Ofsted) is within the list of prescribed persons (Public Interest Disclosure (Prescribed Persons) Order 2014). Section 43F applies additional conditions for a qualifying disclosure which is made under that section. That includes the requirement that the worker has a reasonable belief that the information disclosed and any allegations contained in it are substantially true.

It is clear from Mr Bevis' letter to the claimant of 24 April 2019 (page 167) that the respondents became aware on 1 April 2019 that the claimant had contacted Ofsted, including the matter of the cigarette burns. We understand that the respondents' case, that the claimant did not have reasonable belief in the truth of that disclosure, is that, as expressed in the 24 April letter (p167), Mr Bevis was "amazed" that the claimant had reported it to Ofsted but that Children's Services had not been contacted immediately. The respondents would also, in due course when the claimant provided further information to them, be concerned that the incident had happened allegedly some years prior and that the claimant could not give a precise date and could not remember the name of the child.

However, we bear in mind the account that the claimant gave to Ofsted – that she had approached a senior and then she believed had gone beyond her duty by reporting the matter as well to the nursery manager Ms Moore. We accept that in those circumstances and hoping that the matter would then be dealt with appropriately, over the years the claimant's precise recollections would have faded. It is perhaps also significant that as far as we are aware the claimant was never given any feedback about this cigarette burn issue nor any indication as to how

the matter had been resolved. We understand that the resolution may have been that on further enquiry what the claimant had thought could have been cigarette burns or the scars thereof were in fact scars because of eczema. We bear in mind however that it is not necessary for the information disclosed to be actually true, as long as the worker reasonably believes that it is substantially true. As of the date when the claimant made this disclosure to Ofsted, no one had told her that matters had apparently not proceeded because the explanation was eczema.

Accordingly, in these circumstances we find that the claimant's disclosure to Ofsted in March 2019 and specifically on 27 March 2019 did amount to a qualifying protected disclosure.

8.2. Was the claimant subjected to detriments by the respondents done on the ground that she had made these protected disclosures?

In dealing with this issue we need to determine in respect of each of the 17 alleged detriments whether, on the balance of probabilities the detriment occurred (save for those matters where it is common ground they did). We then need to determine the question of causation - were they done because of the disclosures?

We instruct ourselves that on the causation issue the burden of proof shifts to the respondent. That is because of the provision in section 48(2) Employment Rights Act 1996 which provides:

"*On a complaint under (*section 47B*) it is for the employer to show the grounds on which any act, or deliberate failure to act, was done."*

Below we use the lettering a., b. etc to identify the detriments as they are set out in the list of issues within the Order of 4 February 2020.

Detriment a. The alleged requirement for the claimant to move rooms – from pre-school (Snowdrops) to nursery (Stardust).

We find on the balance of probability that it was mutually accepted between Ms Moore and the claimant that, at least in the short term, it would not be advisable for the claimant and Ms Leggitt to work together. Having regard to the claimant's note at page 120, it seems that the claimant first raised that issue on 5 May 2019 indicating that she would probably have to move rooms, although the following day she was told by Ms Moore that that would happen. In these circumstances we consider that this was simply a proposed pragmatic arrangement and was to a greater extent consensual. In the circumstances the claimant never returned to work, so never had to work in a different location. We accept that the claimant being notionally entered on a rota for Stardust was just done for administrative convenience and, as noted above was academic because the claimant never returned to work.

Detriment b. Ms Moore informing the claimant during a telephone conversation on 12 March 2019 that colleagues had made complaints against her.

We find that colleagues had made complaints about the claimant's behaviour. In fact Ms Leggitt complained about the claimant's alleged behaviour towards her on 27 February 2019 before the claimant had the opportunity to complain about Ms Leggitt's alleged behaviour towards her. We accept that some colleagues thought that Ms Leggitt and the claimant were as bad as each other. However, it is also clear that one of the employees informally interviewed on 6 March 2019 had been critical of the claimant, saying that she was hard to talk to because she would not accept any kind of criticism or help. Whilst it could be a detriment to be informed that colleagues had concerns about you, even if that were true, which it was here, we do not accept that Ms Moore informing the claimant of that was done because the claimant had made the 28 February and 6 March disclosures. Instead it was done because in addition to the Child A issue Ms Moore had to deal with the poor working relationship between two of her staff and this had come to a head on 27 February 2019.

Detriment c. Allegedly the respondent not taking the claimant's concerns about Child A seriously, including failing to look at the CCTV footage, delegating the investigation to a deputy manager and concentrating on the inter-relationship between employees rather than the Child A issue.

We find that Ms Moore's investigation of the Child A issue was cursory and poorly documented. The only interviews conducted appear to have been the informal interviews undertaken on 6 March 2019 which are briefly noted at pages 114 to 116. Those notes indicate that the focus of the enquiry was more about the relationship between the claimant and Ms Leggitt than what had allegedly happened with Child A. One member of staff is recorded being asked about what had happened on 27 February and said that she had not witnessed "the event", but only its aftermath – that the claimant and Ms Leggitt had been upset. It is hard to ascertain what questions were asked of Ms Leggitt when she was interviewed on 6 March (page 115). It is unclear whether the allegation that Ms Leggitt had "manhandled" Child A and/or shouted at Child A was specifically put to Ms Leggitt. The only comment recorded from Ms Leggitt about the incident was "they had fallen out and that Deborah had got in her face several times." Having regard to Ms Moore's note on page 116, it seems that there was no intention to take any further steps with regard to the Child A, issue but that the troubled relationship between the claimant and Ms Leggitt would be discussed further when the claimant returned to work – which of course she never did. We should add that Ms Moore told us that others she spoke to about the 27 February incident reported that they had not seen Ms Leggitt, or for that matter the claimant, interacting with Child A. however unfortunately statements from persons who did not see anything were not recorded.

It is also unclear what happened about the CCTV footage. In
Ms Moore's witness statement at paragraph 10 she says that she did review the CCTV footage but the incident was not recorded. Within that

paragraph there is a reference to a page within the bundle (page 280) which is part of a document described as a Case Report or consultant report by a Mr M Silvey. Mr Silvey is from an organisation known as Face2Face, which we understand to be part of Peninsula. We understand that the claimant's grievance process was effectively re-run in November 2019, via Face2Face. As that post-dates the claimant's resignation we have not been concerned directly with those matters. However, we note that in paragraph 16 of that report there is a reference to Ms Moore having reviewed the CCTV footage on 13 March 2019 and that she had not seen the incident. It was believed that the camera did not cover the area in which the alleged incident took place. Subsequently the CCTV footage was overwritten. We comment that it would have been helpful if Ms Moore could have actually set this out within her witness statement rather than by reference to part of another document created in a period with which we are not dealing.

With regard to the allegation that the investigation was delegated to a deputy manager, we understand that to be a reference to Suzannah Lewis' involvement in the matter. As we understand it that was limited to writing the letter to the claimant (page 130) in which the claimant was informed that Shannon Leggitt had been disciplined. We are satisfied that that does not indicate the matter being delegated to a deputy manager, which Ms Lewis was, but simply that it fell to Ms Lewis to write that letter because Ms Moore was unavailable on the day in question. We are satisfied that the investigation, such as it was, was conducted by Ms Moore, the manager.

We find that there was a detriment. The claimant was not given a full or satisfactory explanation of how her allegation about Ms Leggitt and Child A had been investigated, or what the conclusion was. As we have noted earlier, Ms Lewis' letter was misleading as it did not clarify what Ms Leggitt had been disciplined for. We now know that that was only in relation to the toilet area issue.

However, we need to go on to consider whether these shortcomings in the investigation were because of the disclosures the claimant had made. At this stage in the chronology it would have been the first two disclosures. Bearing in mind that it is for the employer to show the ground on which it acted or deliberately failed to act we find that the evidence shows that the shortcomings resulted from a lack of formality and thoroughness by reason of the first respondent being a relatively small employer with limited administrative resources rather than because the claimant had made the disclosures.

Detriment d. The second respondent failing to reply to the claimant's letter of 25 April 2019.

This letter is at page 168 in the bundle. It is in turn a reply by the claimant to Mr Bevis' letter of 24 April 2019 (page 167) which had sought further information from the claimant about the cigarette burns issue. However, the claimant's letter does go on to note that the claimant was awaiting a response from Ms Moore with regard to sick

pay, none of which had been paid to date. The claimant added that she had been told by ACAS that the appropriate SSP form should have been sent to her within seven days of her first day of sickness. At the date of writing this letter the claimant had been absent from work for some two months.

The claimant's letter also goes on to the issue of CCTV footage, with the claimant pointing out that she had raised this in her earlier letter of 18 March. The claimant had not received a reply to her request to watch the CCTV footage herself. The claimant said that she had repeatedly asked for the footage to be viewed and said that each time she had been brushed off. She concluded her letter by saying that she would be grateful for Mr Bevis' prompt reply.

Mr Bevis does not deal specifically with the issue of the claimant's letter of 25 April in his witness statement. In paragraph, 26 Mr Bevis explains that the SSP issue was transferred from Ms Moore to him to deal with and that he asked the accountant's firm they used to respond to the claimant's request "*but a problem at their end caused a delay and I never did find out what the problem was and by then it was late*." When asked about SSP during cross-examination Mr Bevis repeated that the accountants had had a glitch and he accepted that that made it a bit late for the claimant. He explained that the claimant's request for disclosure of correspondence with the accountant could not be met because that correspondence was not on file and Mr Bevis didn't know why.

It follows that the second respondent has not given any explanation why he failed to reply to the claimant's letter of 25 April 2019 and accordingly we find that the second respondent has not satisfied the burden of proof under section 48(2). Accordingly we conclude that this failure to act was because of the claimant's disclosures. In particular, and as we will mention below, we find that Mr Bevis was very annoyed that the claimant had raised the cigarette burn issue with Ofsted (her fifth disclosure, which Mr Bevis had been aware of since 1 April 2019).

Detriments i and f

Whilst dealing with the issue of statutory sick pay it is convenient to set out our conclusions in respect of alleged detriment I, which is that Mr Bevis also failed to respond to the claimant's email of 7 June 2019 and the chain of emails of which that was the culmination. The 7 June emails are on page 218. There is nothing in Mr Bevis' witness statement other than the passage we have referred to above. Nor did Mr Bevis give further evidence on this point during cross-examination. It follows that this part of the claim succeeds.

Finally, on the issue of statutory sick pay, it is also convenient to deal here with alleged detriment f, which is the allegation that prior to Mr Bevis' involvement, Ms Moore also failed to respond to correspondence from the claimant about statutory sick pay. In particular we were referred to the claimant's email to Ms Moore of 24 April 2019 (page

165). We observe that Ms Moore had written to the claimant on 18 April 2019 (also page 165) explaining to her that on receipt of the claimant's sick notes those had been copied and sent to the accountants. She went on to explain that the accountants would be back to work on Wednesday and that she had emailed them to check the claimant's entitlement to statutory sick pay. Whilst we find that Ms Moore did not reply to the claimant's subsequent email of 24 April, it is not entirely clear that the claimant's email required a reply. She simply stated that she had been signed off for a further four weeks and she asked Ms Moore to give a piece of information to the accountants. No questions were asked or queries raised. We also understand that Ms Moore's 18 April email was probably her last involvement with the statutory sick pay issue before, at Mr Bevis' request, that matter was handed to him. In these circumstances we find that there was no detriment by Ms Moore (as a manager for the first respondent).

Detriments e, g, j and k – the second respondent's approach to the claimant's second employer and related matters

Here the claimant complains about Mr Bevis' first approach to her second employer Reach Out Childcare; Mr Bevis' failure to reply to the claimant's email of 13 May 2019 (page 189) where she had asked him why he had contacted her second employer; Mr Bevis' second contact with the second employer (on 16 May 2019) and Mr Bevis' failure to respond to the claimant's complaint that there had been that second approach.

It is common ground that Mr Bevis did make two approaches to the claimant's second employer. Nor is it disputed that subsequently Mr Bevis failed to explain to the claimant why he had done that. Specifically, he did not respond to her correspondence on those points.

We find that it was detrimental to the claimant for Mr Bevis to make these approaches to the second employer. Those approaches involved disclosing confidential matters and the seeking of information from the second employer which was confidential. There was potential jeopardy to the claimant's second employment because of the highly unusual approach from the first employer or at least Mr Bevis on its behalf. He was casting doubt on whether the claimant was fit for work for the second employer as she was certified unfit to work, at that stage without qualification.

We therefore need to consider the ground on which Mr Bevis says that he took that approach. Essentially, he says that he felt that he had a duty of care towards the service users at the claimant's second place of employment to put them, or at least the second employer, on notice that it might not be safe or advisable for the claimant to be looking after children at the second employer's organisation (in the context of a Saturday club) as she was certified unfit to carry out any work, including work for the first respondent. We do not accept that that is a genuine explanation. If Mr Bevis truly had that concern, and we have some doubt about that, we would have expected him to approach the claimant

about that first, rather than going straight to the second employer. Further we consider that the first approach, purporting to leave a message for the claimant to make contact with him, was in effect setting a trap. Mr Bevis hoped to prove that the claimant was working for the second employer because he thought that she would only get back to him in respect of that message if she had gone into work and received it there. We consider both approaches to the second employer to be somewhat sinister and in bad faith. We are supported in that view by the opinion which Mr Bevis felt it was apt to express in his correspondence with Ofsted where (page 183) he described the claimant's disclosures as "spurious, designed to gain approval by agencies other than ourselves" and that the claimant's actions brought into disrepute "those whistle blowers who have a genuine reason to bring that which is wrong to light". He went on to express the view that the claimant's motive was "to gain notoriety". In our judgment expressing those sentiments supports the view that the approach to the second employer (and for that matter to the GP which we deal with below) was vindictive and on the ground that the claimant had made the disclosures.

Detriment h. Mr Bevis failing to respond to the claimant's request for a reference

The request was made in the claimant's email of 16 May 2019 (page 191). In writing to the second respondent the claimant asked if Ms Moore "would provide a reference for me for another pre-school who will be contacting Nicola Moore, if they haven't done so already". The claimant concluded that letter "I look forward to hearing from you regarding this." It is common ground that Mr Bevis did not reply to this email. He confirmed that it had been sent to the correct email address. His evidence was somewhat contradictory. When asked by the Judge whether he had received it he said not initially but then changed his answer to say that the claimant was sending so many emails that he may have not read it or overlooked it. However, he suggested that this was the same thing as not receiving it. Clearly that cannot be so. In paragraph 10 of his witness statement Mr Bevis says that he can confirm that he did not receive it. If he had it would have been acknowledged and actioned. We consider and find that Mr Bevis' obvious failure to apply to this enquiry which, on the balance of probabilities we find he did receive, was a detriment. The claimant was not asking for an open reference but instead pre-warning her employer that another organisation was likely to make a request for a reference. The claimant was also seeking an assurance that that would be dealt with properly and accurately. We find that this enquiry is also significant to the question we deal with subsequently as to whether or not the claimant affirmed any fundamental breach of contract. The 16 May email indicates that the claimant was preparing her way for appropriate mitigation prior to resigning.

We are not satisfied with Mr Bevis' explanation for not responding and find that he has not discharged the section 48(2) burden, so this part of the claim also succeeds.

Detriment l. The second respondent's alleged intimidating and bullying behaviour at the 24 May 2019 meeting

We have recorded the competing accounts of this meeting earlier within these reasons. In Mr Bevis' witness statement, he makes no mention of the allegation that, when discussing the cigarette burn issue with the claimant he said words to the effect "I'm saying this to you now as an ex-police officer". Mr Bevis refer to the meeting itself in paragraph 14 of his witness statement and accepts that he questioned the claimant about the serious allegation which "if true warranted a full enquiry as they amounted to a section 18 assault on the child which can carry a possible prison sentence for the perpetrator." Although Ms Moore was also at that meeting, she only deals with it in the briefest of terms in her witness statement (paragraph 17). However, during cross-examination Ms Moore accepted that Mr Bevis had made the 'ex-police officer' reference and she believed he had said that because he took the cigarette burn issue very seriously. Whilst Ms Moore could not remember Mr Bevis being aggressive she accepted that he "came across loud". She did not recollect Mr Bevis banging on the desk nor Mr Greaves telling his wife to write down the ex-police officer reference. To her credit Ms Moore did say that she was shocked because Mr Bevis' line of questioning was as she put it quite firm. She referred to Mr Bevis as being "old school".

When being cross-examined Mr Bevis described the claimant's account of the meeting as "What a load of rubbish" denying that he had banged on the table.

On the balance of probabilities, we conclude that Mr Bevis did make the ex-police officer reference. We find that that was oppressive and intimidating for the claimant and went well beyond an employer simply investigating a serious allegation during the course of whistle blowing. We also find on the balance of probabilities that during the course of this meeting Mr Bevis lost his temper with the claimant and as we have noted from his comments to Ofsted it is clear that he took a dim view of the claimant's whistle blowing activities. Accordingly, we find that this was a further detriment and that it was done on the ground that the claimant had made a protected disclosure. That is because it was a direct response to that disclosure.

Detriment m. Mr Bevis lying about the 24 May 2019 meeting being minuted

The status of the meeting is somewhat ambiguous. The respondent describes it as an informal meeting. However, if, as seems likely, it was part of an investigation into a whistle blowing disclosure, it should have been regarded as a formal meeting and it probably would have been sensible for it to be minuted. The fact that it was not or that notes taken

by Ms Moore were never transcribed or disclosed does not appear to us to be a detriment. It is clear that the major complaint about this meeting was Mr Bevis' behaviour during it. Whether or not it was minuted or whether or not the respondent was untruthful about it being minuted is not really the point.

Detriment n. The first respondent requesting consent to obtain a medical report on the claimant

The claimant suggests that this was unnecessary because the respondent was well aware of the claimant's health situation. The request was made in Mr Bevis' letter to the claimant of 27 May 2019 (page 206 to 207). Bearing in mind that by that date the claimant had been absent from work for over three months we consider that making that approach was reasonable. Had matters not developed as they did the first respondent may have needed to begin a capability procedure and that would have necessitated obtaining medical evidence as to the claimant's fitness to return to work. Whilst the claimant is entitled to complain about Mr Bevis' direct approach to her GP earlier in May, we see no objection to the respondent taking the normal and proper course of (subsequently) requesting consent.

Detriments o and p. Mr Bevis writing to the claimant's GP and the content of that letter

It is accepted that Mr Bevis did write the letter of 16 May 2019 (page 193). We consider this to be a most unorthodox step for the chief executive of an employer to take. It is hard to believe that Mr Bevis expected the claimant's doctor to breach doctor/patient confidentiality and so respond to Mr Bevis' enquiry. Again, we consider that this letter was written in bad faith. It is a collateral attack on the claimant's second employment and it appears to be an attempt to influence how, or whether, the doctor should issue fit notes for the claimant. It also includes the serious allegation that the claimant has misrepresented facts to her own doctor. This too we find sinister and most obviously a detriment. Mr Bevis seeks to explain this approach as being a further aspect of what he believed to be his duty of care. He explains in paragraph 12 of his witness statement that the contact with the GP was to seek an explanation of why the claimant was able to work for the second employer but not for the first respondent. We see no need, even if Mr Bevis genuinely held that concern, for him to have approached the GP. It was a matter which he should have discussed with the claimant herself rather than going behind her back. We therefore see this as an adjunct of Mr Bevis' attempt to disrupt the claimant's second employment because of the feelings he harboured towards her because she had made the protected disclosures.

Detriment q. Alleged failure to respond to the claimant's formal grievance

The claimant sent her grievance by email to the second respondent on 12 August 2019 (see page 229). As far as we are aware, this was only acknowledged, indirectly, in Mr Bevis' letter of 27 August 2019 (page

231) - although that letter is mainly a response to the claimant's resignation in the meantime. Having regard to the relatively brief passage of time between those two events, 15 days, and bearing in mind that in the meantime the respondent was in receipt of the claimant's resignation email, we do not accept, if that is the alleged detriment, that the grievance was not acknowledged quickly enough. As to how the grievance was ultimately dealt with, post the claimant's resignation, is not a matter we can deal with. In any event we find no detriment under this head.

Conclusion on detriments

Accordingly and by way of summary we find that detriments **d. e .g .h. i. j. k. .l. o**. and **p** were unlawful detriments, done on the ground that the claimant had made protected disclosures.

8.3. Was the claimant constructively dismissed?

Here we need to determine whether the first respondent committed a fundamental breach of the contract of employment. The claimant relies on the alleged detriments as cumulatively forming the breach, with her discovery on 3 June 2019 that Mr Bevis had written to her GP, being the final straw. Having regard to our findings, not only as to unlawful detriments but also in respect of other matters which we have found to be detriments albeit not because of protected disclosures, we find that there had been a fundamental breach of the contract of employment, specifically the implied term of trust and confidence. Particularly serious were Mr Bevis' approaches to the second employer and the GP and his behaviour towards the claimant at the 24 May 2019 meeting.

8.4. Did the claimant forgive or affirm the breach? We instruct ourselves that there is no "time limit" within which an employee who believes her employer has committed a fundamental breach must resign in order to complain of a constructive dismissal. Each case will depend on and turn upon its own facts.

The respondents' submissions seem to suggest that the claimant had no excuse on health grounds to articulate her resignation because she was able to do various other things, such as corresponding with the respondent and engaging with ACAS. However, we do not understand it to be the claimant's case that she was unable to make a decision on resignation because of health grounds.

As we have noted, the claimant, as early as May 2019, was taking steps to secure alternative employment hence the enquiry she made of Mr Bevis about the availability of a reference.

We also take into account that on the basis that the last straw came to the claimant's knowledge on 3 June 2019, the passage of time before her resignation was 10 weeks, which is not a particularly lengthy period.

Moreover, that was 10 weeks during which she was not actually attending work because of her long term sickness absence.

Further we consider that it was entirely appropriate for the claimant to take steps to mitigate her loss by lining up new employment before resigning from her current employment. Resignation is not a step to be taken likely or necessarily before an alternative means of income has been identified and secured.

There can be no suggestion that the claimant simply resigned because she wanted to go to a new job. She held off from resigning until she had a new job which is different. It is also clear from the correspondence which the claimant had with "Emily", who we assume to be the solicitor under the legal expenses insurance policy, which the claimant has chosen to disclose (pages 222 and 223) that in June the claimant was contemplating resignation in the context of constructive dismissal and was seeking advice about the correct way to approach that.

In all these circumstances therefore, we conclude that the claimant had not affirmed the breach prior to resigning on 12 August 2019. We therefore conclude that for all these reasons the claimant was constructively dismissed.

8.5. Was that dismissal unfair?

We find that as the fundamental breach was intertwined with the claimant's protected disclosures, the dismissal must be regarded as being automatically unfair under the provisions of the Employment Rights Act 1996 section 103A.

In any event although the grounds of resistance alluded in general terms to the dismissal being justified on the basis it was some other substantial reason, that reason has never been identified or established. Nothing further is said about this in the respondents' closing submissions. Therefore, the dismissal would also have been unfair on general principles

Employment Judge Little

Date 30th November 2020 RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 3 December 2020

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