EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110351/2019

Held in Glasgow on 5, 6, 7, 8 and 9 September 2022

Employment Judge P O'Donnell
Members P O'Hagan and S Singh

Miss G Neill	**Claimant** **In Person**
Big Bird Nursery (Larkhall) Limited (in Liquidation)	**Respondent** **No appearance and** **No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The Claimant's claim for unlawful deduction of wages under Part 2 of the Employment Rights Act 1996 is not well founded and is hereby dismissed.

2. The Claimant claim that she had been subject to detriments for making protected disclosures contrary to s47B of the Employment Rights Act 1996 is not well founded and is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought complaints that she was subject to detriments contrary to s47B of the Employment Rights Act 1996 (ERA) because she had made a number of protected disclosures as defined in s43A ERA and that she had been subject to deduction of wages contrary to Part 2 ERA related to holiday pay for the period when she was off work sick in 2018 and 2019.

2. The Respondent lodged an ET3 resisting the claims and was engaged in the Tribunal process until it went into administration in November 2021. The

Claimant obtained permission from the Administrator for the claim to proceed and the present hearing was listed.

3. The Administrator did not choose to attend the hearing and so, although the claim is defended, there was no evidence led by the Respondent.

Case Management

4. At the outset of the hearing, it was identified that there was an outstanding application to amend the claim. The Claimant had lodged a document in July 2021 setting out what was described as "additional information" regarding her claim. It was, however, identified that some of this information related to detriments to which the Claimant alleged she was subject and which occurred after her ET1 was lodged.

5. These new detriments are identified in a table at paragraph 6 of the Note of a Preliminary Hearing heard by EJ Sutherland in October 2021 and were being treated as an application to amend. The Respondent had been directed to confirm whether or not they objected to this application but had gone into administration before they had done so. The proceedings were then sisted until the Administrator gave permission to proceed. However, the outstanding application to amend had never been resolved.

6. The Tribunal dealt with this at the outset of the hearing and, there being no objections, the Tribunal granted the application.

Evidence

7. The Tribunal heard evidence from the Claimant only.

8. Prior to the Respondent going into administration, their solicitor had prepared a joint bundle which had been lodged with the Tribunal in 2021. At the hearing, the Claimant produced further documents to which she wished to refer and these formed a supplementary bundle. Where the judgment below refers to page numbers then these are pages in the joint bundle and where it refers to a page number proceeded by "C" then it refers to a page in the supplementary bundle.

9. The Tribunal found the Claimant to be an honest and credible witness; there was no question that she was, in any way, fabricating any of her evidence.

10. However, for a number of reasons, the Claimant's evidence was not always reliable. It was quite clear that the considerable passage of time had impacted on the Claimant's recollection of events. This is not intended as a criticism of the Claimant; the passage of time would adversely affect the recall of any witness. In particular, the Claimant would occasionally be unable to recall the exact sequence of events or would conflate what happened on different occasions. For example, she gave evidence about issues being raised during a disciplinary hearing that were actually raised at a later appeal hearing.

11. The passage of time and the effect on the Claimant's recollection also impacted on the adequacy of the Claimant's evidence. For example, in terms of the disclosures relied on as founding the detriment claim, the Tribunal only heard sufficient evidence about those disclosures narrated below to be able to make findings of fact about those. To the extent that the Claimant asserted that she made other disclosures but did not give evidence of the detail of these (that is, what was disclosed, to whom and when) then there was not sufficient evidence for the Tribunal to make any findings of fact from which it could conclude that there were other protected disclosures.

12. In particular, the Tribunal has proceeded on the basis that the disclosures relied on are those set out in the further particulars at pp52-53 although the Claimant was given the opportunity to give evidence about any other disclosures related to those which she relied on.

13. The reliability of the Claimant's evidence was also affected by the fact that she would frequently repeat her concerns about how the Respondent's business was being conducted or how she and other employees were retreated at length rather than focus on the specific matter or event about which she was giving evidence. Again, this is not intended as a criticism; the Claimant was clearly very concerned about the events giving rise to her claim and was going to pains to set these out. However, this did mean that the

Tribunal had to regularly intervene to avoid unnecessary duplication of evidence and to ensure that it heard all the relevant evidence.

14. The Tribunal also had to address the absence of evidence from the Respondent. To a large extent, this was to the Claimant's benefit as she gave uncontested evidence about the matters giving rise to the claim. However, there were circumstances where the Respondent's explanation for their actions (for example, why they made the decisions they did as part of the disciplinary process which forms part of the detriments) would be an important element of the factual matrix from which the Tribunal would draw any inferences.

15. In these circumstances, where there was any contemporaneous documentation or correspondence which set out the Respondent's explanation for any actions taken by them then the Tribunal considered that such documents said what they bore to say and took any such explanations given at the time at face value. The Tribunal proceeded on the basis that these were the explanations which the Respondent would have given in evidence had they led any evidence.

16. The Tribunal also bore in mind that the Respondent had set out their case in their ET3 and the Claimant's evidence had to be tested against this.

Findings in fact

17. The Tribunal made the following relevant findings in fact.

18. In addition to the Claimant, a number of other people will feature in the findings in fact:-

    a. Hazel Sneddon (HS), the nursery manager.

    b. Tereasa (Reasa) Young (TY), the manager of the "Hub" which was another unit in the same premises as the nursery also operated by the Respondent.

    c. David Black (DB) and Katherine Black (KB), who became the owners of the nursery in or around May 2018.

d. Mandy Doran (MD), a parent of a child who attended the nursery, was on the parent committee and later was employed at the nursery.

e. Ashley McLullish (AMcL), another parent of a child who attended the nursery and was chair of the parent committee.

f. Laura Richmond (LR), who became nursery manager when HS left to manage another nursery owned by the Respondent.

19. The Tribunal will set out its findings in fact under the following headings:-

a. Introduction – this will set out a summary of the Claimant's employment history.

b. Disclosures – this will set out the findings in fact in relation to the disclosures which the Claimant relies on as founding her detriment claim.

c. Detriments – this will set out the findings in fact in relation to each of the detriments alleged by the Claimant.

20. The Tribunal considers that setting out its findings in this way (as opposed to a continuous chronology) will make it clear which facts which are related or form part of the same theme or issue.

Introduction

21. The Claimant commenced employment with the Respondent (which operated a nursery and other children services such as after school clubs) in January 2017. The role was originally intended to involve the Claimant overseeing training and driving the bus and people carrier used for transporting children. The training aspect of the role never materialised and the Claimant was predominantly involved in driving duties over the initial period of her employment.

22. In September 2017, the Claimant moved into a role of qualified practitioner which involved working with the children in the nursery as well as continuing with her driving duties. She signed a contract for this role on 4 October 2017

(pp97-104). In 2018, the Claimant moved to a term-time contract although her role and duties remained broadly the same. The facts relating to move to the term-time contract are set out below given that the move to term-time working is one of the alleged detriments.

23. The Claimant went off sick on or around 2 October 2018 and did not return to the workplace before the Respondent ceased trading in November 2021. She was not on sick leave for the whole of this period, being suspended on full pay from March 2020 and then on furlough from January 2021.

Disclosure

24. During the course of her employment, the Claimant had concerns about how the nursery operated. The Tribunal will set out its findings of fact in relation to each of the incidences of the Claimant disclosing these concerns to various persons grouped together where there are common issues.

25. On 23 June 2017, the Claimant spoke to HS, TY and another manager (Alex McMahon) about the child restraints in the bus and people carrier used by the Respondent. She stated that the shoulders straps on some of the seat belts in the bus were broken so that only 10 children could be transported safely (the bus has 16 seats). She also stated that children needed a high-backed seat until they were of a certain height.

26. TY disputed that such seats were needed and so the Claimant provided the document starting at p958 (a Department of Transport publication setting out the legal position in seat belts and child restraints) to support her position. HS agreed with the Claimant and adjustments were made to the care plan but no actual changes were made.

27. On 27 September 2018, the Claimant arrived at a school where she was to pick up some children to bring to the Hub for after school care. She was using the people carrier. There were 5 children, 3 of whom needed car seats but only 2 car seats available. She phoned the nursery and spoke to HS explaining that there were not enough car seats. HS responded angrily and

told the Claimant to sort it. The Claimant borrowed a car seat from a parent at the school whom she knew and used that to transport the children.

28. On 23 April 2018, the Claimant has an exchange of text messages with HS (p767-772) in the following terms:-

a. She states that sandwiches were not offered at snacks and that she had a child in hysterics because she had not eaten. She states that children need to be offered alternatives as they will not eat food they do not like.

b. She states that that morning children had been told that it was cereal for breakfast and there was no bread or toast, that that afternoon there were no sandwiches at snacks and 6 children did not eat lunch that day.

c. HS states that she will set up time to go through everything with the Claimant the next day and sets out her understanding that the Claimant's daughter had pitta bread as a snack.

d. The Claimant responds that her daughter had two bits of bread and that if this keeps up she will not leave the building until she knows her daughter has eaten.

e. The Claimant comments that she has seen what is going downstairs for 20 plus children and HS responds that is why there need to be an investigation.

f. The Claimant states that parents have been told that there will be alternatives.

g. HS replies that she will do an investigation and take disciplinary action if required. The Claimant replies that she doesn't need disciplinary action and just does not understand the resistance to offering the children something to eat.

29. On 24 April 2018, the Claimant had finished her shift and had gone upstairs to get ready to leave. She looked out the window and saw staff encouraging

children to climb on top of the shed in the grounds of the nursery and jump off. The shed is a children's shed with a sloped roof about head height for an adult. It is near a fence with barbed wire and spikes.

30. The Claimant went to the office and told HS what she had seen. HS replied "who the fuck is doing that?". The Claimant then took a photograph (C1039) on her phone and showed it to HS.

31. The Claimant subsequently witnessed HS talking to members of the parent committee about the benefits of risky play.

32. A risk assessment of the play in question was done subsequently and it recommended that this should stop.

33. On 29 May 2019, HS sends a text message (C1021) that, from the next day, lunch and snacks are to be served indoors only and there can only be a fruit bowl outdoors. The Claimant responds that "they" (it was not clear to whom this refers) should stop sending children outside without breakfast.

34. The Respondent has a parent committee called "Parent Voice". The Claimant had been a member of the committee in the past but had left by the time of the events giving rise to the claim. She wished to raise with the committee her concerns about the food being served to the children.

35. On 9 May 2018, she has a text exchange (pp786-794) with AMcL who is the chair of the committee:-

    a. The Claimant starts by informing AMcL that she is the parent complaining about food and that she could detail the complaint to AMcL. She states that HS knows that the Claimant wishes to make a complaint and that she has been asking for access to the committee for over a month.

    b. AMcL replies that she only knows what she had been told and if the Claimant wants to fill her in that would be great. There is then a discussion about their respective availability which concludes with AMcL asking the Claimant to set out her concerns in writing.

c. The Claimant replies that children are deemed to have eaten if they so much look at lunch and that no alternatives are offered. She offers to meet another committee member.

d. The Claimant comments that she would not eat the food being offered as it is served burnt or raw. She states that she has been fighting this internally since September.

e. She tells AMcL that the children are told they cannot have cereal because it is toast day or that they cannot have an apple because banana is on the menu. If they do not eat breakfast in the allocated time then they do not get any.

f. The exchange concludes with another discussion of their respective availability.

36. The Claimant alleges that around the same time she had a similar conversation with MD. She refers to an exchange of text messages at pp777-778 as follows:-

a. The Claimant states that she asked to attend a meeting and HS said there was no need as her concerns had been passed along with the committee being on board with the policy. The Claimant stated that she wished to attend so that HS could not lie.

b. MD responds asking the Claimant to note “it” all down and send it to her and AMcL.

c. The Claimant replies that this has already cost her promotion, training and relationships.

d. MD states that the committee was happy for her to attend but HS did not want her to do so. The Claimant replies that she has a right to attend as a parent.

37. On 1 October 2018, the Claimant had a text exchange (pp826-831) with MD who was now employed at the nursery:-

a. The context of the exchange was that there was no detergent available for the washing machine at the nursery. MD had asked for someone to pick some up.

b. The Claimant commented in a text that it was surprising that whoever had put the washing in had not highlighted the lack of detergent.

c. MD commented that if someone mentioned it when the detergent was getting low then it is easily sorted.

d. The Claimant replied that it was easier to have two boxes and a new one could ordered when the first was finished. The same could be done for toilet roll and handwash. MD responded that this was a good idea.

e. The discussion concludes with the Claimant commenting that it is the same with items such as paint, paper, fruit and other resources which run out before they are replaced.

Detriments

38. In February 2018, the Claimant was informed by HS that she wished to promote the Claimant into the role of deputy manager at the Hub. This had been occupied by Alex McMahon who was leaving and HS wanted the Claimant to fill the vacancy because she had previous management experience.

39. The Claimant did not want to be a manager; she was already concerned at the fact that text messages would be sent about work during the weekends and in the evening. She was told by HS that she had no choice and it was either the role of deputy manager or she had no job.

40. The Claimant thought about this and came to the view that the deputy manager role might be better and so she had agreed to this. The manager at the Hub, Bernadette Hutton, was unhappy at the appointment being made without her being consulted but HS was intending to proceed with the Claimant's appointment.

41. HS subsequently informed the Claimant that she was intending to appointment someone she had interviewed for the role of bus driver to the deputy manager role because of the experience which they had. The Claimant could not recall when this occurred but thought it was 4-6 weeks after she was asked to take on the deputy manager role (which would place it in March or early April 2018). She thought that it was around the time when a complaint had been made to the Care Inspectorate about people driving the bus without the proper licences.

42. The day after this discussion, an existing employee, Gemma McCrum-Weir, was announced on Facebook as the new deputy manager. No explanation was given to the Claimant by HS as to why the position had changed and the Claimant did not ask for one. HS would promote people on a whim and then demote them when they fell foul of her or she would create new job titles for staff without actually promoting them.

43. As narrated above in relation to the disclosures, the Claimant had been asking to speak to the parent committee in relation to her concerns about the food being served to the children.

44. On 3 May 2018 (p159), HS emailed the parent committee (copying in the Claimant) to advise them that a parent has asked to raise concerns about food and meal times. She does not name the Claimant as the parent in question. The email goes on to state that the parent wishes to attend the meeting but that HS is unsure that this is the best approach and that it may be better for the concerns to be put in writing. She informs that she is hoping to speak to AMcL to discuss the best approach.

45. By a later email on the same day (p160) sent to the same people including the Claimant, HS informs the committee that she would like them to investigate the issue with a member observing a lunch service and/or snack time as well as discussing matters with HS and other staff.

46. As noted above as part of the disclosures, the Claimant did make direct contact with AMcL and MD regarding her concerns about the food at the nursery and her desire to speak to the parent committee about these.

47. In early May 2018, the Claimant suffered a health scare at work where she felt symptoms of what she thought was a heart attack. An ambulance was called for the Claimant and she had a period of sickness absence. In the event, this was not a heart attack but was related to stress.

48. As a result of this, the Claimant was looking to improve her work/life balance. In addition, her daughter was starting school after the summer holiday in 2018.

49. On or around 28 June 2018, HS contacted the Claimant with an offer of term-time working. There was then an exchange of text messages about how this would work in terms of pay, hours and other terms which continued to 3 July 2018.

50. The exchange of texts appears at p307-313; it was clear to the Tribunal that the pages in the bundle do not set out the exchange in chronological order and that there are gaps in the messages. However, there is sufficient evidence for the Tribunal to make the following findings as to what was discussed:-

    a. HS opens the exchange by explaining that she can offer the Claimant 9am-3pm five days a week for term-time and thought this may be of interest to the Claimant. She explains that the Claimant's salary would be pro-rated and paid over 12 months including holidays which would have to be taken during school holidays.

    b. The Claimant replies that this was worth thinking about and asks for more information about how holidays would work. HS replies that her holiday entitlement would be added to the salary for 38 weeks at 30 hours a week and then divided into 12 monthly payments.

    c. There is then an exchange of messages about the calculation of holiday entitlement and the Claimant's pay.

    d. During the discussion, HS asks the Claimant if she would be willing to move to term-time "now" rather than at the start of the next term. She

explains that the rota is "top heavy" over the summer and this would help her.

e. The Claimant was aware that there was recruitment going on at this time and could not understand how the Respondent was "top heavy" in relation to staff when it was also recruiting. She did not query this with HS but, rather, came to the view that if she did not accept the offer of term-time work then she would lose her job.

51. In the event, the Claimant agreed to move to a term-time contract. A written contract was prepared (pp111-117) and the Claimant asked HS if she wanted her to sign it but she was told this was unnecessary. The Claimant accepted in evidence that this contract set out the terms and conditions of her employment when she returned to work after the summer holidays on 12 or 13 August 2018.

52. Some of the activities carried out at the nursery were outdoors but these could only be supervised by staff who attended fire and tools training. The Claimant had been booked on such training due to take place in June 2017 but this was cancelled by the training provider in May 2017 (p156).

53. The Claimant was never re-booked to do this training. She had suggested other dates to HS but, for the most part, led no evidence about when these were or why she did not get booked on to the training.

54. The Claimant did ask HS to be booked on to a fire and tools course in July 2018. HS explained to the Claimant that she had arranged for a training provider (Dandelion) to attend the nursery at the end of the summer holidays and this would include fire and tools training for all staff. In the event, it turned out that what Dandelion was providing was training on "toddler tools" which is different.

55. An alternative training course was forest craft which HS and some other members of staff had done. They had paid for this training themselves. HS had proposed that the Claimant do this training; new owners (DB & KB) had taken over in or around May 2018 and HS had hoped they would pay for the

Claimant to do this course. In the event, no funding was available and HS explained to the Claimant that she could not justify the new owners paying for it when others had paid for it themselves.

56. HS and the Claimant had, from the outset of the Claimant's employment, discussed the Claimant doing SVQ qualifications. In particular, HS wanted the Claimant to do SVQ level 4 as she wanted the Claimant to be a senior. In an email to parents dated 31 August 2017, HS had stated that the Claimant would be completing her SVQ in childcare.

57. The Claimant had agreed to do the SVQ so long as she did not have to pay the fees of £1900. HS had assumed that public funding would be available as other staff had received funding from external sources or fee waivers from colleges. In the event, it turned out that this assumption was wrong; there was no funding for mature students when the Claimant came to seek it (although there had been in the past) and the Claimant was unable to obtain a fee waiver. She could apply for a part waiver of the fee of £500 but this left £1400 to be paid.

58. In a text exchange on or around 17 May 2018 (p303), HS confirms that the Claimant should not have to pay the cost of the course and this is the advice received from their training provider, BNG. The Claimant asks if she is still doing the SVQ and HS replies that she is so long as funding can be arranged and she will look at other options to fund the shortfall such as graduate schemes.

59. The Claimant did not commence her SVQ before going on sick leave in October 2018.

60. On 2 October 2018, the Claimant was called into the office by HS who said that she knew that the Claimant had been "bitching" about her. This was a reference to the Claimant's text message exchange with MD at pp826-831 set out above.

61. HS stated that this was inappropriate and the Claimant replied that she was not going to be bullied. It was towards the end of the Claimant's shift and

she asked if she could return to work. HS responded that the Claimant would be disciplined if she left the office. The Claimant asked on what charges and stated that HS could not just jump to discipline. HS then informed the Claimant that she was suspended and to go home.

62. HS then sent an email to the Claimant (p170) later on 2 October 2018 enclosing a letter (p171) inviting the Claimant to an investigatory meeting to be held by HS into an allegation that the Claimant raised her voice to senior management, had refused to participate in a meeting and walked out of it. There followed an exchange of emails between HS and the Claimant on 2 and 3 October 2019 (pp172-178) in which the Claimant raised various issues about the reasons for her suspension, concerns about how the investigation was to be conducted and indicated that she would not attend the meeting on 3 October.

63. The meeting proposed for 3 October 2018 did not go ahead. The Claimant went off sick at this time and remained absent from work. The issue of what happened at the 2 October meeting was raised during the later disciplinary process in 2020 and this will be addressed below.

64. The Respondent provided payslips to their staff in two ways; some staff had them emailed to them and for others the payslips were left in the staff room to be collected.

65. The Claimant rarely, if ever, collected her payslip on monthly basis when they were issued. She does recall picking up one payslip from the staff room but not when this was. For the most part, so long as she received her wages, the Claimant was not concerned with collecting her payslip.

66. The only times when this became relevant was when the Claimant needed to renew her tax credits and needed 3 months' payslips as evidence. The Claimant made reference to instances in April, May and October 2017 (pp602, 603, 609 and 639) when she sought information from HS in this regard which was not provided.

67. In 2018, the only evidence of the Claimant seeking payslips before she went off sick was in August 2018 relation to her application for part fee grant for her SVQ (C1009).

68. By letter dated 3 December 2018, the Respondent was contacted by Hamilton Citizens Advice Bureau (CAB) on behalf of the Claimant. The letter raised queries about the Claimant's pay whilst off work and a breakdown of her childcare costs. It also includes a request for all of the Claimant's payslips from the start of the year.

69. On 5 December 2018, HS emails the Respondent's accountant (p202) asking for information to be able to respond to the query from CAB. A response is received on 6 December 2018 (p204) and HS asks for further information on 13 December (p205) with a response the same day (p207).

70. CAB chase HS for a response to their letter by email on 19 December and HS responds by email around half an hour later attaching a letter with a response to the query (pp209-213). The Claimant's wage slips for November and December were also attached with the remainder for 2018 being supplied in January 2019.

71. On 11 January 2019, the Claimant submitted a complaint to the Scottish Social Services Council (SSSC) regarding HS (pp843-855). The complaint relates to the treatment of staff by HS and the Claimant's personal experiences of this. It alleges bullying, the sabotaging of careers, manipulation, interference in the personal lives of staff and falsehoods. It is not necessary for the purposes of the issues to be determined by the Tribunal to narrate the contents in detail.

72. On 24 January 2019, HS submitted a complaint to SSSC about the Claimant (pp214-219). The complaint is directed to the Claimant's alleged conduct at the meeting on 2 October 2018 and, again, it is not necessary to narrate the detail of this.

73. By letter dated 6 June 2019, SSSC confirmed to the Claimant that no action would be taken in relation to the complaint by HS.

74. The Claimant received a further letter from SSSC dated 15 July 2019 that they had received a further complaint from the Respondent. This relates to allegations that the Claimant had taken and shared pictures of children at the nursery without authority. These allegations are the central allegation of the 2020 disciplinary process and will be set out in detail below.

75. SSSC issued a decision in relation to this second complaint by letter dated 11 December 2020 (pp941-943). They concluded that the Claimant had exercised poor judgment in sending one of the photographs but was acting in good faith. They found that the Claimant had shown insight into her behaviour and considered that there was little risk of repetition. They considered that the Claimant's fitness to practice was not impaired and no action was required.

76. The Claimant remained absent from work on sick leave throughout 2019. She submitted fit notes completed by her GP during this time, latterly she would email these to an admin worker in the nursery called Victoria Laing.

77. The ET1 giving rise to these proceedings was lodged on 21 August 2019.

78. On 11 September 2019, the Claimant's GP produced a fit note (p889) which indicated for the first time that the Claimant could return to work with adjustments (that is, a phased return and amended duties). This was sent by email to Ms Laing (p917); the covering email simply said "please see attached" and did not draw attention to the contents of the fit note. There was no direct response from anyone at the Respondent to this fit note.

79. By letter dated 28 October 2019 (p245), DB wrote to the Claimant to inform her that it had come to his attention that she was attending voluntary sessions at another organisation. He references her current absence and indicates that he wishes to understand why the Claimant can work at these sessions but not for the Respondent. He makes reference to photographic evidence from which he considers that the Claimant may be fit to attend work and offers a meeting to discuss a return to work.

80. The Claimant does not directly respond to this communication at that time. For example, she did not draw attention to the September fit note saying she could be fit to return to work with adjustments nor did she take up the offer of a return to work meeting at that time. Equally, the Respondent does not pursue the issue. The issue in the October letter raised becomes one of the issues which triggers the disciplinary process in 2020 and the Claimant does respond at that time.

81. The Claimant submits a further fit note in November 2019 in the same terms as the September fit note. Neither the fit note nor the covering email appeared in the bundle.

82. By email dated 13 February 2020 (p897), the Claimant submits another fit note in the same terms as the September one and this time asks for a meeting with DB. Victoria Laing replies that she is on maternity leave but that she has forwarded on the request.

83. At pp899-916, there is a lengthy exchange of emails between the Claimant and DB making arrangements to meet.

84. A meeting went ahead on 4 March 2020 at a neutral location (the Radstone Hotel) with the Claimant, DB and LR. By this point, HS had left the nursery and moved to work at another nursery owned by the Respondent.

85. The meeting started by completing a return to work interview form (p919-921). The Claimant asked about returning to work and DB replied that it was not as simple as that because the Claimant had the Tribunal claim against them and then raised three allegations of misconduct against the Claimant:-

    a. The photographs apparently showing her working when off sick.

    b. The allegation that she had raised her voice to HS during the meeting on 2 October 2018.

    c. The allegation that she had sent photographs of children at the nursery to MD without authority.

86. In relation to the third allegation, the Claimant did not deny sending these photographs (indeed, she accepts throughout the process that she did send them) and she explained that most of the photographs were of MD's daughter and were being sent to show MD that her daughter was settling at the nursery. MD had been concerned about whether her daughter was settling well and the Claimant said that she had agreed with HS to send photos to reassure MD. The other photo was the one which the Claimant had taken of children climbing on the roof of the shed on 24 April 2018 (C1039) to show to HS. She had sent it to MD as a member of the parent committee.

87. In relation to the first allegation, the Claimant explained that she was attending a play session with her daughter and was there as a parent. She was not working. The position was subsequently confirmed by a letter dated 12 March 2020 from the organisation which held the play session (p924).

88. The Claimant also explained her version of what happened at the meeting with HS on 2 October 2018.

89. The Claimant was informed that she was to be suspended on full pay whilst these allegations were investigated. This was confirmed in a letter dated 6 March 2020 (pp922-923) in which the Claimant was invited to an investigation meeting on 11 March 2020.

90. The investigation meeting took place on 13 March 2020, again at the Radstone Hotel, with the Claimant, DB and LR in attendance. A minute of the meeting is at pp373-375 and the Claimant provided an addendum to this at pp925-931. The Tribunal does not intend to set out the detail of what was discussed at the meeting. Both sets of notes show that the Claimant was given the opportunity to set out her position in relation to the three allegations.

91. The Respondent decided to proceed to a disciplinary hearing and by letter dated 2 April 2020 (pp328-329), the Claimant was invited to a disciplinary hearing on 9 April 2020. The letter set out the following information:-

    a. There was an offer to hold a virtual meeting due to social distancing requirements in place at the time.

b. The letter sets out which of the Respondent's policies are said to have breached as well as what elements of the SSSC code of practice was breached.

c. It warns the Claimant that issues giving rise to the disciplinary hearing may amount to gross misconduct and that a possible outcome is her dismissal.

d. It encloses additional documents which include a statement from MD, a copy of the images the Claimant sent to MD, investigation notes from HS and a statement from the "room leader' about the employee handbook.

e. Although it is not expressly said in the letter, the disciplinary is, on the face of it, only now concerned with the third allegation of sending pictures with the other allegations having fallen away given that the additional documents accompanying the letter are solely concerned with that allegation. Subsequent correspondence does clarify that it is only the allegation relating to the sending of pictures which is the subject of the disciplinary process.

f. The disciplinary hearing is to be heard by KB.

92. The hearing does not proceed on 9 April 2020; the Claimant's solicitors write to the Respondent explaining that the Claimant has not had enough time to prepare for the hearing or arrange representation. There then follows a lengthy sequence of correspondence between the parties seeking to arrange the disciplinary hearing:-

a. By letter dated 15 April 2020 (pp330-331), KB acknowledges the correspondence from the Claimant's solicitor (which is not in the bundle) and re-arranges the hearing for 23 April 2020:-

i. The option for a virtual hearing is repeated.

ii. The Claimant's right to be accompanied is set out.

iii. KB notes that the Claimant has difficulty in printing documents for the hearing and offers to print these for her if she emails then or sends them by post.

iv. The factual detail of the allegation to be considered at the hearing is now set out. This confirms that it is only the allegation relating to the sending of photographs to MD that is proceeding. It also refers to the photographs being sent in January 2018.

v. The policies which this is said to breach and the warning of possible dismissal are repeated.

vi. Further information has now been obtained by the Respondent and this is enclosed with the letter.

b. A letter dated 20 April 2020 is sent by the Claimant's solicitor in response to the letter of 15 April. Again, this is not in the bundle. KB sends an initial response on 21 April 2020 by email (p332) stating that she will respond in full and explaining that they intend to proceed with the hearing on 23 April and the potential consequences for the Claimant if she does not attend.

c. A full response is given by KB by letter dated 22 April 2020 (pp333-334):-

i. KB confirms that the Claimant remains suspended and should make herself available to attend the hearing.

ii. She offers to consider allowing the Claimant to be accompanied by someone other than a fellow employee or trade union representative.

iii. There is reference to evidence on which the Claimant is seeking to rely and KB offers to try to find this if the Claimant or her solicitor can tell her what it is.

iv. She repeats the offer of a virtual meeting if the Claimant is unable to attend in person. She also offers alternatives of the Claimant sending written submissions or having some attend on her behalf to read out a written statement.

d. There is further email correspondence from the Claimant's solicitor on 22 April 2020 which is also not in the bundle but is referenced in a letter from KB on 23 April 2020 (pp335-336):-

i. She acknowledges the difficulties the Claimant has with an internet connection and so postpones the hearing to 30 April to allow them to purchase a mobile Wi-Fi device and send it to the Claimant to use.

ii. KB asks for confirmation of who the Claimant wishes to accompany her and what software she prefers to use to connect to the meeting.

e. KB again writes to the Claimant's solicitor by email on 28 April 2020 (pp337-338) in response to correspondence from them which is not in the bundle:-

i. She notes that the Claimant has decided to use her own internet connection.

ii. KB again asks for confirmation of who the Claimant wishes to accompany her to the meeting.

iii. She notes that the Claimant says that she cannot communicate with another person about her case but is not clear why this is not possible.

iv. She also asks for any additional information to be supplied in advance of the hearing.

f. KB writes to the Claimant by letter dated 30 April 2020 (pp339-340). Again, this appears to be in response to correspondence from the Claimant's solicitor which is not in the bundle:-

i. She notes that information provided by the solicitor shows that the date of January 2018 for the photographs being sent was wrong and they were sent in March and April.

ii. The letter corrects the dates in the allegation.

iii. For this reason the hearing on 30 April is postponed. The letter states that it has been re-arranged for 1 April which must be, on the face of it, a typographical error.

g. The Claimant's solicitor replies by letter dated 1 May 2020 (pp341-342) querying the re-arranged date and raising various complaints about the process. KB responds to this by email dated 1 May (p343) confirming the hearing on 1 May 2020 has been postponed.

h. By letter dated 5 June 2020, KB writes to the Claimant about further arrangements for the disciplinary hearing:-

i. To address concerns raised by the Claimant's solicitor, the Respondent had now engaged a HR consultant from Citation to conduct the disciplinary hearing.

ii. The hearing is now arranged for 11 June 2020 and is intended to be held remotely by Zoom.

iii. The allegations are repeated with the revised dates.

i. On the basis of what is said in a letter dated 11 June 2020 from KB to the Claimant (pp347-348), the hearing did not proceed that day. It is not expressly said why not but the implication is that there had been some confusion over the start time. The hearing was rescheduled for 12 June 2020 to be held remotely. Details of how to connect to the hearing were provided and the letter repeated the allegations and possible outcome.

j. The Claimant was unable to attend on 12 June 2020 and so by letter dated 15 June 2020 (pp349-350), KB re-arranged it for 19 June 2020.

The letter goes on to repeat the arrangements for connecting to the hearing, the allegation and possible outcome.

k. On the basis of what is said in an email from KB to the Claimant's solicitor on 3 July 2020 (p351), the Claimant had been unable to connect to the remote hearing due to technical difficulties. Again, this is sent in response to correspondence which is not in the bundle.

l. By letter of the same day (pp352-353), KB writes to the Claimant to rearrange the hearing for 8 July 2020. The letter goes on to repeat the information set out in previous correspondence in relation to the allegations, the potential outcome, the right to be accompanied and the evidence sent to her previously.

m. On the basis of what is said in subsequent correspondence, the hearing was again re-arranged for 15 July 2020. That hearing did not proceed and there was an agreement to re-arrange the hearing after the school holidays.

n. There was further correspondence from the Claimant's solicitor, which was not in the bundle, which led to the hearing being re-arranged for 21 August 2020. This was confirmed in a letter from KB to the Claimant dated 14 August 2020 (pp354-355) which repeats the information about the allegations, outcomes and evidence from the earlier correspondence.

o. By letter dated 20 August 2020 (p356), KB explains to the Claimant that Citation is unable to send their consultant to the hearing on 21 August and so this will be postponed.

p. KB writes to the Claimant to invite her to a re-arranged hearing on 28 August 2020 by letter dated 25 August 2020 (pp357-358).

93. The evidence pack which was provided to the Claimant during the course of this correspondence is at pp359-380. It includes the images the Claimant shared with MD, a typewritten statement from MD, hand written statements from 4 employees confirming the existence and accessibility of the employee

handbook and other policies, what purport to be extracts from the handbook and other polices, an extract from SSSC guidance, a typewritten statement from HS, a typewritten statement from LR regarding the availability of policies and minutes of the investigation meeting with the Claimant.

94. The disciplinary hearing did proceed on 28 August 2020 with the Claimant and KB present along with Roy Berkeley from Citation who chaired the hearing.

95. A minute of the meeting prepared by the Respondent is at pp381-383. In evidence, the Claimant said that she had her own minutes of this meeting but they were not in the bundle. The Tribunal does not intend to set out what was discussed at this meeting verbatim but it does note the following:-

a. The Claimant denied having seen any handbook or policies. She stated that she had never been directed to anything of this nature.

b. She was asked why she had said in her message to MD with pictures *"I didn't send you these so please don't put them on FB"* and replied that she did not want other parents asking her for pictures of their children.

c. She was asked if she was aware of the SSSC Code of Practice on more than one occasion; on the first occasion, she replied that she was applying for registration and then went to say that HS had asked her to send pictures; on the second occasion, she replied no and made reference to the SSSC investigating this issue.

d. The Claimant, unprompted, raised the various issues about which she has been concerned throughout this case such as the food being served at the nursery, being allegedly blocked from accessing the parent committee, risky play, HS allegedly bullying her into a term-time contract and other complaints about how HS managed the nursery and staff.

96. KB wrote to the Claimant by letter dated 8 September 2020 (p384) to explain that further investigations were being carried out into certain of the points raised in the hearing.

97. A statement was taken from TY (p385) in which she stated that she had carried out an induction with the Claimant when she started employment and that this included all policies and procedures as well as the SSSC Code of Practice.

98. A statement was also taken from Laura MacDonald (p386) who confirmed that she had been authorised by HS to take photos of children on her own phone but that she then had to delete these and show that to HS.

99. KB issued her decision by letter to the Claimant dated 18 November 2020 (pp387-390). The letter sets out the allegation and summarises what was said by the Claimant. KB reaches the following conclusions:-

    a. She believes that the Claimant was issued with the handbook and that she had received training at her induction and since in relation to the relevant policies and procedures including the SSSC Code of Practice.

    b. She did not find any evidence that there was a common practice of taking photographs of the children with staffs' own phones. Specific permission was required and that any photographs taken were managed in accordance with the social media policy.

    c. She found that other instances of staff posting social media images which the Claimant had produced were in line with the policy.

    d. There was no permission given by HS for the photographs in question to be taken and shared.

    e. At the time they were sent, MD was not an employee of the Respondent.

    f. The images were not blurred out as suggested by the Claimant.

g. To the extent that the Claimant was asserting that she had sent the photograph of the children on the shed because she wished to raise concerns about this, KB noted that there were other routes by which the Claimant could have done so legitimately.

h. KB decided that the Claimant had committed an act of serious misconduct and issued a final written warning.

100. The Claimant appealed this decision by way of a letter from her solicitors dated 24 November 2020 (pp391-392). The grounds of appeal were:-

a. KB was biased. DB, her husband, was the investigatory office and the consultant from Citation was also the Respondent's representative in the Tribunal proceedings.

b. Incorrect factual statements were produced. No information was given as to which statements were said to be incorrect and why.

c. There were inaccuracies in the evidence. Again, no detail was given of this.

d. There had not been a reasonable investigation and statements had been omitted. No detail was given of which statements were missing.

e. The Claimant had produced evidence which had been ignored.

f. A lack of specification of the allegations; the Claimant was said to be unaware of the scope of the investigation and so could not participate fully in the hearing. Notice of the evidence was not provided in advance of the hearing.

g. There had been procedural defects.

101. The Claimant was invited to an appeal hearing by a letter from DB dated 27 December 2020 (p393) to be held on 28 January 2021. This did not proceed due to the pandemic restrictions which were put in place in Scotland at the time. By letter dated 7 January 2021 (p394), DB confirmed that the hearing would be postponed until these restrictions were lifted.

102. By letter dated 1 March 2021 (p395), DB invited the Claimant to a re-arranged appeal hearing on 9 March 2021. This was to be chaired by someone from Citation albeit a different person from the disciplinary hearing with LR in attendance as a note-taker. They would make recommendations to DB who would make the final decision on the appeal.

103. On 5 March 2021, the Claimant emailed DB raising issues with the impartiality of the consultation from Citation, concerns about DB making the decision and LR being the note-taker. This email was not in the bundle but is referenced in a letter from DB dated 8 March 2021 (p397-398) responding to it. He explained that as a small business there were only a limited number of people who could deal with the process.

104. The appeal meeting proceeded on 9 March 2021 and a minute of the meeting is at pp399-413. The Tribunal does not intend to repeat this verbatim but makes the following findings of fact:-

a. The Claimant spent a considerable amount of time during the meeting setting out the various complaints she had about HS, the running of the nursery and the management of staff which featured in these proceedings. It was clear from the outset that she alleged that the disciplinary action was related to her complaint to SSSC about HS who wished to get rid of her.

b. She also raised issues about the allegations which had been dropped during the process.

c. She highlighted that she had sent pictures to MD of her own child.

d. She made reference to evidence she had sent to KB which she believed supported her case. This was a reference to documents which appear at pp465-535 of the bundle consisting mainly of screenshots from Facebook pages, screenshots of messages and other pictures presented without context or explanation.

e. She highlighted her concern that KB and DB were husband and wife. She felt that other managers could have done the investigation stage.

f. She alleged that information in the statements had been fabricated with statements being solicited from staff under duress.

g. She denied that she had received any training and that there had been no induction. She alleged that TY's statement was untrue.

h. She raised issues about the length of time it took before MD was concerned about the pictures being sent to her.

i. Reference was made to the SSSC complaints and the outcome of the complaint against the Claimant regarding the sharing of photographs.

j. She stated that she had provided evidence of other staff using their phones to take pictures and of them sharing pictures on social media.

105. After this meeting, the consultant from Citation met with KB and DB on 23 March 2021 to ask questions arising from the meeting with the Claimant. A minute of this is at pp414-416:-

a. She questions why the issue with photographs had not been picked up sooner. DB makes reference to the Claimant's sickness absence and that action was not taken until she was returning to work.

b. It was noted that the Claimant asserts that the allegation has been made up because she made protected disclosures. DB makes reference to the various routes by which disclosures could be made and that the Claimant had not followed these options but had sent the pictures to a parent.

c. Each of the grounds of appeal in the letter from the Claimant's solicitor was discussed.

106. The consultant then produced a report setting out her findings in respect of each ground of appeal. This report is at pp417-423 and can be summarised as follows:-

a. In relation to the issue of bias, it was noted that there were only two decision makers in the business and that this is an unavoidable

difficulty. Steps were taken to bring in external support and it was concluded that there was no adverse impact on the fairness of the process.

b. The Claimant had provided nothing to demonstrate that the statements taken during the investigation were inaccurate. DB had confirmed that these reflected what was said by the employees who gave the statements.

c. Similarly, it was found that there was no evidence of inaccuracies in the evidence. There had been an error in dates of the photographs but this had been corrected.

d. The Claimant gave no information as to what else could have been done in the investigation. When asked about this, the Claimant replied that she would wait for the Tribunal.

e. It was not clear what relevance the documents produced by the Claimant had to the issues in the disciplinary and it was described as a *"dump of information".*

f. The letter inviting the Claimant to the disciplinary hearing set out the allegations and enclosed the evidence to be considered.

g. It was not clear what procedural defects were being asserted by the Claimant.

h. No mitigation was put forward by the Claimant other than her assertion that she was being pursued for having whistleblown.

i. The report concluded that there was nothing which would lead to a recommendation that the decision should be overturned.

107. DB wrote to the Claimant by letter dated 17 May 2021 (p424) enclosing the report. He stated that he had reviewed the report, the minutes of the appeal meeting and the submissions made by the Claimant. He confirmed that he agreed with the findings and recommendations of the report and so denied the appeal.

108. By this time, the Claimant had been placed on furlough. She had been contacted by an email from LR on 6 January 2021 (p975) which enclosed a letter regarding furlough. A copy of the letter was not in the bundle but it asked for the Claimant's consent to be placed on furlough which she gave.

109. The Claimant received no further contact from the Respondent after the letter at p424. Equally, the Claimant made no contact with the Respondent after this letter. She continued to receive furlough pay during this time. The next contact the Claimant had regarding her employment was a letter advising her that the Respondent had gone into administration which she received in or around October 2021.

Relevant Law

110. Section 47B ERA makes it unlawful for a worker to be subject to a detriment on the grounds that the worker made a "protected disclosure".

111. A disclosure is a protected disclosure if it meets the definition set out in s43A ERA read with ss43B-H:-

43A Meaning of 'protected disclosure'

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 sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

112. Sections 43C-F set out the persons to whom a qualifying disclosure must be made for it to be a protected disclosure (for example, a person's employer or legal adviser).

113. Section 43G & H set out conditions in which a disclosure not made to a person who falls within ss43C-F can, nevertheless, be a protected disclosure.

43G Disclosure in other cases

(1) A qualifying disclosure is made in accordance with this section if—

…

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.]

43H Disclosure of exceptionally serious failure

(1) A qualifying disclosure is made in accordance with this section if—

…

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.]

114. The Public Interest Disclosure (Prescribed Persons) Order 2014 in its Schedule sets out the list of prescribed persons and a description of the matters for which person is prescribed.

115. In order to be a qualifying disclosure, any communication must have sufficient factual content capable of tending to show one of the matters listed in s43B(1) and a mere allegation is not enough (*Kilraine v Wandsworth LBS* [2018] ICR 1850).

116. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

117. Section 48(2) ERA states that the burden of proving the reason for any detriment lies with the employer. However, if the employer does not discharge that burden that does not automatically mean that the reason is a prohibited one but simply that the Tribunal rely on this in drawing an adverse inference. The Tribunal still has to have regard to all the evidence in deciding whether the reason for any detriment is a prohibited one (*Serco Ltd v Dahou* [2017] IRLR 81).

118. In assessing the reason for any detriment, the Tribunal must consider whether the disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the employee (*Fecitt v NHS Manchester* [2012] IRLR 64).

119. In construing the contract of employment, the express terms agreed between the parties are paramount, particularly where these are reduced to writing in the form of a contract which sets out what the parties have agreed. However, oral contracts can also be reached and oral terms can be agreed in addition to any written contract that may exist. Where it is alleged that there was an oral agreement or term which was different from anything that had been reduced to writing then there needs to be sufficient evidence to prove that the parties had intended that any such oral agreement would vary the express written contract.

Decision - General

120. The Tribunal will address each of the claims in turn; the wages claim first and then the detriment claim.

121. In relation to the detriment claim, the Tribunal will, first, consider whether the Claimant made disclosures which meet the statutory definition of a "protected disclosure" before turning to the question of whether she was subject to any detriments because she had made any such disclosures.

122. The Respondent's ET3 raises the issue of time bar in respect of the detriment claim and, although that is an issue which goes to the Tribunal's jurisdiction, the Tribunal considers that it cannot properly address that issue until it has decided which events relied on by the Claimant amount to detriments and whether they were done because she had made a protected disclosure or disclosures. It is not until these issues are determined that the Tribunal can know when any time limit started, assess whether individual detriments form a series of detriments, consider whether to exercise its discretion to hear any claim that is out of time and whether the issue of time limits arises at all. The Tribunal will, therefore, only deal with the issue of time limits (if so required) once it has determined the substantive issues in the detriment claim.

123. The Tribunal also reminded itself of the extent of its jurisdiction. The Claimant was clearly unhappy at the way in which the Respondent ran its business, both in relation to its staff and to the children who attended the nursery. However, the Tribunal does not have some general power to resolve all

workplace disputes. Rather, it is given the power by various Acts of Parliament (and secondary legislation) to determine claims relating to the specific statutory employment rights arising from that legislation by applying the tests set out therein.

124. Further, the Tribunal can only determine matters which are set out in the pleadings of the parties. In relation to the Claimant, these are the matters set out in the further particulars of the original claim at pp49-55 and the additional detriments added by way of amendment as set out above.

Decision – holiday pay

125. The basis of the claim under Part 2 ERA is that the Claimant, having moved to a term-time contract before going off sick in October 2018, was entitled to be paid her full pay whenever the nursery was closed for holidays during her sickness absence (when she was only paid Statutory Sick Pay). This is set out in the further particulars at p51 where the dates when the Respondent was closed for holidays and the amounts sought are set out.

126. The Tribunal considers that what has been set out in the further particulars simply cannot be correct; the Claimant is seeking holiday pay for 79 days (or 474 hours) which is far in excess of the 123 hours' holiday entitlement set out in her contract or the pro-rated entitlement she would have under the Working Time Regulations 1998 (WTR). It cannot be correct that she is entitled to receive holiday pay when off sick well in excess of what she would have been paid when at work.

127. In these circumstances, the Claimant's pled case is not well-founded.

128. However, the Tribunal has gone on the consider whether there was any basis on which it could be said that the Claimant should have been paid for the 123 hours entitlement during her sick leave.

129. A copy of the Claimant's term-time contract is at pp111-117. It is not signed by either party but the Claimant accepted in evidence that she had seen this document around the time she moved to term-time working and that she had

understood that these were the terms and conditions under which she was employed at the relevant time.

130. Clause 8 of the contract states that the Claimant is entitled to 123 hours holiday in each holiday year. It goes on to state that this entitlement is exclusive of any statutory or public holidays or any period when the nursery is closed during the summer or at Christmas. It goes on to set out the procedure for booking holidays, restrictions on carrying forward unused holidays and what happens on termination of employment.

131. The written contract is entirely silent on the point of when the Claimant can or cannot take holidays but, in a text exchange between the Claimant and HS at p307 (which forms part of the discussion about the move to a term-time contract), it is said by HS that any holidays have to be taken during the school holidays.

132. The Tribunal does not consider, however, that this means that the Claimant was automatically on holiday (and entitled to holiday pay) whenever the nursery was closed. Rather, it considers that the proper interpretation of the contractual position is that the Claimant was entitled to book and take 123 hours holiday in each leave year as set out in the express terms of Clause 8 which includes a requirement for holidays to be booked in advance.

133. The Claimant would have been entitled to book and take such holidays during her sick leave. If she had done so then she would have been entitled to be paid at her normal hourly rate for any holidays which she took. This would be the case whether it was the contract which was relied on or whether it was the WTR.

134. However, she did not take any holidays and so the obligation to pay her at full pay was never engaged. Neither her contract nor the WTR allows for a payment to be made in lieu of untaken holidays during employment and so there is no legal basis on which the Tribunal could conclude that the Claimant was entitled to such a payment.

135. A payment in lieu only arises under the contract or WTR on the termination of employment. Although the Claimant's employment has now come to an end, the present proceedings do not include a claim for pay in lieu of untaken holidays on the termination of employment (or, indeed, a claim for any other termination payments) and the only claim in respect of holiday pay before the Tribunal in the present proceedings is that set out at p51.

136. The position is not affected by the fact that the Claimant was paid "rolled up holiday pay" when she moved to term time working (that is, her monthly pay was calculated on the basis of the period of the year she worked and her holiday entitlement). The Claimant still required to have booked and taken holidays during her sick leave in order to trigger her entitlement to holiday pay. The only impact of the rolled up holiday pay would be that credit would have to have been given for any rolled up holiday pay already paid during the leave year in any payment she may have received when taking holidays during her sick leave.

137. In these circumstances, the Tribunal finds that the claim for holiday pay under Part 2 ERA is not well-founded and is hereby dismissed.

Decision – Protected disclosure detriment

138. The first issue to be addressed is whether the Claimant has proved that she made disclosures which meet the definition of "protected disclosure" under s43A ERA.

139. The Claimant relies on six broad headings of disclosure; the first three were all made to the Claimant's manager, HS, or other managers within the Respondent's organisation; the latter three disclosures were all made to parents of children who attended the nursery albeit the last disclosure was made to MD at a point when she was employed at the nursery and was made in the context of her employment.

140. In relation to the latter three disclosures, the Tribunal does not consider that these amount to protected disclosures as they are not made to persons who

fall within the scope of ss43C-F (that is, the employer, a legal adviser, a Minister of the Crown or a prescribed person).

141. The further particulars in which the disclosures were set out did not plead a case that either s43G or s43H applied to the latter three disclosures. The further particulars were prepared by the Claimant's then solicitors and so the Tribunal does have some expectation that those would be fully and properly pled. The Claimant did not seek to advance any argument relating to ss43G-H at the hearing but she is a litigant in person and so some leeway has to be given to her.

142. In these circumstances, the Tribunal has given consideration to whether either of these sections apply even though, strictly speaking, no such case had been expressly advanced in the pleadings or at the hearing.

143. The difficulty for the Claimant in placing any reliance on these issues is that there are a number of prescribed persons to whom the disclosures in question could have been made but the Claimant did not do so. This certainly prevents the Claimant from relying on there being no prescribed person for the purposes of s43G(2)(b) or from relying on s43G(2)(c)(ii).

144. However, more broadly, the Tribunal does not consider it was reasonable for the Claimant to have made these disclosures to the persons whom she did in circumstances where there are organisations to which such disclosures can be made but she did not do so. Although the Claimant commented in evidence that previous complaints to external bodies had not resulted in action, there was no evidence about those complaints. For example, there was no evidence that these complaints related to similar subject matters or that the lack of any action was because there was no basis to these other complaints.

145. For all these reasons, the Tribunal does not consider that the latter three alleged disclosures meet the definition of protected disclosure as they were not made to persons who fall within the scope of ss43C-F nor were they made in circumstances which fell within ss43G or H.

146. Further, the Tribunal also considered that the disclosure made to MD about the food issues would not amount to a qualifying disclosure in terms of s43B; the text exchange between them in or around May 2018 is solely concerned with the Claimant's desire to meet with the parent committee and does not disclose any information which shows or tends to show anything which falls with the categories listed in s43B(1).

147. Similarly, the Tribunal considers that the text exchange between the Claimant and MD on 1 October 2018 would not amount to a qualifying disclosure because any information disclosed by the Claimant does not, on the face of it, show or tend to show anything which falls with the categories listed in s43B(1). It does not, for example, obviously indicate that a criminal offence is being committed, a legal obligation is being failed or health and safety is being endangered.

148. Turning to the earlier three disclosures, these were all made to HS (and in instance other managers) and the Tribunal considers that these were, therefore, within the scope of s43C being made, in effect, to the Claimant's employer in the form of managers.

149. The question then is whether these disclosures satisfied the definition of "qualifying disclosure" in s43B. The Tribunal will address each of these in turn.

150. The first disclosure related to concerns the Claimant had regarding the safety of children being transported in vehicles provided by the Respondent:-

    a. On or around 23 June 2017, the Claimant disclosed information that a number of the seat belts in the bus used by the Respondent were broken. She also disclosed an absence of high backed seats which were needed when children were below a certain height. This information was disclosed to HS, Teresa Young and Alex McMahon.

    b. On or around 27 September 2018, the Claimant disclosed to HS that she only had 2 children's car seats available for use to transport

children that day but 3 of the children being transported required such seats.

c. The Tribunal considers that, in both instances, this information shows or tends to show that the health and safety of the children being transported was being endangered. It is beyond question that a lack of proper safety restraints would endanger the safety of those children in the event of an accident.

d. The Claimant had a reasonable belief that the children's health and safety was being endangered given the obvious risks posed to them in the absence of proper, safe restraints.

e. The Tribunal considers that it is clearly in the public interest to reduce or avoid injury to any person, especially children, in the event of an accident.

f. In these circumstances, the Tribunal does consider that the disclosures made on 23 June 2017 and 27 September 2018 were qualifying disclosures and, having been made to the Claimant's employer, amount to protected disclosures as defined in s43A ERA.

151. The second disclosure relates to the Claimant's concerns about the food being provided to the children when they were at the nursery:-

a. The Claimant relies on the following communications to HS in relation to the second disclosure:-

i. In an exchange of text messages on 23 April 2018, she informed HS that:-

1. Sandwiches were not provided to children at snack time and that she had a child in hysterics with stomach cramp because she had not eaten.

2. Children had been told there was no bread or toast at breakfast, just cereal; 6 children had not eaten lunch; no sandwiches had been provided in the afternoon.

ii. By text message on 29 May 2018, she was informed by HS that only fruit was to be served outside and replied that children should not be sent out without breakfast.

b. The Tribunal does not consider that the exchange on 29 May 2018 amounts to a disclosure of information and, rather, is the Claimant expressing a view or opinion. This cannot, therefore, amount to a protected disclosure.

c. The other communications, however, are disclosures of information.

d. The Tribunal does consider that the information disclosed on 23 and 28 April 2018 does show or tend to show that the health and safety of children is being endangered because they are, for whatever, reason not eating during the day. The Tribunal considers that it is obvious that if anyone, especially children, are not getting enough to eat that this will adversely impact on their health.

e. In such circumstances, the Claimant clearly held a reasonable belief that the children's health and safety was being endangered.

f. Ensuring that children are fed and healthy is something which the Tribunal considers must be in the public interest.

g. In these circumstances, the Tribunal does consider that the disclosures made on 23 and 28 April 2018 were qualifying disclosures and, having been made to the Claimant's employer, amount to protected disclosures as defined in s43A ERA.

152. The third and final disclosure relates to a concern raised by the Claimant with HS on 24 April 2018 regarding risky play by children:-

a. The Claimant disclosed to HS that she had seen children climbing what was known as "the shed" in the grounds of the nursery and jumping off it into pile of toys.

b. The Tribunal considers that this information shows or tends to show that the health and safety of the children in question was being

endangered; the pictures of the shed provided by the Claimant in evidence shows that the roof of the shed is about head height for an adult and that it is near a fence with barbed wire and spiked tops.

c. In such circumstances, the Claimant's belief that there was a danger to health and safety must be reasonable.

d. The need to prevent or avoid injury to children is something which is clearly in the public interest.

e. In these circumstances, the Tribunal does consider that the disclosure made on 24 April 2018 was a qualifying disclosure and, having been made to the Claimant's employer, amounted to a protected disclosure as defined in s43A ERA.

153. The Tribunal, therefore, finds that the Claimant made protected disclosures to her employer as set out above and so it now turns to the question of whether the Claimant was subject to any detriment for having made these disclosures.

154. The Tribunal will look at each of the alleged detriments in turn to consider whether they are capable of amounting to a detriment (that is, whether a reasonable worker would consider that they had been disadvantaged) and, if so, whether the reason for any detriment was one or more of the protected disclosures which the Tribunal has held the Claimant made.

155. However, the Tribunal also bears in mind that it should look at matters as a whole and not just detriment by detriment. It may be that when all of the matters relied on by the Claimant are considered together, there is a factual matrix from which the Tribunal can draw an inference that the Claimant has been subject to a detriment.

156. The Tribunal also bears in mind that the absence of the Respondent means that they have failed to discharge their burden of proof under s48(2) ERA to show the reason for any detriment but that this does not mean that the Claimant automatically succeeds; she still needs to discharge the burden of showing she has been subject to a detriment. Further, the Tribunal may draw

an adverse inference in relation to the reason for any detriment where the Respondent has not discharged the burden under s48(2) but are not obliged to do so. In particular, in the present case, the Respondent's failure to discharge the burden is not because it has led inadequate or unreliable evidence but because it is no longer in existence and so incapable of mounting a defence.

157. The Tribunal reminds itself that it is not simply a question of whether the Respondent acted fairly or reasonably towards the Claimant but whether there is evidence that their actions were materially influenced by one or more of the disclosures. A finding that the Respondent has acted unfairly or unreasonably in one or more instance is evidence from which the Tribunal can draw an adverse inference but it is not necessarily conclusive, in and of itself.

158. The detriments fall into two distinct groups; those which were raised in the further particulars lodged earlier in the Tribunal proceedings in which HS is the alleged perpetrator; those added by way of amendment as set out in the additional information provided in July 2021 where the alleged perpetrators are said to be DB and KB. The Tribunal does bear in mind that it is possible for all of the alleged perpetrators to have the same motivation and there are some links between the alleged detriments (for example, the issue for which the Claimant was given a warning by KB is the same issue which formed one of the complaints about the Claimant to SSSC by HS).

159. It has been noted by the Tribunal that there is not, on the face of it, any express evidence of a direct causal link between the disclosures found by the Tribunal and any of the alleged detriments. There is, for example, nothing said or done by HS, DB or KB which expressly indicates that they are taking the actions in question because the Claimant made the relevant disclosures. However, the Tribunal bears in mind that, as with claims of unlawful discrimination, there is rarely any such evidence and most respondents would not admit, even to themselves, that they had an improper motive for their actions. The Tribunal, therefore, has to consider what inferences it can draw from the primary facts of the case and, in particular, whether there are any

facts from which it can draw the inference that the disclosures had a material inference on the actions of the Respondent.

160. The first alleged detriment is that the Claimant had been offered the promoted post of deputy manager in the Hub by HS who later withdrew this and promoted another employee.

161. It could be thought that it is odd for the Claimant to allege that she had been disadvantaged by the withdrawal of a promotion which she had not sought and, on her own evidence, did not actually want. However, the Tribunal considers that a reasonable worker, having reconciled themselves to the change in circumstances, would consider that they were being disadvantaged when that opportunity was taken away. The Tribunal does consider, therefore, that this was a detriment.

162. The question is then whether the detriment was on the grounds of the protected disclosures which the Tribunal found the Claimant made. Taking account of the following factors, the Tribunal does not consider that there is any basis to conclude that the disclosures were a material influence on the withdrawal of the promotion:-

a. The majority of the disclosures found by the Tribunal occurred after the offer of the promoted post was withdrawn and so cannot have had any influence on this decision.

b. The only disclosure which was made before the withdrawal of the promotion in March 2018 had been made in June 2017. The two events are not, in any way, proximate and there is a considerable passage of time between them. There was no evidence that HS had harboured some sort of grudge for 9 months and then used this opportunity to get back at the Claimant.

c. The evidence of HS's management style was that it was chaotic, that she would introduce new ideas about teaching methods out of the blue at short notice and that she would regularly change her mind about all sorts of things relating to staff on a whim. The Tribunal recognises

that it can be possible for a particular whim to be motivated by one of the Claimant's disclosures but there was simply no evidence of this.

163. The second alleged detriment is that the Claimant was denied access to the Parent Voice committee to raise her concerns about the food available to the children when at the nursery.

164. The Tribunal notes that the Claimant was never expressly told that she could raise her concerns with the committee. There was no evidence of any discussion or correspondence between HS and the Claimant in which the Claimant had been told that her concerns would not be passed to the committee.

165. Rather, email correspondence between HS and the committee shows that she was suggesting that the Claimant put her concerns in writing for the committee to review and investigate. The Claimant was, therefore, going to be allowed to raise her concerns and for those to be looked into by the committee. It simply was not going to be done in the way in which the Claimant wanted it to be done (that is, by her personally attending a meeting).

166. Further, the Claimant was copied into this correspondence and so HS was being transparent in her approach to this issue. This also meant that the Claimant had access to the email addresses for the committee members and could have contacted them directly (either individually or as a group) by replying to these emails. On the face of it, these are not circumstances where the Claimant was being prevented from contacting the committee.

167. The Tribunal does not consider that a reasonable worker would consider that they were being disadvantaged in such circumstances. The concerns which they had were being passed to the group with whom they wished to raise those concerns. The fact that it was being done by one method rather than another does not mean that there was any disadvantage. Arguably, putting her concerns in writing would be to the advantage of the Claimant; it would allow her to marshal and organise her thoughts; it would provide a clear record of what she had raised that did not rely on people's recollections of any discussion.

168. The Tribunal, therefore, does not consider that the Claimant was subject to a detriment in relation to access to the Parent Voice Committee in circumstances where she was being given access but just not in the way she wanted.

169. It is worth noting that the Claimant did, in fact, have direct access to the committee as she was able to message two of its members directly raising her concerns. In these circumstances, it is arguable that, even if there was a theoretical disadvantage in having to put her concerns in writing, this disadvantage did not, in fact, arise because the Claimant was able to make direct contact. It is also worth noting that when she did make direct contact, this was done in writing by way of text messages.

170. The Tribunal has also considered whether, if there was a detriment, HS's actions were materially influenced by the disclosures. It is true to say that the concerns which the Claimant wished to raise with the committee were ones which formed one of the disclosures found by the Tribunal. However, such a link is inevitable in the circumstances of the case and the Tribunal does not consider that it is sufficient on its own for the Tribunal to draw any adverse inference.

171. The Tribunal does give regard to the fact that HS was not seeking to prevent the Claimant's concerns coming to the attention of the committee and she communicates with them about this issue, making suggestions about an investigation and inviting members of the committee to observe the functioning of the nursery. The Tribunal does not consider that, on the face of it, these are the actions of a manager who is seeking to disadvantage the Claimant in raising her concerns.

172. Turning to the third detriment which is the move to term-time working, the Tribunal, in assessing whether the Claimant was subject to a detriment and, if so, whether this was on the grounds of any of the protected disclosures found by the Tribunal, have taken into account the following matters:-

    a. This was not a unilateral change to the Claimant's terms and conditions but, rather, an agreed change after discussion.

b. It arose in the context of the Claimant seeking a better work/life balance after a health scare relating to stress and where her daughter was starting school.

c. The move to term-time working was raised by HS as an option for the Claimant to consider and there was no evidence that this would be imposed on the Claimant or that she would, for example, lose her job if she decided not to take the option.

d. The text message discussion between the Claimant and HS is, on the face of it, the type of discussion between employees and managers which the Tribunal regularly sees in many cases where a change in terms and conditions is being discussed. There is nothing in it which raises any eyebrows; the Claimant raises queries about how it would work which are answered by HS; the Claimant expresses an interest from the outset and is given time to consider the offer.

e. The Claimant placed considerable reliance on a message from HS asking her to move to term-time working earlier to assist HS in managing rotas over the summer holiday period. The Claimant has taken the description of the nursery being “top heavy” over this period when it was also recruiting to mean that her job was being threatened if she did not move to term-time working. The Tribunal does not consider that a reasonable worker would read the text in this way; the message is clearly a request for the Claimant to make the move earlier than intended and comes after a lengthy discussion about the move to a term-time contract; there is no evidence that any recruitment was for people to work in the nursery over the summer as opposed to the start of the new term at the end of the holiday period; it requires a considerable leap of logic to go from this text to the Claimant’s job being threatened.

f. Ultimately, the move to term-time working was a matter of agreement and the Claimant consented to the change.

173. The Tribunal does not consider that a reasonable worker would consider that they had been disadvantaged by a change in terms and conditions which had been the subject of discussion and agreement and which assisted them in achieving aims such as an improved work/life balance and their childcare arrangements.

174. Further, there was no evidence that the change to a term-time contract was, in any way, materially influenced by the disclosures:-

a. There was no close proximity in terms of disclosures; the closest disclosures to the discussion about the change had been in April 2018 some months before; the disclosures about the car seats had either been a year before or had not yet occurred.

b. There is a clear, innocent explanation, on the face of it, why HS offered the option of term-time working, that is, the Claimant seeking a better work/life balance. There is no evidence to suggest that this was not the genuine reason.

c. Similarly, there is an innocent explanation for the change in terms and conditions, that is, the Claimant agreed to this.

175. The fourth detriment relates to the Claimant's access to training on fire and tools as well as her SVQ.

176. The Tribunal notes that there was no absolute refusal in terms of any training; the Claimant had been booked on fire and tools training in 2017 which was cancelled by the training provider and not the Respondent; there were attempts to re-run this training but they never resulted in anything; HS suggested alternative training that would have been better for the Claimant; there was nothing led in evidence that HS had stated that the Claimant could not or would not be allowed to do her SVQ.

177. The clear issue with any of this training was the lack of funding; HS was looking to get the new owners (DB and KB) to fund certain training but this did not materialise; other staff, including HS, had to self-fund certain training courses; there had been an assumption that there would be funding from

other sources for the SVQ because others had received this in the past but this particular funding was not available when the Claimant came to do her SVQ.

178. There was no evidence whatsoever that any of the problems with funding was influenced by the Claimant's protected disclosures.

179. Turning to the fifth detriment, this is the events of the meeting between HS and the Claimant on 2 October 2018 at which the Claimant was suspended and threatened with disciplinary action.

180. It is certainly the case that a reasonable worker would consider that they were being disadvantaged where they were being subject to unjustified disciplinary action and so this would amount to a detriment.

181. However, it is quite clear that the reasons for HS's actions on 2 October 2018 were not the disclosures found by the Tribunal above. On the Claimant's own case, in her further particulars and her evidence, these actions directly arose from the issues the Claimant had raised with MD on that same day regarding cleaning, art and other supplies in the nursery.

182. The Tribunal has found that the Claimant had not made a protected disclosure to MD when she raised these issues. Further, this had no connection with any of the earlier disclosures (for example, it was not a repeat of the earlier protected disclosures) nor was there any evidence that this was in some way a "last straw" for HS prompting her to take action against the Claimant because of all the issues she had raised.

183. On the face of it, HS was annoyed by what the Claimant had raised with MD and there was a verbal exchange between them which became heated. The Claimant's evidence was that it was HS who became angry during the meeting and HS asserted, in correspondence after the meeting to the Claimant and others, that it was the Claimant who became angry.

184. In these circumstances, the Tribunal does not consider that the actions of HS arising during and from the meeting 2 October 2018 were materially influenced by the protected disclosures.

185. The sixth detriment is the lack of payslips. The Tribunal notes that this is not something which changed over time; the Claimant's evidence was that she never received any payslips at the time they would be expected to be issued. This is because they were left in the staff room and were never collected by her. In these circumstances, it was not the actions of the Respondent that meant that the Claimant did not have payslips at the time they were issued but, rather, the actions of the Claimant in not collecting them.

186. Further, the Tribunal notes that the first time the Claimant had to chase up payslips in order to assist with her application for tax credits was in April 2017 long before she made any protected disclosures. A similar request was made in October 2017. The only evidence which the Tribunal had of requests for payslips in 2018 was a text message in August 2018 in relation to the Claimant's application for a part time fee grant for her SVQ and a request in December 2018 (see further below).

187. It is difficult, therefore, to see how any protected disclosures had any material influence on the Claimant's receipt of her payslips when the situation about which she complains had persisted throughout her employment and, in particular, before she had made any disclosures.

188. The Claimant specifically relies on a request made via Citizens Advice Bureau (CAB) in December 2018 and it is important to consider the sequence of events in relation to this:-

a. CAB write to HS by letter dated 3 December 2018 raising various queries about how the Claimant's pay has been calculated during her absence. The letter includes a request for the Claimant's payslips.

b. On 5 December, HS emails the Respondent's accountants asking for them to look into the queries being raised. There is then an exchange of emails which concludes on 13 December.

c. HS responds to CAB on 19 December (albeit after they had sent an email chasing a response earlier that same day) and provides the most recent payslips.

d. The full set of payslips requested are provided in January 2019.

189. The Tribunal does not consider that this is an unreasonable period of time for the Respondent to reply. This was not a simple request for payslips and involved HS seeking information from the accountant. At no point in this exchange of correspondence was it said that the Claimant needed the payslips by a certain point in time in order to respond to HMRC or anyone else. The time of year also has to be taken into account as the nursery would have closed for the Christmas period. A reasonable worker would not consider that they were being disadvantaged in these circumstances.

190. There is certainly no evidence that HS's response to the request from CAB was in any way influenced by the Claimant's protected disclosure. She acted quickly to get information from the accountant and supplied what had been requested. These are not the acts of a manager trying to disadvantage one of their staff.

191. The further particulars set out a number of financial losses suffered by the Claimant which are said to be detriments (for example, reduction in council tax benefit, loss of home and critical injury insurance, loss of tax credits and a reduction in her credit score). However, the Tribunal consider that these are all losses which are not "detriments" in themselves in the sense that they are actions or omissions by the Respondent but, rather, are losses flowing from the other alleged detriments (for example, the Claimant was unable to maintain her insurance payments because of her reduced income when she was off sick and she alleges she was off sick because of the actions of HS). The Tribunal considers that these are issues of remedy in the event of a finding that the Claimant was subject to an unlawful detriment.

192. The final detriment which relates to the actions of HS are the complaints she made to SSSC about the Claimant. It is quite clear from the sequence of events that these complaints are made in retaliation to the Claimant's complaint to SSSC about HS. The Claimant's complaint to SSSC is not relied on as a disclosure nor is it obviously connected to the specific disclosures

being a wide ranging complaint about how HS treats staff and runs the nursery.

193. In these circumstances, the Tribunal find that the protected disclosures found by it had no material influence on HS making her complaints to SSSC as there is a clear and obvious explanation for why these complaints were made unconnected to the disclosures.

194. The Tribunal pauses here to consider whether, viewed as a whole, there is any basis to infer that the alleged detriments said to arise from the actions of HS were materially influenced by the protected disclosures found by the Tribunal.

195. At most, the picture painted by the evidence is that HS had a chaotic management style where she would change her mind about how the nursery operated or make decisions about staff out of the blue, at short notice and sometimes on a whim. The Claimant describes her treating other staff badly and, although that does not mean that the treatment of the Claimant cannot be motivated by the disclosures, it does weigh against the Claimant's case where she has not been specifically singled out for poor treatment.

196. The Tribunal has to take account of the fact that certain of the alleged detriments do not meet the legal test individually and so they cannot weigh in the Claimant's favour in assessing the collective effect of the matters relied on.

197. Similarly, the fact that there is no evidence (direct or inferential) that the alleged detriments were materially influenced by the disclosures found and, in some instances, there was a clear and obvious "innocent" explanation for certain detriments has to weigh against drawing any inference from the whole of the evidence that there was a prohibited reason for HS's actions.

198. The Tribunal now turns to the detriments which are said to arise from the conduct of DB and KB. These fall into two broad categories; the disciplinary process resulting in the final warning given to the Claimant; the fact that the Claimant did not return to work and remained absent from work on suspension

and then furlough. There is some obvious overlap between these two broad issues (for example, the Claimant's suspension being the reason for a period why she did not return to work).

199. Dealing with the return to work issue first, this starts in September 2019 when the Claimant submits a fit note which states that she would be fit to return to work with adjustments such as a phased return.

200. The Tribunal notes that this fit note (as had been the case with preceding fit notes and the subsequent fit note) was sent by email to a person in admin and not to DB, KB or anyone else in a management position. There was no evidence that DB, KB or any manager had seen the fit note and the covering email did not say action was required or draw attention to the fact that the Claimant was ready to return to work which may have caused the admin person receiving the email to refer the matter to a manager.

201. The Tribunal considers that, in these circumstances, the likely reason why the Respondent did not take steps for the Claimant's return to work on receipt of the September fit note was because it had not come to the attention of any manager that the Claimant was fit to return.

202. When the Claimant does seek a meeting about a return to work, this is organised within a relatively short period of time. The Tribunal considers that these are not the actions of an employer who is seeking to prevent an employee returning to work.

203. It is correct that that meeting does not result in the Claimant's return but that is because she is then suspended as part of the disciplinary process. This, on the face of it, provides an explanation for why she does not return to work at that point. The Tribunal will address the issue of whether the suspension amounts to an unlawful detriment below when it considers the disciplinary process.

204. After the conclusion of the disciplinary process, the Claimant is placed on furlough from January 2021. This was during the Covid pandemic where a

significant proportion of the UK workforce was being furloughed and there is nothing obviously untoward in the Claimant being furloughed.

205. One of the Claimant's complaints about the disciplinary process was that she was not furloughed during this and was being required to attend meetings. She complains that no account was being take of her health which included auto-immune conditions. This stands somewhat at odds with the complaint that she was kept on furlough and not allowed to return to the workplace. If the Claimant's health conditions meant that she was at risk if she attended the workplace then this would be the case whether she was attending for a disciplinary meeting or to perform her duties. Indeed, the risk would be greater in the latter circumstances as she would be present for a longer period of time and surrounded by children who may not, at the time, have been vaccinated.

206. The Tribunal considers that, rather than being disadvantaged by being kept on furlough, she was being advantaged as she was not being required to attend work, exposing her health to any risk arising from the pandemic. In these circumstances, there was no detriment to the Claimant.

207. Further, the reason why the Claimant remained on furlough was, on the face of it, because neither she nor the Respondent had ever got in contact to discuss her coming off furlough and returning to the workplace. The Claimant does have to share some of the responsibility in the regard as she took no steps to seek a return to work and so it cannot be said that it was solely the actions of the Respondent which kept the Claimant on furlough.

208. The Claimant presented no evidence as to why she did not make contact or seek a return to work. Equally, the lack of communication by both parties meant that there was no correspondence from which the Tribunal could identify a reason why the Respondent made no contact.

209. The only piece of evidence relating to the Claimant's return to work which had any connection to the disclosures was the reference by DB at the return to work meeting to the Tribunal proceedings. There was no further explanation

what was meant by that reference and the proceedings were never mentioned again in any subsequent correspondence.

210. The Tribunal considers that there is a subtle but important distinction between the protected disclosures themselves and any legal proceedings in which those disclosures feature. In particular, the Tribunal considers that steps taken to protect the Respondent's position in the proceedings are not matters which, on the face of it, are materially influenced by the disclosures themselves but rather by the needs of the litigation.

211. In these circumstances, to the extent that there was any detriment to the Claimant in the fact that she did not return to the workplace, there was no evidence, express or inferential, that the fact that Claimant had not returned to work at any time from September 2019 until the Respondent ceased trading was because she had made the protected disclosures found by the Tribunal.

212. Turning to the disciplinary process, the Tribunal bears in mind that the Claimant alleges that various decisions taken during that process amount to detriments but it considers that the process has to be viewed as a whole rather than being parsed into discrete incidents.

213. In assessing whether the disciplinary process amounted to a detriment and, if so, whether this was motivated by the protected disclosures found, the Tribunal has taken account of the following matters:-

a. Neither KB nor DB instigated the complaints which triggered the disciplinary process. These matters all came to their attention from other sources. The Tribunal considers that an employer who receives information that one of their employees has committed acts of misconduct has to be entitled to investigate that and take action. There is nothing inherently untoward in an employer doing so.

b. There were originally three complaints of misconduct against the Claimant but two of these were dropped after the investigation. The Tribunal considers that, on the face of it, this demonstrates that the

Respondent was acting properly and taking account of the information it had received which supported the Claimant's position.

c. The Claimant was suspended on full pay during the process. The Tribunal considers that there are obvious reasons for this; the need to investigate including interviewing other staff members; one of the allegations related to the sharing of pictures of the children and there was a risk of a repeat of this.

d. The Respondent made every effort to ensure that the Claimant could participate in the process. Although the Claimant complained that she was being required to attend meetings during a pandemic, it was quite clear from the outset that alternatives were being proposed such as remote hearings via Zoom, the Claimant providing written submissions or having someone attend to read out a statement on her behalf. The Respondent even offered to buy the Claimant a mobile wi-fi device to use when there were issues with her being able to connect to remote meetings.

e. The disciplinary hearing was moved multiple times to take account of the Claimant being unable to attend. Although there were occasions when the Respondent gave short notice of meetings (and in some instances, invitation letters included typographical errors in relation to the dates of meeting being in the past), it was quite clear that the Respondent was making every effort to ensure that the Claimant could attend and this is not a case where the Respondent proceeded to a hearing in the absence of the Claimant.

f. The Claimant relied on the wording of the correspondence inviting her to the disciplinary hearing as evidence that there was a foregone conclusion that she was to be dismissed. The wording in question is something familiar to the Tribunal in almost every case involving dismissal and disciplinary action where employers, quite properly, warn the employee of the potential sanction if the misconduct is upheld. There is nothing untoward in this and, indeed, an employer

who did not provide such a warning could well find any dismissal was then procedurally unfair. In any event, the Claimant was not dismissed.

g. The Claimant complains about the fact that KB and DB are husband and wife in the context of their involvement at various stages of the disciplinary process. It is inevitable in small businesses such as this that there will be close connections between decision-makers and these does not mean that there is anything untoward or unlawful.

h. In this case, the Respondent did try to address this issue by bringing in an external HR company to conduct as much of the process as possible.

i. There is the fact that the Claimant did actually do what was alleged in terms of taking photographs of the children and sending them to someone. This was not a case where the fact of the misconduct was in dispute.

j. The Claimant relied on the later decision of SSSC in relation to the same complaints made to them. It is important to remember that an employer's internal disciplinary process is different in purpose and function from a SSSC investigation; the former is about determining whether there was misconduct and applying a sanction if there was whilst the latter is about determining whether the individual is fit to practice or whether they pose a risk to the public in the future.

k. In any event, SSSC did not find that the Claimant had done nothing wrong as she asserted in her evidence. They did find that the Claimant had exercised poor judgment but that, having shown insight into what she had done wrong, her fitness to practice was not impaired.

l. The Claimant disputed the truthfulness of much of the evidence gathered in the investigation, in particular that various policies were in existence at the relevant time and that she knew of these. It is important to bear in mind that KB & DB only became involved in the

business after the Claimant sent the photographs and so would have no direct knowledge of such matters. They were, therefore, reliant on what others told them and where there were any disputes of evidence then they had to resolve those. Although the Claimant believes that these should have been resolved in her favour, the fact that they were not does not, in itself, mean that the Respondent was acting unlawfully.

m. The Respondent carried out further investigations into matters raised by the Claimant at the disciplinary hearing before making the decision to dismiss.

n. The Claimant produced evidence to the Tribunal which she said proved that certain matters asserted by witnesses were untrue. For example, she said that the rotas at pp612-618 showed that she was not on shift with TY when it was said that TY gave her an induction. However, this evidence was not produced in the appeal hearing and the Claimant simply asserted that what was said in TY's statement was untrue. She did not direct the appeal officer to this evidence.

o. The Claimant also relied on documents provided by her then solicitor which she asserted showed that other employees had also shared images of the children. Putting aside the fact that two wrongs do not make a right, it was not immediately obvious on the face of these documents what it was the Claimant believed they showed. The Claimant that these showed that employees had created links between their personal Facebook pages and that of the nursery. However, the nursery's Facebook page was itself public and so these other employees were not sharing something private or confidential. Further, the photographs in question were taken and posted with authorisation. This is very different from what the Claimant had done.

214. Looking at all of these factors, the Tribunal considers that this paints the picture of an employer who is doing nothing more than dealing with a disciplinary process arising from complaints received about one of their employees. There is nothing to suggest that DB or KB would have behaved

any differently if the Claimant had not made the disclosures which she had and so there is no basis to conclude that the disclosures had any influence, let alone a material influence, in relation to their actions.

215. The Tribunal also considers that a reasonable worker would not consider that they had been disadvantaged in relation to the process when looked at as a whole; the Respondent has to investigate the complaints; they drop certain allegations when they receive information showing there is nothing in those; they make every effort to ensure the worker can participate; they try to reduce any concerns by using an external HR company; they investigate issues raised by the worker. Much of this is to the worker's advantage.

216. In relation to the actual decision to impose a warning and the decision not to uphold the appeal, the Tribunal does not consider that these decisions were manifestly wrong, unfair or unreasonable. Both DB and KB had evidence on which they could reach their conclusions; the Claimant did not deny that she did the acts in question; there was evidence that staff, including the Claimant knew about the relevant policies and codes of conduct. Whilst the Claimant disputed the accuracy or truthfulness of some of this, the Tribunal, as set out above, does not find anything so unfair or unreasonable in the conclusions of KB or DB on which evidence to accept that raise any adverse inference.

217. Whilst any worker would be upset and unhappy to receive a warning, the reasonable worker would reflect on the fact that they did do what was alleged and that they have not lost their job in circumstances where they could have been dismissed.

218. In all these circumstances, the Tribunal does not consider that the disciplinary process as a whole or any discrete part of it amounts to a detriment on the grounds that the Claimant made the protected disclosures in question.

219. Finally, the Tribunal has considered whether, viewing the case as a whole, there is any basis to conclude that the Claimant has been subject to a detriment because she made the protected disclosures found by the Tribunal.

220. The Tribunal takes account of all the factors above including the absence of any direct evidence of a causal link between the disclosures and the detriments, the fact that certain matters do not amount to a detriment, the reasons which the Tribunal has identified for certain actions by the alleged perpetrators and the whole factual matrix. On that basis, the Tribunal does not consider that it can draw the inference the conduct of the Respondent as whole amounts to a detriment and certainly not that any of the actions were materially influenced by the disclosures.

221. For all the reasons set out above, the Tribunal considers that the claim under s47 ERA is not well founded and it is hereby dismissed.

Employment Judge: **P Smith**
Date of Judgment: **7 October 2022**
Entered in register: **13 October 2022**
and copied to parties