EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105623/2020 (V)

Held by Cloud Video Platform (CVP) on 15-18 February & 16-19 May 2022

Employment Judge M Sangster
Tribunal Member J Chalmers
Tribunal Member S Singh

Ms M Mitchell	**Claimant** **Represented by:** **Ms E Matheson - Solicitor**
Geeza Break	**Respondent** **Represented by:** **Mr R Clement - Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. The claimant was subjected to a detriment as a result of making a protected disclosure, contrary to section 43B of the Employment Rights Act 1996. The respondent is liable for this and is ordered to pay the claimant the sum of **£2,315.62** by way of compensation for injury to feelings and **£776.81** for financial loss, both sums including interest to the calculation date.

2. The claimant's complaints under section 100(1)(c) and 103A of the Employment Rights Act 1996 do not succeed and are dismissed.

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing

was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant presented complaints of 'ordinary' unfair dismissal under section 94 of the Employment Rights Act 1996 (**ERA**), automatically unfair dismissal under sections 100(1)(c) and 103A ERA, unlawful detriment under section 47B ERA and wrongful dismissal.

3. The claimant's complaints of unfair dismissal under section 94 ERA and wrongful dismissal were dismissed, as having no prospect of success, by judgment dated 11 March 2021.

4. The respondent resists the remaining complaints.

5. The claimant gave evidence on her own behalf and led evidence from Jane Timoney (**JT**), Foster Respite Carer with the respondent.

6. The respondent led evidence from Doreen Paterson (**DP**), Chief Executive Officer for the respondent, Sandra Anderson (**SA**), Administrator for the respondent and Maureen Connor (**MC**), Respite Carer for the respondent.

7. The other individuals referenced in this judgment are as follows:

    a. Julie Imeson (**JI**), Operations Manager for the respondent; and

    b. Cathy McInally (**CM**), Senior Support Worker for the respondent.

8. A joint set of productions was lodged, extending to 293 pages. A cast list and statement of agreed facts were also lodged by the parties.

Issues to be determined

9. The issues to be determined by the Tribunal, as set out in the note issued by Employment Judge Hoey following the case management preliminary hearing held on 29 June 2021, were discussed at the outset of proceedings. Parties agreed that the issues to be determined by the Tribunal were as set out in that note and that the disclosures relied upon were set out in the further and better particulars of claim lodged by the claimant on 4 June 2021. The issues to be determined by the Tribunal were accordingly as follows:

Protected disclosure and detriment - section 47B ERA

10. Did the claimant make one or more qualifying disclosures, as defined in section 43B of the Employment Rights Act 1996:

    a. The claimant says she made disclosures to the respondent as follows:

        i. On 17 March 2020 the claimant emailed the respondent, advising that her Glasgow City Council link worker had informed her that they had to cancel all home visits to carers and families due to the Coronavirus pandemic.

        ii. On 19 March 2020, as set out within the ET1: “I sent email to Geeza Break raising concerns that 2 children who had been in my care within a week were showing symptoms of the virus and were having to isolate. I asked if Geeza Break should inform other families therefore given them the option to cancel respite sessions to reduce the risk of spreading the virus”.

        iii. On 20 March 2020, the claimant emailed DP, copying in others, This email pointed out that the claimant lacked sufficient Personal Protective Equipment and advised of which was required.

        iv. On 23 March 2020, the claimant forwarded an email from Glasgow City Council to DP, copying in JI, which stated that all respite placements had been cancelled by Glasgow City Council.

        v. On 24 March 2020 CM called the claimant, in response to the claimant’s email to her of 20 March 2020 regarding PPE. The claimant advised CM that the respite care provision should be cancelled, in line with Government restrictions, given that the UK was now in a lockdown

        vi. Also on 24 March 2020, as per the ET1: “I emailed Geeza Break to postpone that evening overnight session and to request annual leave for 3 weeks. I also stressed in this email that I felt

some of the guidance given by Geeza Break would be putting carers and children at great risk".

vii. On 29 June 2020, as per the ET1, the claimant raised "concerns" about health and safety during a one-to-one staff meeting with JI. Those concerns raised related to the lack of support given to carers during the lockdown period and about the pre-respite telephone risk assessment paperwork which was issued to her that day. The claimant objected to the paperwork to JI, on the basis that there had been no prior consultation, nor any input from experienced carers in collating the risk assessment. She questioned why those staff who were most at risk from working during this time were not involved in the decisions already made by senior management. The claimant told JI that due to the seriousness of the Coronavirus pandemic, she thought the risk assessment was something that required more qualified staff performing the role of Health & Safety/Risk Assessors. The claimant objected to being ask to take part in this process as it had never been part of her job role and she was concerned about the implications of the competency of the resultant risk assessment. She questioned whether the risk assessment was a legal document, and asked who would be liable if information was inaccurate, or if something should happen to any of the children or families. She questioned the content of the risk assessment and objected to the fact that, as a consequence of the changes being made to the process, her personal health information would become available to families using her care, her social bubble and the social bubble of those families in her care.

viii. On 2 July 2020, the claimant emailed further concerns to her manager, as had been requested of her by JI at the meeting described at (vii) above. She raised concerns that had not been addressed at the meeting and sent this email to JI and DP. The claimant asked various questions around managing children

with underlying health conditions and how to encourage them to wear masks, transporting children, social distancing, physical distancing, wearing masks in her home. She also asked questions about the Telephone Risk Assessments.

b. Did she disclose information?

c. Did she believe the disclosure of information was made in the public interest?

d. Was that belief reasonable?

e. Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered?

f. Was that belief reasonable?

11. If the claimant made a qualifying disclosure, it was agreed it was a protected disclosure because it was made to the claimant's employer.

12. Did the claimant suffer a detriment on the ground that she has made a protected disclosure pursuant to section 47B of the Employment Rights Act 1996. The detriments relied upon are:

a. 3 July 2020: the claimant was suddenly pressurised into responding to the respondent's emails within very tight timescales. She felt she was bullied by her manager, as she received 4 missed calls and an email from her manager within 1 hour and 20 minutes.

b. 3 July 2020: the claimant was instructed to take annual leave for 2 weeks as a result of the discussions about overnight foster care by her manager.

c. 21 July 2020: the claimant's contractual hours were reduced from 36 hours per week to 16 hours per week and she was demoted from her position of Respite Foster Carer to Respite Sitter. JI told her during this meeting, that this was "because you had so many concerns" "concerns where you did not feel equipped to do risk assessments". The claimant

was advised that she had refused to do overnight care at a previous meeting.

d. 2 September 2020: the claimant was denied copies of recordings of various meetings she had attended.

e. 21 September 2020: the claimant was not permitted the right to appeal her dismissal.

Unfair dismissal – section 100 and 103A ERA

13. Was the sole or principal reason for the dismissal the fact the claimant made a protected disclosure in terms of section 103A of the Employment Rights Act 1996?

14. Was the sole or principal reason for the dismissal the fact the claimant made disclosures in relation to the circumstances under which she worked during the coronavirus pandemic which she reasonably believed to be harmful or potentially harmful to health and safety thereby in breach of section 100(1)(c) of the Employment Rights Act 1996.

Remedy

15. The claimant seeks compensation only. If there is a compensatory award, how much should it be? The Tribunal will decide:

a. What financial losses has the dismissal/detriment caused the claimant?

b. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

c. If not, for what period of loss should the claimant be compensated?

d. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

e. If so, should the claimant's compensation be reduced? By how much?

f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

g. Did the respondent or the claimant unreasonably fail to comply with it by the respondent failing to allow the claimant to appeal?

h. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

i. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

k. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

l. What basic award is payable to the claimant, if any?

m. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Findings in Fact

16. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

17. The claimant commenced employment with the respondent on 29 April 2019, as a Foster Respite Carer. Prior to that, the claimant had undertaken work for the respondent as a volunteer.

18. The claimant was contracted to work 36 hours a week, over two 18 hour shifts (generally 3/4pm to 9/10am the following day). The claimant also worked an additional overnight shift, on voluntary basis, each week.

19. The claimant's role involved looking after children in her own home. The work undertaken was generally planned respite care, although the claimant also, on occasion, undertook respite care on an emergency basis. The respondent also employed Respite Sitters, who were not authorised to take children into their

own homes and who worked during the day for up to 4 hours. Respite Sitters were able to utilise the respondent's community based flat, if they wished to do so.

20. The claimant also undertook some work for Glasgow City Council.

21. On 17 March 2020 the claimant sent an email to JI and DP stating as follows

'Good morning Julie,

Hope you are well.

Due to the current Coronavirus concerns and yesterday's government annou ncement and Eds email.

- *Stop all non-essential contact with others*
- *Avoid social contact*

I would like to clarify some points and seek your advice on what action I shou ld take.

1: If I arrive to pick up a child and mum, carer or grandparent informs me that they have kept the child off nursery or school due to their Coronavirus conce rns. Should the child go to respite?

2: If the child is coughing or has a runny nose what action should I take? Sho uld the child go to respite?

3: What are the other carer/sitter providers doing? Where are they going to ta ke the children?

Also I am currently providing a Sitting Service for one of the South Side famili es and I will be struggling to find suitable safe places to take the child, if the weather is ok I can go to the park but apart from this I am unsure where to ta ke the child without social contact.

Also my Glasgow City Council link worker has informed me that they have to been told to cancel all home visits to carers and families due to the virus.

I appreciate this is a very difficult time for all, especially our most vulnerable c hildren. We all need to keep safe so any further guidance would be appreciat ed.'

22. The claimant had an overnight respite session from 17-18 March 2020. This was the last respite care she undertook for the respondent.

23. On 18 March 2020, JI sent an email to the claimant attaching a list of responses to the questions the claimant had asked the previous day.

24. On 19 March 2020, the claimant sent an email to various members of the respondent's management team, stating:

'Good morning all,

Hope everyone is ok, and keeping safe.

I received a call yesterday from [baby's mother] to inform me that she had to call emergency services at 5 a.m. yesterday to take baby [name] to the hospital as his temperature was high and he was coughing. [Baby's mother] said that the hospital said that he was showing the symptoms of the virus and he maybe a carrier but they didn't test him she was advised to isolate herself and the children for the next 14 days. She said that [baby] also has Bronchiolitis and is greatly concerned as he also has kidney problems. She also said that she and her other child [name] suffer from Asthma, she is very concerned. I advised her to contact the professional services if needed.

I have asked [baby's mother] to contact all relevant key workers and inform them of the situation.

This is my second respite child that I have had within a week showing symptoms should Geeza Break be informing other families of this therefore given them the option to postpone their planned respite therefore reducing further risk.'

25. The claimant had a respite session scheduled for the 20 March 2020 with this family, which was cancelled as a result of the baby requiring to isolate. Her last respite session with him had been 13-14 March 2020. A further respite

session, with a different family, which had been scheduled for 22 March 2020, was also cancelled by a family member who was clinically vulnerable.

26. In response to her email dated 19 March 2020, the claimant received a phone call from CM. CM stated that, if families were informed of children having Covid-19 symptoms, the families would panic. The claimant was also advised that if she cancelled respite she would not be paid, but if the families cancelled she would be paid. The claimant asked CM about further personal protective equipment (PPE) and was advised by CM that the respondent was still trying to source it.

27. As at 20 March 2020, the claimant was in possession of a limited stock of PPE, namely face masks, gloves, hand gel and anti-bacterial wipes. This was sufficient to undertake her role. The respondent was waiting for a delivery of further PPE.

28. At 15:56 on 20 March 2020, the claimant sent an email to various members of the respondent's management team, stating as follows:

'Good afternoon all,

Hope everyone is keeping well and safe.

I am assuming as yet no further PPE (Personal Protective Equipment) has b een sourced.

As I am at present still continuing to work with families and children, I am loo king for the following equipment:

- *Aprons*
- *Hand sanitiser*
- *Bacteria wipes*
- *Paper towels*
- *Thermometer*

I have limited stock and going out again to try and source more, if anyone ha s extra at home this is the time to share. ***"SHARING IS CARING"***

Also can you let me know if I do manage to obtain more will be reimbursed?

"Stay positive even when it feels like everything is falling apart "

"Challenges are what makes life interesting and overcoming them is wh at makes life meaningful"

Have a good weekend and ….Stay safe…'

29. On 23 March 2020, the claimant was advised by Glasgow City Council, by email, that all respite placements organised by them were cancelled unless otherwise notified. The claimant forwarded the email she received from Glasgow City Council to DP and JI on receipt, stating *'For information only. Please see below email received from Glasgow City Council.'*

30. On the evening of 23 March 2020, lockdown was announced. It came into force the following day. The claimant was paid in full, from the commencement of the lockdown until her employment terminated. She was not furloughed.

31. At 11:25 on 24 March 2020, the claimant received a telephone call from CM. The claimant was advised by CM that there was a washable fabric apron available for her to collect. The claimant was advised by CM that the respondent had been unable to source any other PPE, but were continuing to try to do so. Following the call, the claimant made a note of what she felt were the relevant/most important parts of the discussion. Her note stated *'The telephone conversation continued for 9 minute and I expressed my concern about the dangers to children and families "as I have stated in previous emails" I also explained that "as the country was in now in a 3 week lockdown" "I thought you were call me to inform me that all respite was now cancelled'.* The Tribunal found that the claimant did **not** state to CM during the call *'all the respite care provision should be cancelled, in line with Government restrictions, given that the UK is now in a lockdown.'* If she had done, that would have been recorded in the note she made immediately following the call.

32. In an email sent at 12:28 on 24 March 2020, JI informed the claimant and her colleagues that the respondent was taking advice from Social Work regarding the provision of respite care. In her email JI stated that things were changing on a daily basis, and with each announcement from Government, which made decisions complex. Respite Foster Carers were informed that, if they felt unable to provide respite the respondent understood. Respite Foster Carers were otherwise informed that they were still to provide overnight respite care for families, if possible.

33. The claimant sent an email to JI, copied to the respondent's management team, at 15:47 on 24 March 2020, stating as follows:

'As the government has now classed the Coronavirus as a NATIONAL EMERGECY I would like to postpone my planned respite session for 3 weeks and I am requesting Annual Leave for this period.

I understand that is a very difficult time for our most vulnerable families and children and am very sad but and this is a decision that I have not taken lightly. As an unpaid volunteer I am very willing and able to help with shopping, calls, and food deliveries etc. to our most vulnerable families if you require.

Under current government guidelines and guidance from Glasgow District Council (see copy of email sent to you on 23/03/20) I feel that it is a sensible decision to postpone respite for the short period.

I have a personal responsibility and a duty of care to my children and families to prevent further spread of the Coronavirus. As you are aware 2 of my respite children that I have in my care, home/car and close contact 11/03/20

and 13/03/20 are now in isolation for 14 days (see email sent to you on 19/03/20) And as GeezaBreak are unable to provide me with the appropriate PPE I would be putting other children and families at serious risk. I feel that it

would be total irresponsible of me to put our vulnerable families at further risk of possible death. I have asked GeezaBreak (see email dated 19/03/20) if it would be advisable to inform families that other children in my care are in

isolation so that they can make an informed decision as to whether to take a chance and send them to respite and as per telephone call of 19/03/20 I was advised not to as this would panic families, If I had children going to respite

and at a later date I was inform that this was the case ...What would I do and how would I feel...?.

As you are aware I have been a dedicated carer for many years and the children's welfare is my main concern, and as one of our main GIRFEC principles is SAFE, and keeping children safe and away from harm. In my opinion advising sitters/carer to take children to the GeezaBreak flat is putting sitters, carer and children at great risk in a confined space and unsuitable and dangerous advice under the current government guidance. (Government guideline not to be in confined, enclosed, spaces 2 metre apart, I would be putting the child at risk in my car or taking them to the flat).

I am sorry that this is short notice and I would appreciate if you would contact me families of the situation.'

34. The claimant's request to take three weeks annual leave was granted and the respite care she was due to commence that day was cancelled. The respondent subsequently cancelled all planned respite care.

35. In the period from 24 March 2020 until the end of June 2020, the claimant did not undertake any respite care. She did however assist the respondent, on a weekly basis, to drop off food packages to vulnerable families.

36. On 25 June 2020, the claimant was asked by the respondent to attend a COVID-19 induction and back to work discussion. She was advised by the respondent that respite would restart from the 29 June 2020, and asked to provide availability to attend a meeting at the office as soon as possible.

37. The meeting was arranged for 29 June 2020 and took place that day. The claimant attended the meeting with the anticipation that overnight respite care would restart from 29 July 2020. JI conducted the meeting. At the meeting, the claimant was given an induction pack, to take away and review. There was a brief discussion about what was in the pack, including a new risk assessment

form which the respondent had prepared, and the process for undertaking the risk assessment. JI told the claimant that the process sought to limit contact as much as possible and that parents would be aware that children should be ready when they arrived and meet the carer at the front door. The claimant expressed some concern about whether she could complete a risk assessment, but stated that she would review the form in detail and revert with any particular concerns. The claimant was also given a supply of PPE and asked to inform the respondent if she required anything further. The possibility of a gate to be used in the claimant's flat was discussed. JI then asked the claimant a series of prepared questions and noted the claimant's answers to each question. JI's record of the meeting stated as follows:

1. *'How do you feel about coming back to work?*

   Nervous, anxious. Wondering how safe I'm going to be.

2. *Do you have any safety concerns which have not been addressed in your discussion with your line Manager?*

   Yes lots which I will email.

3. *How have you cope personally during the last few months?*

   Nobody has been in my house. I have obeyed all government directions.

4. *What has been you experience in supporting families during this period?*

   N/A

5. *Do you feel safe returning to work during the first phase?*

   No, I have concerns which I will email after I've looked at the induction pack.

6. *Are you comfortable to raise any health and safety concerns and bringing them to the organization to be addressed?*

   Yes.

7. *Do you feel the PPE supplied is appropriate to carry out your job role safely?*

   Yes for now.

8. *Do you have any other concerns during your COVID-19 induction discussion?*

   Yes lots but I need to think about them. You haven't covered every eventuality.'

38. This was the extent of the discussion at the meeting on 29 June 2020. The meeting concluded with the claimant indicating that she would review all the documentation provided, in detail, and provide comments/queries once she had done so. While the claimant asserted in her pleadings and evidence that there had been a detailed discussion with JI on 29 June 2020 in relation to the risk assessment and the process involved in this, the Tribunal did not accept that this was the case, given the terms of the note made during the meeting by JI and the claimant's evidence, which was that she wanted to review all the documents provided by JI during the meeting in detail, before providing comments.

39. The claimant reviewed the risk assessment form following the meeting with JI. She noted that this required her to complete a section requiring her to 'measure the level of the risk' in the respite care proceeding as 'high/medium/low'. She was concerned that she had not been given any guidance or training by the respondent in relation to how she should make that assessment. She felt that she was not qualified to do so.

40. JI also met with the three of the respondent's four other Foster Respite Carers that day, including JT and MC at the end of June 2020. The remaining Foster Respite Carer was shielding, so JI did not meet with her. Two of the other individuals JI met with also raised concerns about returning to work, JT and one other. MC did not raise any concerns and she returned to work on 29 June 2020. Whilst she was not able to undertake any overnight care, due to Government guidance at the time, she returned to work and was paid for her

full contractual hours on her return, even if there was insufficient work for her to undertake. Initially, she was working 16-20 hours per week.

41. JI emailed the claimant on 1 July 2020 at 13:05. In her email she stated that there would be no overnight foster respite care until the Scottish Government guidelines changed to permit this. She stated that she was aware that the claimant had concerns regarding returning to work and asked her to outline these as clearly as possible, by 2 July 2020, in order that they could be addressed.

42. The claimant sent an email to JI at 23:43 on 1 July 2020. In her email she stated:

'As I stressed several times on Monday this is an unknown situation and very scary times and I am concerned for everyone. I am personally feeling extremely anxious; therefore I feel I need to tread very carefully. As this is a very serious and potential life threating situation I have to think very carefully about the concern and questions that I have, I will get my questions and concerns to you as soon as possible.

I have attached a list of PPE that I can think of at the moment, some of the items I picked up on Monday but there are other items on the list that I feel would reduce risk of contamination.'

A list headed 'PPE REQUIRED' was attached to the claimant's email.

43. The claimant then sent an email at 16:46 on 2 July 2020 to JI, copied to DP, stating as follows:

'Good afternoon Julie

As Monday 29th [June] was our first return to work consultation I have been tried my best to think of ways to manage and safely return to work, due to the limited time I may have other questions/concerns and I will get them to you as soon as possible. As discussed at our meeting on Monday I would like to have a meeting with other carers and discuss ways of managing respite and the support that we can offer each other.

Q: What about the children with underlying health conditions e.g.? Asthma etc...groups at serious risk how will this be managed i.e. masks, allergies etc.?

Q: If it's the most needy and vulnerable families does that then put the carers at more risk?

Q: Are there other risk assessments around Covid 19 are being carried out prior to the Telephone Risk Assessment? What are they? Will this information be available to respite carer before collecting child for respite?

Q: Will it be made very clear to parent from the placement agreement that under no circumstances should the parent send the child to respite if they are showing signs/unwell or have been in contact with someone showing symptoms of CV?

Q: Will GB placement agreement be temporarily amended to highlight how important it is not to put respite carers at risk?

Q: What safeguards are in place when transporting children? E.g. putting on seat belts/social distancing etc.

Q: What if children refuse to put on mask?

Q: Do we need to wear mask at all times at home around the children when they are in our house on respite?

Q: You have given me a visor in my PPE, when do I use this?

Q: What about the social distancing and physical distancing? Have the families been made aware that children must adhere to social distancing and physical distancing in my home (depending on age of child)?

Q: At our meeting on Monday I asked if I called a parent prior to the respite session and they didn't answer the phone what would happen, you said that the respite would not go ahead. Are the family aware that this is what will happen? Will I be paid if this happens?

At our meeting on Monday we discussed limiting contact with parent/guardian and that the child would be ready when I arrive therefore limiting contact. I have now had time to read over the Telephone Risk Assessment form and this requires signatures. Therefore involves contact. I have read over the document and as discussed on Monday I don't feel I am qualified to carry out a risk assessment on Covid 19. I am fine calling family prior to respite for an informal chat asking how things are.

My concerns and questions about the Telephone Risk Assessment are:

Q: Is it a legal document?

Q: Does it make the respite provider liable?

Q: Does it mean the respite provider will be held responsible if something goes wrong?

Q: Do the families understand and have been made aware that Geeza Break will be asking these questions?

Q: How can we be sure that information is factual and true?

Also I don't feel my health inform should be on a form that the families have access to and have to read and sign.'

44. JT sent an email to JI on 2 July 2020 at 17:13. In her email she raised concerns, following the meeting held with her on Monday 26 June 2020. Her concerns related to PPE and the risk assessments. She requested some additional PPE. In relation to the risk assessment she stated:

'In relation to the COVID 19 telephone Risk Assessment, I do not feel comfortable doing it. I don't feel there is any need for my personal information to be outlined in this way. Why are we having to reassure parents? They either trust us or they don't! I for one am not happy with my personal information being available to parents/carers.

I also do not feel it's my role to be phoning the parents/carers and asking them such personal questions. I don't have a problem giving them a quick 'check-up' call to ask if they are all well and not displaying any symptoms of COVID

19. I definitely DO NOT feel that I should have the overall decision of measuring the risk and deciding should respite go ahead. This is far too much of an accountability and responsibility on me!

The final disclaimer does leave lots of room for error as parents/carers can simply be dishonest over the phone. We have no proof of their whereabouts or who they have been in contact with. Therefore, why is my signature required? Perhaps the respite coordinator when doing their initial Risk Assessment with the family, could provide them with several copies of the COVID 19 Risk Assessment to complete. This could be completed and signed by them prior to me collecting the child and pass it to me upon collection.'

45. On the morning of 3 July 2020, JI attempted to contact the claimant on her home and mobile telephone. The claimant was in her house at the time, but did not answer her mobile or home phone. JI tried both telephone numbers again just over an hour later. Again, the claimant did not answer her mobile or home phone. JI then sent an email to the claimant at 12:45 stating *'I have been unable to contact you on your home telephone number or your mobile number, could you contact me at the office today please.'*

46. The claimant responded by email at 15:17, stating that she was feeling extremely anxious and had concerns about how she could safely progress back into work. She stated that she had emailed her concerns and questions about returning to work and asked JI to send an email to her if anything required clarification, as she felt a telephone conversation could be misunderstood. The claimant raised with JI that within a period of one hour she had received two missed calls mobile, two missed calls on her home phone and an email. She asked JI to *'correspond via email'* going forward to give them both time '*to understand and digest what is being communicated'* and *'to think rationally before making any decisions in this challenging time.'*

47. JI responded to the claimant's email at 16:06 stating *'I was calling out of courtesy and to explain that I was placing you on annual leave. Please find details in the attached letter. I acknowledge receipt of your concerns and will be in touch shortly.'* The attached letter indicated that the claimant was placed on annual leave for two weeks, commencing on the 6 July and returning to

work on 21 July 2020. The letter stated that the claimant was required to take annual leave *'further to recent discussions and given the impact virus is having on business and your availability to work'* and this was required *'until your concerns are addressed regarding returning to work.'*

48. The two other Foster Respite Carers, who had each also raised concerns at/following the meeting with JI on 29 June 2020, also received similar letters and were placed on annual leave for two weeks. MC did not receive a similar letter. She was not placed on annual leave for 2 weeks and continued to work throughout this period.

49. On 15 July 2020 the respondent provided detailed responses to the questions raised by the claimant on 2 July 2020.

50. By letter dated 16 July 2020, the claimant was asked to attend meeting on 21 July 2020 *'to discuss the current Covid-19 situation and proposed organisational changes'*.

51. The two other Foster Respite Carers, who had also been placed on annual leave at the same time as the claimant, were also invited to similar meetings. MC was not invited to a similar meeting and continued to work her full contractual hours.

52. The claimant attended the meeting on 21 July 2020. JI conducted the meeting SA was also present. The meeting was recorded and SA prepared a typed transcript from the recording. At the outset of the meeting, JI indicated that *'Now that we are coming back from the Covid situation, we have been looking at budgets. Consultation meeting today to let you know where the organisation stands. The budget shows a deficit of 34k at the moment, we also have IGF which gives us funding... Integrated Grants Fund that is Glasgow City Council. They will not be paying the same amount of money that they paid for services we delivered before. That will take that amount up to a substantial amount of money. We are not sure what the final figure is going to end up, but we know there will be a significant drop in income... We are only looking at this year's figures going forward. What we are proposing is a temporary change to your contract for at least 6 months. This will give us time to deal with this deficit and*

also to look for other pockets of funding. We are proposing 16hrs Respite Sitting which would help you as I know you had concerns returning to work and having families in your own home. Respite Sitting would be 4 hours at a time. We would be making good use of outdoor space, the Geeza Break flat could be used and some facilities are opening.'

53. The claimant indicated that she felt this represented a change in her job role, her terms and conditions and her job description.

54. The claimant stated that she felt the Foster Respite Carers should have been consulted about the risk assessment process, prior to it being finalised. She raised concerns about the proposed risk assessment process, stating *'I will give you an example, one of my concerns I said to you about how can we be sure that the information from the parent is factually true and you said to me, you know the family, but I have had no contact with these families for 4 months, Family Support Workers have so they know more what has happened.'*

55. JI asked the claimant *'What you were saying was about the families that you did not think they would tell you the truth?'* The claimant agreed and stated *'I don't want to comment on a particular family, but I already know some of the families have already told lies, and we know obviously they are going to go "[Aye, Aye, Aye], we are fine".'*

56. A significant amount of the discussion at the meeting related to when the claimant was informed that there would be no overnight respite care on her return to work. JI indicated the claimant was at meeting on 29 June 2020, which the claimant disputed, stating that she was not informed until JI's email of 1 July 2020. The claimant stated that she wanted to return to work to undertake her normal job, including overnight respite care. She stated that decisions had been made without taking the Carers concerns or feelings into account. The meeting was challenging and fractious.

57. The conclusion of the meeting was that JI would provide the claimant with written confirmation of the proposed changes the following day and the claimant would then raise any concerns she had in relation to the proposal by

Thursday 23 July 2020, at 12 noon. A further meeting would then take place on Friday 24 July 2020.

58. JI sent an email to claimant on 22 July 2020. Attached to that was a document entitled 'Summary of Temporary Changes to Contract which will be reviewed in January 2021' which stated

'Due to the uncertainty regarding Integrated Grant Funding we are not expecting the same level of funding. The company now has a deficit of £34,000 and we know this will increase due to the IGF funding not being received. We are hoping to address this issue over the next 6 months and will review the situation again in January 2021. This period will allow us to approach other funders with our proposals

We are proposing that we make temporary changes to your contract which will include the following:

1. *Transferring your role to Respite sitting on a 16hr plus contract with the same hourly rate of pay.*
2. *No overnight respite sitting currently.*
3. *The 4hrs per respite session will allow you to build confidence in your role after COVID-19 working initially with families you are familiar with first.*
4. *Terms and Conditions in your contract have not changed only the contractual hours.'*

59. On 23 July 2020, JI sent an email to JT stating *'Further to our discussion on Tuesday 21st July 2020 we would like to ask you to consider doing Respite Sitting at your full contractual hours. This would be done over 7 days, consisting of Morning afternoon and evening work.'* JT agreed to this and was due to return to work on that basis on 3 August 2020, but was unable to do so due to illness. She ultimately returned to work, on her full contractual hours, in December 2020.

60. The meeting scheduled for 24 July 2020 was delayed, at the claimant's request, to 27 July 2020.

61. JI conducted the meeting on 27 July 2020. SA was also present. The meeting was recorded and SA prepared a typed transcript from the recording. JI confirmed, at the outset of the meeting, that the claimant was being offered a 16 hour plus contract, to be undertaken in four hour sessions over seven days consisting of mornings, afternoons and evenings. The claimant stated that she felt she was being asked to undertake a completely different role and expressed concern at the significant reduction in hours (36 to 16), the change in her job role and the change in shift pattern. She stated that she wanted to continue with her role as a Foster Respite Carer. She stressed that that was her role: she was not a Respite Sitter. She indicated that she took on the role because it was 18 hour shifts and that she wanted to continue on that basis, looking after children overnight, in her own home. The claimant asked whether she was required to sign something in relation to the proposed changes. JI indicated that she did not, as the respondent was still in a consultation period with her. As with the previous meeting, a significant amount of the discussion related to the dispute between the parties as to when the claimant was informed that there would be no overnight respite care on her return to work. JI also stated that the claimant had indicated on 29 June 2020 that she did not want to look after children in her own home, which the claimant disputed. The claimant repeatedly requested the minutes of the previous meetings, with a view to establishing her perspective, and the meeting was brought to an end to enable these to be provided to her. The meeting was somewhat heated and unprofessional, with both parties speaking over the other.

62. The other Foster Respite Carer agreed to return to work following the second meeting with her and did so shortly thereafter.

63. On 28 July 2020, at 16:52, the claimant sent an email to JI again requesting copies of the minutes of the previous meetings. She also stated *'Also as discussed on 27th July 2020 there are significant variations and fundamental changes to my Contract of Employment and as requested I would like a copy of the new amended contract before making any decisions.'*

64. JI sent the claimant an email on 29 July 2020 at 15:00, asking her to attend a meeting on Friday 31 July 2020 for a meeting to discuss her contract.

65. The claimant understood that the meeting was to discuss the proposed changes to her contract. The claimant was informed by another Foster Respite Carer, on the afternoon of 30 July 2020, that the changes to the contract would be commencing the following Monday. That evening, she prepared a letter of resignation, addressed to DP, stating *'It is with deep regret that I would like to inform you of my intention to resign from my role of Foster Respite Carer, effective immediately. After 12 years as a Voluntary Respite Carer and one year as a salaried Foster Respite Carer I am resigning my position as I cannot accept the terms and conditions of the "temporary changes of my Contract of Employment" due for review January 2021 being forced on me. I wish you and Geeza Break all the best for the future.'*

66. The claimant attended the meeting on 31 July 2020. JI conducted the meeting and it was recorded. SA also attended the meeting and subsequently typed up a transcript from the recording. JI opened the meeting by stating that it would be a brief meeting. She indicated that *'Because of behaviours displayed of the last 4 weeks which are not aligned with the culture of the business, we are dismissing you with immediate effect. This will take effect from 31st July. You will have 1 weeks' notice plus any deductions. We will write to you to confirm this information and the specific reasons discussed for the dismissal.'* The claimant requested a copy of the respondent's grievance procedure. She handed JI a sealed envelope, requesting that it be passed to DP. The meeting then ended.

67. JI passed the envelope to DP, following the meeting with the claimant. It contained the letter of resignation from the claimant.

68. A letter was sent to the claimant, dated 31 July 2020, confirming her dismissal. The letter indicated that the reason for dismissal was *'refusal to deliver day care on a temporary basis and displaying behaviours over the past four weeks which are not aligned with the culture of the business.'*

69. The reference to *'behaviours…not aligned with the culture of the business'* was solely related to the claimant stating, in the meeting on 21 July 2020, *'how can we be sure that the information from the parent is factually true'* and *'I already know some of the families have already told lies'* (see paragraphs 53 & 54 above).

70. The claimant's employment terminated on 31 July 2020 and she received a payment in lieu of her contractual notice entitlement.

71. On 3 August 2020 the claimant sent an email to DP highlighting that her employment was terminated and at the same meeting she handed in her resignation letter. She asked for clarification of whether she had been dismissed or whether her resignation had been accepted. DP responded the following day, indicating that the claimant had been dismissed.

72. The claimant requested copies of the recordings of the meetings held between her and JI on 21, 27 and 31 July 2020. The respondent did not provide these, as the transcripts prepared from the recordings had already been provided to the claimant.

73. On 9 September 2020 the claimant submitted letter to the respondent's Chief Executive, seeking to appeal against her dismissal. The respondent indicated, on 15 September 2020, that the claimant had no right to appeal under the respondent's procedures, as she had less than 24 months' service. They indicated that they would be prepared to treat the reason for leaving as resignation, given the circumstances, and asked whether the claimant would be agreeable to this. The claimant indicated on 21 September 2020 that she was not agreeable to the proposal.

74. The respondent's disciplinary procedure states that *'the Organisation reserves the right to discipline or dismiss you without following the Disciplinary Procedure if you are an employee with less than 24 months' continuous service'* and that any appeals required to be submitted in writing, within a period of 5 working days of receiving notification of the decision being appealed.

75. The respondent resumed planned overnight respite care towards the end of 2020. The Foster Respite Carers resumed overnight respite care, undertaken in two 18 hour shifts per week, at that point.

Claimant's submissions

76. Ms Matheson's submission, for the claimant, addressed each asserted disclosure in turn, setting out the basis upon which each should be found to be a qualifying disclosure. She submitted that the claimant had a reasonable belief that the information disclosed on each occasion tended to show that the health and safety of the children looked after by the respondent and their families, as well as the respondent's employees, was being or was likely to be endangered. The claimant had a reasonable belief that the information disclosed on each occasion was in the public interest.

77. The cases of ***Chesterton Global Ltd and another v Nurmohamed (Public Concern at Work intervening)*** (CA) [2017] IRLR 837 and ***Dobbie v Felton t/a Feltons Solicitors*** 2021 IRLR 679 were referred to.

78. Each asserted detriment was then addressed, and the evidence in relation to each summarised. The case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 was referred to in relation to what constitutes a detriment.

79. The burden is on the claimant to establish the reason for dismissal. The reason advanced by the respondent is not the real reason for dismissal for the following reasons:

    a. The reasons given orally and in the dismissal letter differ.

    b. The reason for the proposed cut in hours was stated to be a funding deficit, but the respondent's evidence to the Tribunal contradicted this.

    c. The reason the respondent proposed the change to the claimant's terms and conditions is because she raised concerns. She was dismissed because she would not agree to those changes, which she felt were being forced upon her.

d. The claimant did not call clients liars. This is a clear example of manufacturing a reason to justify the claimant's dismissal.

e. JI misrepresented the position in relation to the claimant calling clients liars and not being willing to have children in her home. She singled the claimant out for significant changes to her contract, which she knew would not be accepted by the claimant to hide the real reason for dismissal, which was that JI felt undermined by MM questioning the processes and procedures created by her and raising numerous concerns in relation to this. The claimant would be in the same position as MC had she not raised any concerns, namely working her full contractual hours as a respite foster carer, albeit not undertaking overnight respite care for a temporary period

80. The case of ***Royal Mail Group Ltd v Jhuti*** 2020 ICR 731, SC, was referred to to support the submission that the real reason for the claimant's dismissal was hidden behind allegations of misconduct. The case of ***El-Megrisi v Azad University in Oxford UKEAT/0448/08*** was referred to, to support the submission that, where there are a number of disclosures, the Tribunal might conclude that all, or some, of them cumulatively were the principal reason for dismissal.

81. In the alternative, the sole or principal reason for the claimant's dismissal was that she brought circumstances to her employer's attention which she reasonably believed to be harmful or potentially harmful to health and safety, in breach of section 100(1)(c).

82. In relation to remedy, the claimant wrote her resignation letter in the heat of the moment. She did not think she would use this and handed this to JI when in shock at having been dismissed without notice. In any event, given the reduction in the claimant's hours and change in status, the respondent was a material breach of contract the claimant would have been entitled to resign. The claimant did not contribute to her dismissal

83. The claimant was dismissed at the age of 61 in the middle of a pandemic. Despite this she has been able to mitigate her loss to an extent but it is just and

equitable in the circumstances to make an award for future loss. Any award should be uplifted as a result of the respondent's unreasonable failure to follow the ACAS code, by not warning the claimant that she could be dismissed and not offering a right of appeal. An award of at least £12,500 is appropriate for injury to feelings, plus interest.

Respondent's submissions

84. Mr Clement lodged a written skeleton submission, which he supplemented with an oral submission. His submissions are summarised as follows:

a. He narrated the facts which he felt were relevant and set out the disclosures relied upon. Reference was then made to the relevant legislative provisions and the following cases:

i. ***Bolton School v Evans*** [2006] IRLR 501;

ii. ***Babula v Waltham Forest College*** (CA) [2007] ICR 1026;

iii. ***Kilraine v London Borough of Wandsworth*** (EAT) [2016] IRLR 424 & (CA) [2018] IRLR 424;

iv. ***N. Williams v Michelle Brown AM*** UKEAT/0044/19/OO;

v. ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416; and

vi. ***Barton v Royal Borough of Greenwich*** UKEAT/0041/14.

b. The respondent's position is that the claimant did not make any protected disclosures. She was simply raising questions and seeking clarification. Each asserted disclosure was addressed in turn and it was submitted, in relation to each, that the relevant tests under s43B and s100(1)(c) ERA were not met as the claimant had not disclosed information, she did not believe the disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered and, if she did, that belief was not reasonably held. It was conceded however that, if there was found to be a disclosure of information meeting these conditions, the claimant believed that disclosure made was made in the

public interest and that belief was reasonably held. Further, they were made to her employer, so if qualifying disclosures were made, they were protected disclosures.

c. The claimant did not suffer the detriments alleged and, in any event, if she had, they were not related to her raising questions and seeking clarification. Each asserted detriment was addressed in turn.

d. The reasons for the claimant's dismissal were as stated, namely the behaviour displayed by the claimant over the previous four weeks. The refusal to deliver day care was encompassed within the claimant's behaviour in that timescale, so the terms of the letter of dismissal were entirely consistent with what was stated at the dismissal meeting. It is not credible that the respondent relied upon six disclosures made by the claimant in March 2020 to dismiss her on 31 July 2020 having paid her for four months in the interim, despite the fact that she was not undertaking any work. The respondent offered to change the reason for the termination of the claimant's employment. Again, this is not consistent with the actions of an employer who had acted in the way alleged by the claimant.

e. In relation to remedy the claimant would have resigned in any event as she was not willing to undertake day care. There is clear evidence of this by the fact that the claimant resigned at the meeting in which she was dismissed. In the alternative she contributed to her dismissal, by calling families liars and refusing to follow a reasonable instruction to undertake day care. Compensation should be reduced by 100%. The respondent did not unreasonably fail to follow the ACAS code, so no uplift is appropriate. The claimant has not taken reasonable steps to mitigate her loss. There is insufficient evidence upon which to base any award for injury to feelings.

Relevant Law

Protected Disclosure

85. Section 43A of the Employment Rights Act 1996 (**ERA**) provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

86. A qualifying disclosure is defined in section 43B ERA as *"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."

87. Section 43C ERA states that:

'A qualifying disclosure 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...."

88. In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

> *"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).' Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."*
>
> *"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

89. In ***Simpson v Cantor Fitzgerald Europe*** [2020] ICR 236, the EAT confirmed these principles, stating:

> *'43... As the Court of Appeal in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 made abundantly clear, in order for a statement*

or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation.

69. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.'

Detriment Claim – Protected Disclosures

90. Section 47B ERA states that

'A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'

91. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

92. Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather, the protected disclosure must materially influence (in the sense of it being more than a trivial influence) the employer's treatment of the whistleblower (***NHS Manchester v Fecitt and others*** [2012] IRLR 64).

93. Helpful guidance on the approach to be taken by a Tribunal when considering claims of this nature is provided in the decision of ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416 at paragraph 98.

Automatically Unfair Dismissal – Protected Disclosures

94. S103A ERA states that:

'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.'

95. In ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening)*** 2012 ICR 372, the Court of Appeal held that the causation test for unfair dismissal is stricter than that for unlawful detriment under s47B ERA: the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas s103A ERA requires the disclosure to be the primary motivation for a dismissal.

Automatically Unfair Dismissal - Health & Safety Grounds

96. Section 100 ERA states:

'(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that-

(c) being an employee at a place where

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matters by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.'

Observations on Evidence

97. The Tribunal felt that each of the witnesses presented their evidence honestly and to the best of their ability.

98. It was clear to the Tribunal that JI was responsible for operational matters and DP had very limited involvement. The Tribunal did not however hear evidence from JI. While DP attempted to cover JI's involvement in her evidence, this introduced ambiguity in a number of respects. For example:

a. DP accepted that there had been no mention of proposed changes to contracts in the meeting between the claimant and JI on 29 June 2020, but it is clear from the transcript of the meeting on 21 June 2020 that JI's position was that it was discussed.

b. The transcript of the meeting held on 21 June 2020, and the attachment to the email sent to the claimant on 22 June 2021, both suggested that the reason for proposing changes to the claimant's contract was a budget deficit. DP stated in evidence the respondent always runs at a deficit, this was not the reason for the proposed changes and she didn't know why JI had raised this with the claimant at the meeting.

c. DP stated that the only reason for the proposed contractual changes was that the respondent was unable to do overnight respite sitting, given the Government guidelines at the time. Accordingly, the only change was that respite care could not be undertaken overnight for a temporary period. Her understanding was that all Foster Respite Carers were informed that they could continue to work 36 hours per week, if they wished, and that they would be able to do so by undertaking 8-10 hours shifts. Her position was that JI 'would have' sent the claimant the same email as she sent to JT on 23 July 2020 (see paragraph 58 above). However it is clear from the transcript of the meeting between the claimant and JI on 27 July 2020 that the claimant was informed that she was simply guaranteed 16 hours per week (albeit with the potential of additional hours, which were not guaranteed) and that this was to be undertaken in shifts limited to 4 hours each.

d. DP indicated that she was informed by JI that the claimant did not want to look after children in her own home, was adamant that she did not want to undertake her contractual hours (36 per week) over 7 days, on a temporary basis and had refused to return to work on this basis. It was clear from the transcripts of the meetings however that claimant had indicated that her preference would be to look after children in her own home, that she wanted to continue with her full contractual hours and had not yet been asked to make decision on whether she would return to work on the new terms proposed.

Discussion & Decision

Disclosures

99. The Tribunal firstly considered each of the matters relied upon by the claimant as protected disclosures, or concerns raised in accordance with s100(1)(c) ERA.

100. The Tribunal was mindful that five elements require to be considered in determining whether each asserted disclosure amounted to a qualifying disclosure (as set out at paragraph 10.b. to 9.f. inclusive above). The Tribunal noted that, unless all five conditions are satisfied, there will not be a qualifying disclosure. Given respondent's position, stated in submissions (that if there was found to be a disclosure of information meeting the other elements of the test, the respondent conceded that the claimant believed that disclosure was made in the public interest and that belief was reasonably held), the Tribunal confined their consideration to the remaining three conditions.

101. In relation to whether the disclosures fell within the scope of s100(1)(c) ERA, the Tribunal noted that no evidence was led in relation to the existence of a health and safety representative or committee for the respondent. The Tribunal accepted however that, if there was such a representative or committee, the claimant was unaware of the existence of this, so it was not reasonably practicable for her to raise the matters by those means.

102. The Tribunal's conclusions in relation to each asserted disclosure, and whether it was a protected disclosure or fell within the scope of s100(1)(c) ERA, are set out below.

103. **First Asserted Disclosure - 17 March 2020.** The terms of the email relied upon by the claimant are set out at paragraph 21 above. The claimant relies upon the section of the email stating that her other employer, Glasgow City Council, had informed her that they had *'been told to cancel all home visits to carers and families due to the virus.'* The Tribunal accepted that this was a disclosure of information, in relation to what Glasgow City Council were doing. The Tribunal found however that the information disclosed did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. The information disclosed was simply a statement of what Glasgow City Council had been told. There was no indication or suggestion that the respondent should take this action, or that there was a risk to health and safety risk if the respondent did not do so. In context, and as stated by the claimant in her evidence, she was at the time she sent the email simply seeking guidance from the respondent in relation how they wished her to act, given the situation developing at that time in relation to the Covid-19 virus. The claimant did not believe that the information disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. If she did, that belief was not reasonable. The Tribunal accordingly concluded this was not a qualifying disclosure.

104. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the circumstances disclosed to her employer were not 'connected with her work' with the respondent. They were connected to the work she did with another employer. The information disclosed did not, therefore, fall within the scope of s100(1)(c) ERA.

105. **Second Asserted Disclosure - 19 March 2020.** The terms of the email relied upon by the claimant are set out at paragraph 24 above. The claimant relies upon the section of the email where she highlighted that two children who had been in her care were showing symptoms of the virus and isolating, and asks

if she should inform other families, therefore giving them the option to postpone respite sessions to reduce further risk. The Tribunal accepted that this was a disclosure of information: the claimant stated that the baby was showing symptoms of the virus, as was another child the claimant had been caring for. She then asked a question, namely '*should Geeza Break be informing other families of this therefore given them the option to postpone their planned respite therefore reducing further risk.'* There is no information disclosed in that question.

106. In relation to the information which was disclosed, the Tribunal concluded that it did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. It was simply a statement that two children who had been in the claimant's care were showing symptoms of the virus, but neither had been tested. The information disclosed did not tend to show that the health or safety of any individual had been, was being, or was likely to be (in the context of it being probable or more probable than not), endangered. The children may/may not have the virus. The claimant was not displaying any symptoms. With appropriate precautions, such as the claimant isolating if she developed symptoms and taking appropriate precautions (handwashing, cleaning and using PPE), there was no reason to believe that there was any risk to health and safety. The Tribunal accordingly found that, if the claimant did hold a belief that the information disclosed tended to show that the health or safety of any individual had been, was being, or was likely to be endangered, that belief was not reasonably held. In context, and as stated by the claimant in her evidence, she was, at the time she sent the email, simply seeking guidance from the respondent, given the situation developing at that time in relation to the Covid-19 virus. It was not therefore a qualifying disclosure.

107. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the claimant did bring circumstances connected with her work to the respondent's attention, namely that two children, who had been in her care, had developed symptoms of the virus. She did so by reasonable means. The claimant believed that the circumstances were (potentially or actually) harmful

to health and safety. The Tribunal however found that the claimant's belief was not a reasonable belief, for the reasons set out above. The circumstances disclosed did not, therefore, fall within the scope of s100(1)(c) ERA.

108. **Third Asserted Disclosure - 20 March 2020**. The terms of the email relied upon by the claimant are set out at paragraph 28 above. The claimant asserts that she disclosed in her email that she lacked sufficient PPE. What she in fact stated is that she was *'looking for the following equipment'* and that she had a *'limited stock and going out again to source more, if anyone has extra at home this is the time to share'.* While that is a disclosure of information (that her stock of PPE is limited), she does not state that she does not have sufficient PPE to carry out her duties in the immediate future. She states that she has limited stock and is taking steps to secure more. She does not state that there is a risk to health and safety arising from the limited stock which she does have. The Tribunal accordingly concluded that the information disclosed did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. The Tribunal found that the claimant did not believe that the information disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. If she did, that belief was not reasonable. It was not therefore a qualifying disclosure.

109. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the claimant did bring circumstances connected with her work to the respondent's attention, namely that she has a limited stock of PPE and was taking steps to secure more. She did so by reasonable means. The Tribunal found that the claimant did not believe that the circumstances disclosed were, at that stage, potentially or actually harmful to health and safety. If she had been unable to secure more PPE, then the position may have changed, but, at the stage of sending the email, she had a limited stock, sufficient to undertake her duties. The circumstances disclosed did not, therefore, fall within the scope of s100(1)(c) ERA.

110. **Fourth Asserted Disclosure - 23 March 2020.** The terms of the email relied upon by the claimant are set out at paragraph 29 above. The Tribunal accepted that this was a disclosure of information in relation to what Glasgow City Council were doing. The Tribunal found however that the claimant did not believe that the information disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. If she did, that belief was not reasonable. The information disclosed was simply a statement of what one organisation had decided to do in response to the developing situation regarding the Covid-19 virus. The claimant did not indicate or assert that the respondent should take the same action, or that there was any health and safety risk if the respondent did not follow suit. The information disclosed did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being or was likely to be endangered. The Tribunal accordingly concluded this was not a qualifying disclosure.

111. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the circumstances disclosed to her employer were not 'connected with her work' with the respondent. They were connected to the work she did with another employer. The information disclosed did not, therefore, fall within the scope of s100(1)(c) ERA.

112. **Fifth Asserted Disclosure - 24 March 2020.** The claimant asserts that she stated to CM, during a call with her on 24 March 2020, that *'all the respite care provision should be cancelled, in line with Government restrictions, given that the UK was now in a lockdown.'* She relies on this as a protected disclosure. As set out in paragraph 31 above, the Tribunal found that this statement was not made by the claimant during the call with CM. Rather, the claimant simply stated to CM that '*the country was now in a 3 week lockdown'* and *'I thought you were call me to inform me that all respite was now cancelled.'* The statement regarding the country being in lockdown is a disclosure of information. The second statement is simply a statement of the claimant's opinion/state of mind: the information disclosed is limited to that. Without more, the information disclosed does not meet the threshold level of sufficiency in terms of factual content and specificity, such as was capable of

tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. It was not therefore a qualifying disclosure.

113. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the circumstances disclosed to her employer, that the country was now in a 3 week lockdown were not 'connected with her work'. That was a statement regarding what was occurring in the country generally. Her statement that *'I thought you were call me to inform me that all respite was now cancelled'* was not a circumstance connected with the claimant's work. It was a statement regarding what she thought CM was going to say to her during the call. As she did not bring circumstances connected with her work to the respondent's attention during the call, the circumstances disclosed did not fall within the scope of s100(1)(c) ERA.

114. **Sixth Asserted Disclosure - 24 March 2020.** The terms of the email relied upon by the claimant are set out at paragraph 33 above. In considering the terms of this email, the Tribunal also took into account the terms of the previous emails referred to in the email. The Tribunal found that information was disclosed in this email, namely that the respondent's failure to provide the claimant with appropriate PPE was putting children and families at risk, and that the respondent's advice *'to take children to the [respondent's] flat is putting sitters, carers and children at great risk in a confined space, and [is] unsuitable and dangerous advice under the current Government guidance. (Government guideline not to be in confined, enclosed, spaces 2 metre apart, I would be putting the child at risk in my car or taking them to the flat.)'* The Tribunal found that these statements had sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. The Tribunal found that the claimant believed that the information disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. The Tribunal found that that, taking into account the broader context as set out in the claimant's emails as a whole, that belief was reasonably held. It was therefore a qualifying disclosure. Given that it was

made to her employer, it was also a protected disclosure (the **Protected Disclosure**).

115. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the claimant did bring circumstances connected with her work to the respondent's attention, namely that the respondent's failure to provide the claimant with appropriate PPE was putting children and families at risk, and that the respondent's advice to take children to the respondent's flat, a shared confined space, and transporting the children there, was putting sitters, carers and children at risk. She did so by reasonable means. The Tribunal found that the claimant believed that the circumstances disclosed were, at that stage, potentially or actually harmful to health and safety and that that belief was a reasonable belief. The circumstances disclosed therefore fell within the scope of s100(1)(c) ERA.

116. **Seventh Asserted Disclosure - 29 June 2020.** The claimant asserts that she made disclosures to JI during a meeting on 29 June 2020. The Tribunal's findings in relation to what occurred during that meeting are set out at paragraphs 37 & 38 above. The Tribunal concluded that the claimant did not disclose any information to JI during that meeting. Given that she did not disclose information to JI, the Tribunal concluded that there was no protected disclosure made to JI during the meeting.

117. The Tribunal concluded that the claimant did not disclose any circumstances connected with her work during the meeting. S100(1)(c) ERA was accordingly not engaged.

118. **Eighth Asserted Disclosure - 2 July 2020.** The terms of the email relied upon by the claimant are set out at paragraph 43 above. The claimant asked a number of questions in her email. She did not assert in those questions that the health or safety of any individual had been, was being, or was likely to be, endangered by the procedures adopted by the respondent, as she did not know what procedures were to be followed and was requesting information and clarification of these. She was accordingly requesting, rather than providing, information. That does not amount to a disclosure of information. However, in the paragraph between the two sets of questions the claimant

does, the Tribunal found, disclose information. The information disclosed is that:

a. While she had understood that contact with parents would be limited, the risk assessment form requires to be signed by the parents when the carer is collecting the child and this involves contact; and

b. The claimant did not feel qualified to carry out a risk assessment on Covid-19.

119. In relation to contact with the parents, the information disclosed was that the risk assessment form requires to be signed by the parents when the carer is collecting the child and this involves contact. She does not suggest that there is, or could be, any risk to health and safety as a result of that contact. Without more, the information disclosed does not meet the threshold level of sufficiency in terms of factual content and specificity, such as was capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. The Tribunal accordingly concluded that this was not a qualifying disclosure.

120. In relation to the risk assessments, the information disclosed was that the claimant did not feel qualified to carry out a risk assessment on Covid-19. That is simply a statement of the claimant's opinion/state of mind: the information disclosed is limited to that. An individual may not feel qualified to carry out a risk assessment, but may be well able to do so without any risk to health and safety. Without more, such as an explanation of why the claimant does not feel qualified to do so, or an indication of the likely consequences, the information disclosed does not meet the threshold level of sufficiency in terms of factual content and specificity, such as was capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. The Tribunal accordingly concluded that this was not a qualifying disclosure.

121. In relation to whether the disclosure fell within the scope of s100(1)(c) ERA, the claimant did bring circumstances connected with her work to the respondent's attention, namely that rather than limiting contact as had been

discussed, the respondent's risk assessment required the claimant to have contact with parents. She did so by reasonable means. The Tribunal accepted that the claimant was concerned that contact with the parents was unnecessary and could lead to spread of the virus. She accordingly believed that the circumstances disclosed were potentially or actually harmful to health and safety. At that stage, it was commonly understood that the virus was spread by close contact. Scotland was in Phase 2 and people were only allowed to meet socially outdoors (limited to two households per day). The Tribunal found, as a result, that that belief was reasonably held in circumstances. The circumstances disclosed therefore fell within the scope of s100(1)(c) ERA.

122. The claimant also stated that she did not feel qualified to carry out a Covid-19 risk assessment. This was a circumstance connected with her work which she brought to the respondent's attention. She did so raising this in the email, which was by reasonable means. The Tribunal found that the claimant believed that the circumstances disclosed were potentially or actually harmful to health and safety. She was concerned that, as she had not received any guidance or training in relation to how the form should be completed, particularly the section requiring her to 'measure the level of the risk' in the respite care proceeding as 'high/medium/low'. The Tribunal concluded that that belief was a reasonable belief. The circumstances disclosed therefore fell within the scope of s100(1)(c) ERA.

Detriment Claim – S47B ERA

123. The Tribunal then considered whether the claimant was subjected to any detriment by an act, or a deliberate failure to act, by her employer on the ground that she made a protected disclosure. As indicated above, the Tribunal found that one disclosure amounted to a protected disclosure. The Tribunal's conclusions in relation to each detriment asserted by the claimant are as follows:

a. The first detriment asserted by the claimant was that, on 3 July 2020, she was suddenly pressurised into responding to the respondent's emails within very tight timescales and that she felt bullied by her

manager, as she received 4 missed calls and an email from her within 1 hour and 20 minutes. The Tribunal notes that, by 3 July 2020, the claimant had already submitted her questions to the respondent in relation to the paperwork passed to her and a list of the additional PPE she felt she required. She did so on 2 and 1 July 2020 respectively. There was accordingly no pressure to respond to any emails from the respondent on this date. This asserted detriment has accordingly not been established in that respect. In relation to the telephone calls, the Tribunal found that these did occur: JI called the claimant on her home and mobile telephone numbers, but the claimant did not answer. JI tried both numbers again just over one hour later. When the claimant did not answer on that occasion, JI sent her an email asking her to make contact. The conduct complained of was accordingly established. The Tribunal found however that the established conduct was not a detriment: it was not something about which a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they required to work. The claimant was being paid full pay at the time, despite not being required to undertake any work. The calls made to her were made within her normal working hours. She had not indicated that she did not wish her employer to contact her by telephone. It was accordingly entirely reasonable for her employer to attempt to contact her during her working hours. It did not constitute a detriment. In any event, the further calls (after the first) and email were simply because of the fact that the claimant had not answered on the first occasion. There was no evidence to suggest that the protected disclosures made by the claimant were a material factor in JI's repeated attempts to contact the claimant.

b. The second detriment asserted by the claimant was that she was instructed, on 3 July 2020, to take annual leave for 2 weeks. The Tribunal found that this conduct was established and it did amount to a detriment. Being instructed to take two weeks' annual leave, without the requisite notice required in the Working Time Regulations 1998, is

something which a reasonable worker would or may view as a disadvantage. The letter stated that the claimant was being required to take annual leave *'further to recent discussions and given the impact coronavirus is having on the business and your availability to work'* and that this was required *'until your concerns are addressed regarding returning to work'.* It was only sent to those Foster Respite Carers who had raised concerns in relation to their return to the workplace. In the claimant's case, that included the Protected Disclosure, which she had made the previous day. The Tribunal accordingly concluded that the Protected Disclosure was a material factor (in the sense of it being more than trivial) in JI's decision to place the claimant on annual leave. The claimant was accordingly subjected to a detriment, contrary to s47B ERA, as a result of making a protected disclosure.

c. The third detriment asserted by the claimant was that, on 21 July 2020, her contractual hours were reduced, from 36 hours per week to 16 hours per week, and she was demoted from her position of Respite Foster Carer to Respite Sitter. The Tribunal found that, whilst there was a consultation meeting with the claimant on 21 July 2020, at which the potential of a change to her contract was discussed, no changes were implemented. In fact, at no point during her employment were the potential changes, which were discussed at the meeting, imposed. The claimant continued to be paid her full contractual hours as a Respite Foster Carer until the termination of her employment on 31 July 2020. The detriment alleged has accordingly not been established.

d. The fourth detriment asserted by the claimant was that, on 2 September 2020, the claimant was denied copies of recordings of various meetings she had attended. The Tribunal found that the claimant was not provided with copies of the recordings of the meetings she attended. The conduct complained of was accordingly established. The Tribunal found however that the established conduct was not a detriment: it was not something about which a reasonable worker would or might take the view that they have been

disadvantaged, given that transcripts of the meetings had been provided. In any event, the decision not to provide the recordings was based on legal advice and the fact that transcripts had already been provided. There was no evidence to suggest that the Protected Disclosure was a material factor in the decision not to provide the recordings.

e. The fifth and final detriment asserted by the claimant was that, on 21 September 2020, she was not permitted the right to appeal her dismissal. The Tribunal accepted that the conduct asserted was established and the claimant was not permitted to appeal the decision to dismiss her. The Tribunal found however that it was not a detriment: it was not something about which a reasonable worker would or might take the view that they had been disadvantaged in circumstances where the disciplinary procedure expressly states that the procedures only apply where an individual has under two years' service and the appeal is lodged over a month after the stated timescales for an appeal had expired. In any event, the decision not to allow the claimant to appeal was based on the terms of the disciplinary policy. There was no evidence to suggest that the Protected Disclosure was a material factor in the decision not permit the claimant to appeal.

Automatically Unfair Dismissal Claims

124. The Tribunal then considered whether the claimant had established, on the balance of probabilities, that the reason (or principal reason if more than one) was an automatically unfair reason, namely:

a. That she made the Protected Disclosure (s103A ERA); or

b. That she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed to be harmful or potentially harmful to health and safety (s100(1)(c) ERA).

125. In considering this, the Tribunal was mindful that the principal reason is the reason that operated on the employer's mind at the time of the dismissal

(***Abernethy v Mott, Hay and Anderson*** 1974 ICR 323, CA) and that, if the fact that the employee made a protected disclosure or raised concerns under s100(1)(c) influenced, but was not the sole or principal reasons for dismissal, then the employee's claim under s103A/100 ERA will not be made out (***Fecitt and ors v NHS Manchester (Public Concern at Work intervening)***).

126. The Tribunal firstly considered the reasons advanced by the respondent. The letter of dismissal stated that the reason for dismissal was the claimant's *'refusal to deliver daycare on a temporary basis and displaying behaviours over the past four weeks which are not aligned with the culture of the business.'*

127. The Tribunal noted that, as at 31 July 2020, the claimant had not refused the proposed changes to her contract. During the meeting on 27 July 2020, she had expressly asked JI whether she was required to sign something in relation to the proposed changes. JI stated that she did not, as the respondent was still in a consultation period with her. The claimant was dismissed for refusing to undertake day care on a temporary basis at the next meeting. She had not been asked whether she agreed to the changes or not after the meeting on 27 July 2020. She had not been asked to sign anything in relation to the proposed changes after the meeting on 27 July 2020. The only contact between the claimant and her employer, after the meeting on 27 July 2020 and prior to her dismissal, was the claimant's email of 28 July 2020 (when she stated that she would like a copy of the new amended contract before making any decisions) and the letter inviting the claimant to the meeting on 31 July 2020. In these circumstances, the Tribunal concluded that the claimant had not refused to undertake day care on a temporary basis. The respondent was consulting with her in relation to the prospect of this, but she had not yet been asked to make a decision. The Tribunal accordingly concluded that the reason asserted by the respondent was not the genuine/real reason for the claimant's dismissal.

128. The other reason asserted by the respondent was that the claimant '*displaying behaviours over the past four weeks which are not aligned with the culture of the business'.* As set out at paragraph 69 above, this related solely to the claimant's comments, in the meeting on 21 July 2020, *'how can we be sure that the information from the parent is factually true'* and *'I already know some*

of the families have already told lies'. Whilst DP asserted in evidence that this was entirely unacceptable, the Tribunal noted that the comments were made in the course of a private discussion between an experienced respite carer and her line manager. Further, in her own evidence to the Tribunal, DP stated that it was possible that parents would conceal information and there was a risk of the parents being dishonest. In addition, as set out in paragraph 44 above, JT set out in writing, in her email of 2 July 2020, that *'The final disclaimer does leave lots of room for error as parents/carers can simply be dishonest over the phone'.* No action was taken against JT for making the statement that parents/carers could be dishonest. No satisfactory explanation was provided for this or why, given that it appears to be accepted that parents may conceal information or be dishonest, the claimant stating that she was aware some families had told lies was behaviour not aligned with the culture of the respondent's business to such an extent that it formed the basis for the claimant's dismissal. The Tribunal also noted that the comments were made on 21 July 2020 but no mention of this was made at the subsequent meeting on 27 July 2020. Again, no explanation was provided for why, if the comments were so serious that they formed the basis for the claimant's dismissal, the respondent continued with the meeting on 27 July 2020, making no reference to this. Taking each of these points into account, the Tribunal concluded that the reason asserted by the respondent was not the genuine/real reason for the claimant's dismissal.

129. Having reached the conclusion that the reasons asserted by the respondent were not genuine, the Tribunal proceeded to consider what the principal reason that operated on the employer's mind at the time of the dismissal was, why the employer reached the decision they did and what, consciously or unconsciously, was their reason or motivation for reaching that conclusion. The Tribunal was mindful that it may be appropriate to draw inferences as to the real reason for the employer's action when doing so (***Kuzel v Roche Products Ltd*** 2008 ICR 799, CA).

130. The Tribunal was mindful that, as confirmed by Lord Justice Mummery in ***Kuzel,*** the fact that the Tribunal has rejected the reasons for dismissal advanced by the respondent, does not mean that the Tribunal is bound to

accept the reason put forward by the claimant. The Tribunal reminded itself however that, in this particular case, unlike the circumstance in ***Kuzel,*** it was for the claimant to establish, on the balance of probabilities, that the reason (or principal reason if more than one) was an automatically unfair reason.

131. The Tribunal considered whether the Protected Disclosure was the principal reason that operated on the employer's mind at the time of the dismissal. The Tribunal concluded that it was not. The Protected Disclosure was made on 24 March 2020. Following on from that, the respondent paid the claimant her full pay for four months, despite the fact that she was not undertaking any work, and undertook consultation with her in relation to temporary changes to her contract and return to work. There is no evidence to support the Protected Disclosure being the sole or principal reason for the claimant's dismissal on 31 July 2020.

132. The Tribunal considered whether the health and safety concerns raised by the claimant on 24 March 2020 were principal reason that operated on the employer's mind at the time of the dismissal. The Tribunal discounted the concerns raised by the claimant on 24 March 2020 as being the sole or principal reason for the claimant's dismissal, for the same reasons set out in the paragraph above.

133. The Tribunal considered whether the health and safety concerns raised by the claimant on 2 July 2020 were principal reason that operated on the employer's mind at the time of the dismissal. The Tribunal noted that the respondent provided detailed written responses to the issues raised by the claimant on 15 July 2020. The respondent's position was that they had requested that the claimant and her colleagues raise any concerns with them, so they could be addressed. They were happy to do so and did not dismiss the claimant for raising issues, in response to a request by them that she do so. In any event, their position was that the issues raised by the claimant had been addressed in their responses, so their understanding was that these were no longer live issues. There was accordingly no reason for them to dismiss the claimant for raising these issues. The Tribunal noted that, if the concerns raised by the claimant in her email of 2 July 2020 were the principal reason operating in the

respondent's mind, they had the opportunity to dismiss the claimant at the meetings on 21 and 27 July 2020, but did not do so. More fundamentally, the Tribunal noted that JT had raised similar concerns to those of the claimant on 2 July 2020. She raised concerns that she did not feel in a position to measure the risk inherent in respite proceeding, as was required by the risk assessment form, and decide if it should go ahead. She stated this involved far too much accountability and responsibility on her. While she did not raise particular concerns in relation to contact with the parents, she did raise significant concerns in relation to her information being on the form and the fact that she required to sign the form. JT was not dismissed. The Tribunal concluded that, if the sole or principal reason for the claimant's dismissal was the terms of her email of 2 July 2020, then JT would have also been dismissed for raising similar concerns. She was not. JT returned to work. Accordingly, whilst it may have been possible to draw an inference that the concerns raised by the claimant (and her colleagues) materially influenced the decision to proposed changes to the claimant's contract, along with the Scottish Government guidance that no overnight respite care should be undertaken, it cannot be said that this was those concerns were the sole or principal reason for the claimant's dismissal. Rather, the Tribunal concluded that the reason which operated on the respondent's mind at the time of the dismissal was a belief that the claimant would not return to work undertaking day care only, even on a temporary basis, as well as the increasingly fractious relationship between JI and the claimant, as evidenced by the tone and content of the meetings held between them on 21 & 27 July 2020.

134. For these reasons the Tribunal concluded that the claimant has not demonstrated, on the balance of probabilities, that the health and safety concerns raised by the claimant on 2 July 2020 were principal reason that operated on the employer's mind at the time of the dismissal.

135. Given these findings, the claimant's complaints under sections 100(1)(c) and 103A ERA do not succeed and are dismissed.

Remedy

136. The Tribunal found that the claimant had been subjected to a detriment as a result of making a protected disclosure when she was required to take two weeks annual leave from 6-20 July 2020 inclusive.

137. The Tribunal concluded that it was appropriate to make an award equivalent to two week's pay in respect of this, being the two weeks holiday pay that the claimant would otherwise have been entitled to on the termination of her employment, had she not been subjected to this detriment. The claimant's gross weekly pay was £360, so the award made is of £720, plus interest of £56.81 (calculated from 28 June 2021, (the midpoint between the date and the calculation date) to the calculation date, at the prescribed rate of 8%).

138. While the claimant gave evidence in relation to injury to feelings in relation to the respondent's actions generally and the termination of her employment, no specific evidence was led in relation to how the claimant felt about being required to take two weeks annual leave.

139. In the circumstances, and given the very limited evidence led in relation to this point, the Tribunal concluded that an award at the lower end of the lower Vento band was appropriate, namely £2,000, plus interest of £315.62 (calculated from 3 July 2020 to the calculation date, at the prescribed rate of 8%).

Employment Judge: **M Sangster**
Date of Judgment: **23 June 2022**
Entered in register: **24 June 2022**
and copied to parties