



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms S K Dhaliwal

-v-

Spotty Zebra Day Nursery Limited

FINAL MERITS HEARING (CONDUCTED BY THE CLOUD VIDEO PLATFORM)

Heard: Centre City Tower, Birmingham

On: 5, 6 and 9 to 13 January 2023

Before: Employment Judge Perry, Mrs J Keene & Mr E Stanley

Appearances

For the Claimant:

In person

For the Respondent:

Mr S Hoyle (Litigation Consultant)

JUDGMENT

1. The claimant did not make disclosures that qualify for protection.
2. In any event the alleged protected disclosures were not the reason or principle reason for her dismissal nor was she subjected to detriments that were materially influenced by those protected disclosures.
3. Her claims fail and are dismissed.

REASONS

References below in circular brackets are to the paragraph of these reasons. Those in square brackets to the page of the bundle or where preceded by a document reference or the initials of a witness, that document or witness statement.

BACKGROUND AND ISSUES

1. This claim was presented on 19 November 2022 following early conciliation between 28 July to 19 August 2021.
2. The issues were identified at a Case Management Discussion conducted by coincidentally the chair of this panel on 17 May 2022 (the CMD) [80-86]. It



was identified at the case management hearing that the complaints pursued were for whistleblowing detriment and dismissal (pursuant to ss. 47B and 103A Employment Rights Act 1996). Ms Dhaliwal does not have qualifying service to bring a claim of ordinary unfair dismissal.

3. The solicitors firm who represented Ms Dhaliwal throughout the proceedings ceased to act on her behalf on the day before the hearing was due to commence. The panel were concerned that given witness statements had been exchanged very late that the effect of those matters could cause prejudice to Ms Dhaliwal. We therefore instructed Ms Dhaliwal's (by then) former solicitor to attend the hearing remotely which he did, a list of issues was clarified with his assistance, certain matters the tribunal had previously ordered to be clarified at the CMD not having been done. That list of issues is attached as an appendix to this judgment.
4. The tribunal satisfied itself that Ms Dhaliwal not only positively wished to proceed but was in a position to do so. We timetabled the hearing to ensure that she would complete her evidence during the first two days (a Thursday and Friday) giving her an opportunity over the following weekend to undertake any further preparation that was required. She was agreeable to that. The questions that she posed of the respondent's witnesses indicated to the panel that she understood the various legal principles concerned.
5. It was agreed at the outset of the hearing whilst Ms Dhaliwal still had the assistance of her solicitor that a claim for wrongful dismissal/notice pay was no longer pursued. That claim is dismissed.
6. Her dismissal aside, the complaints comprise 8 acts/omissions that are alleged to be detriments. Ms Dhaliwal alleges they stemmed from her making what she alleged were some 14 protected disclosures. We refer to them below as PID1-14. They are argued on the basis of two of the s.43B(1) Employment Rights Act 1996 (ERA) criteria :-



(b) a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

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

7. A timing point potentially arises. That is dependent upon the date of Ms Dhaliwal's dismissal.

THE EVIDENCE

8. The panel had before us a bundle of some 525 pages to which a small number of documents were added as the hearing progressed. The parties were also asked to clarify certain issues such as the date certain individuals were offered roles and other points.
9. The Tribunal sought the respondent provide a list of any authorities that it was to refer to (including hyperlinks) and having explained at the outset the legal principles involved to Ms Dhaliwal again insured her understanding of these when the respondent was providing closing arguments. Both parties were given the opportunity to make oral submissions and Ms Dhaliwal also provided written submissions.
10. In her closing submissions (and despite reminders of the need to do so) Ms Dhaliwal only addressed PID2 & PID4. We address all 14 PIDs.
11. The tribunal also had before us a chronology, cast list, and witness statements from Ms Dhaliwal, the nursery manager, Ms Kerry-Ann Williams [KAW], the deputy manager Ms Zoe Henderson [ZH], and three members of staff, Ms Anna Leach [AL], Miss Leigh-Ann Tooth [LAT] who no longer works for the respondent (she was employed by the respondent from 8 February 2020 until 25 February 2022) and Ms Caroline Clarke [CC].
12. All gave oral evidence save for Ms Clarke who we were told was unable to do so for medical reasons. Whilst medical evidence of that was not provided we indicated we would give her evidence such weight as we deemed appropriate.



13. Whilst giving evidence both Ms Dhaliwal and Ms Williams indicated that they were dyslexic. Ms Dhaliwal provided on the day submissions were heard a report setting out her diagnosis.
14. Ms Dhaliwal explained that accounted for a number of discrepancies regarding dates and other matters such as the inconsistency in the numbering of her protected disclosures that we set out below.
15. We have disregarded any numbering errors and instead considered the substance of what was said. We clarified and drilled down into those points as they arose. For consistency having pointed out where these issues arise we have referred to the disclosures by reference to the way they are referred to in the list of issues.
16. Given written reasons have been sought and they will be posted on the internet we do not consider it to be in the interests of justice to publish the surnames of persons not called or against whom allegations were not directly made. We refer to them by their first names.

THE LAW

17. We explained the law at the outset and when became additional points were being taken.

Dismissal/Detriment cases contrasted.

18. In detriment cases the test to be applied differs to that in unfair dismissal. In detriment claims statutory protection will:-

“[45] ... be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test ... in s.47B to be the same as for unfair dismissal, it could have precisely the same language, but it did not.”¹

¹ Both Elias LJ in the Court of Appeal in *Fecitt v NHS Manchester* [2012] IRLR 64 (CA)



19. It is in principle possible to distinguish, for the purpose of section 47B, between the fact that a worker had made a protected disclosure and the manner or way in which the information is disclosed, for instance the disclosing of information by using racist or otherwise abusive language ². Thus, the fact that the employee disclosed particular information can play no part in a decision to subject the employee to a detriment where the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable and so the employer will not be liable.
20. Difficulties also arise because of the effects the disclosure had on the workers' relationships or with their managers. In *Martin v Devonshires* ³ the EAT said this about the Tribunal's finding as to the reason for the treatment which was found to be by reason of:-

*"...a combination of inter-related features – the falseness of the allegations, the fact that the Appellant was unable to accept that they were false, the fact that both of those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness. **But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself.** Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."*

[Our emphasis]

21. Similarly, it is also possible, depending on the circumstances for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed. Thus, where an employee hacked into a school's computer system in order to demonstrate that it was not secure it was determined that the employee's conduct,

² *Panayiotou v Kernaghan, Chief Constable of Hampshire Police* [2014] UKEAT/0436/13, [2014] IRLR 500(EAT - Lewis J) at [49]

³ [2011] ICR 352



although related to the disclosure, was separable from it. The Court of Appeal noted, however, that a **"tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself"** ⁴.

22. The Employment Appeal Tribunal in [Woodhouse v North West Homes Leeds Ltd](#) [2013] IRLR 773 having determined that the Tribunal had not identified the features that rendered the reason asserted for the treatment properly and genuinely separable from the making of the complaint itself, cautioned that in such cases, it would only be the exception that the detriment or dismissal would not be found to be done by reason of the protected act.
23. [Martin](#) was considered along with a number of other cases by the CA in [Fecitt](#) *Error! Bookmark not defined.*. There, Elias LJ gave the following guidance:-

"51. ... I entirely accept that where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."

Protected disclosures.

24. To qualify for protection as a **"whistleblower"** a **worker** (that term includes employees) is required to make a **"protected disclosure"**. In order to be protected the disclosure must be a **"qualifying disclosure"**, namely:-

"... 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 [what we will refer to for ease as the "states of affairs" listed in subsections (a)-(f)] ..." ⁵

⁴ [Bolton School v Evans](#) [2007] ICR 641 (CA) and see the comments of Buxton LJ at [18]

⁵ s. 43B(1) ERA



25. Two relevant states of affairs are argued here; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and (d) that the health or safety of any individual has been, is being or is likely to be endangered.
26. No point is taken in relation to worker status, with regards to the various conditions set out in ss.43C to 43H ERA (as amended) ⁶ or on the basis the alleged disclosures otherwise qualify, for protection that they were made in the public interest.
27. Thus, if the disclosure **“qualifies”** for protection it will be **“protected”**.
28. In order for a disclosure to qualifying for protection facts (information) must be relayed, as opposed to an allegation being made ⁷, an opinion or state of mind expressed ⁸ or a position stated for the purpose of negotiation ⁹. Thus, the words, **“The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around,”** relay information whereas **“You are not complying with health and safety requirements”** is the making of an allegation and is not relaying information ¹⁰.
29. Employment Tribunals have to take care to ensure they do not fall into the trap of thinking that an alleged disclosure has to be either allegation or information, when reality and experience teaches that it might well be both; they are often intertwined ¹¹. The question is whether the statement or disclosure in question has **“a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection”**.

⁶ For disclosures made prior to 25 June 2013 it was a requirement of both s. 43C and 43G that the disclosure should have been made in **“good faith”**. That requirement was removed by s. 24(6) Enterprise and Regulatory Reform Act 2013, but the definition of “qualifying disclosure” in s. 43B was amended to include that the disclosure should be made **“in the public interest”**. The question of good faith remains relevant to remedy.

⁷ [Cavendish Munro v Geduld](#) [2010] IRLR 38, UKEAT/0195/09 [24]

⁸ [Goode v Marks and Spencer](#) UKEAT/442/09 [36]

⁹ see [Cavendish Munro](#). This approach was also applied in [Goode, Norbrook Laboratories v Shaw](#) UKEAT/0150/13 and [Millbank Financial Services v Crawford](#) [2014] IRLR 18 EAT.

¹⁰ see Lady Slade in [Cavendish Munro](#) where she explains the rationale for this and contrasts the statutory words in Part IVA ERA and the provisions in the Sex Discrimination Act 1975 and Race Relations Act 1976

¹¹ Langstaff P (EAT) in [Kilraine v London Borough of Wandsworth](#) UKEAT/0260/15



This "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" ¹². A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so ¹³.

30. In addition to identifying the date and content of each disclosure, the claimant will ordinarily be expected to identify each alleged failure to comply with a legal requirement or health and safety matter (as the case may be), the basis on which it is alleged each disclosure is qualifying and protected and save in obvious cases, the source of the obligation by reference for example to a statute or regulation ¹⁴. Each of the complaints should be looked at individually rather than collectively to see whether it identifies (not necessarily in strict legal language) the breach of obligation on which the employee relies.

¹⁵

31. As to any of the alleged failures, the burden is upon the claimant to establish on the balance of probabilities that her employer was in fact and as a matter of law, under a legal (or other relevant) obligation and the information disclosed tends to show that that person has failed, is failing or is likely to fail to comply with that obligation ¹⁶.

32. It is also a necessary ingredient of a "qualifying disclosure" that a Claimant has a reasonable belief that the state of affairs exists. The EAT summarised the approach thus¹⁷:-

"(2)... the first question for the ET to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question. The second question for the ET to

¹² Sales LJ (CA) in [Kilraine v London Borough of Wandsworth](#) [2018] EWCA Civ 1436 at [35 & 36]

¹³ [Jesudason v Alder Hey Children's NHS Foundation Trust](#) [2020] EWCA Civ 73 [20]

¹⁴ [Blackbay Ventures v Gahir](#) [2014] ICR 747 (EAT) [98] & [Eiger Securities v Korshunova](#) [2017] IRLR 115 (EAT)

¹⁵ [Fincham v HM Prison Service](#) UKEAT/0991/01

¹⁶ [Korashi v Abertawe Bro Morgannwg University Local Health Board](#) [2012] IRLR 4 EAT at [24]

¹⁷ [Soh v Imperial College](#) UKEAT/0350/14 [42] approving the approach in [Darnton v University of Surrey](#) [2002] UKEAT 882/01, [2003] IRLR 133



consider is whether, objectively, that belief was reasonable (see Babula¹⁸ at paragraph 81).

(3) If these two tests are satisfied, it does not matter whether the worker was right in his belief. **A mistaken belief can still be a reasonable belief.**

(4) Whether the worker himself believes that the state of affairs existed may be an important tool for the ET in deciding whether he had a reasonable belief that the disclosure tended to show a relevant failure. Whether and to what extent this is the case will depend on the circumstances. In Darnton¹⁹ HHJ Serota QC explained the position in the following way:

‘29. ... It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1).’ “

33. The rationale that underlies our **emphasis** in (3) is that the policy of the legislation is to encourage responsible whistle-blowing²⁰.
34. While “*belief*” alone requires a subjective consideration of what was in the mind of the discloser, “*reasonable belief*” involves an objective test²¹ and its application to the personal circumstances of the discloser, which are likely to include his/her knowledge of the employer’s organisation as a well-informed insider and having regard to his/her qualifications. Thus, the reasonable belief of an experienced surgeon may be entirely different view to that of a layperson²².

¹⁸ [Babula v Waltham Forest College](#) [2007] ICR 1026 CA [82]

¹⁹ (above)

²⁰ [Babula](#) (above) at [80]

²¹ [Babula](#) (above) at [82]

²² [Korashi](#) (above)



35. The use of the word “**and**” requires the worker to reasonably believe the disclosure is in the public interest ***and*** to reasonably believe the disclosure tends to show one of the *states of affairs* (the criteria in s.43B(1)(a)-(f)).
36. There is thus not only a two stage test in relation to the state of affairs issue but also to the public interest question:-
- 36.1. Did the worker believe, at the time that he was making it, that the disclosure was in the public interest and
- 36.2. if so, that belief was reasonable ²³.
37. The Court of Appeal eschewed attempting to provide any general gloss on the phrase "in the public interest" noting as Parliament had chosen not to define it “*the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression*”. It reminded us that whilst the necessary belief is that the disclosure is in the public interest, that does not have to be the worker’s predominant motive in making it. The reasons why the worker believes that to be so are not of the essence. The Court of Appeal also noted as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; the CA declined to endorse either the "range of reasonable responses" approach or "Wednesbury" test instead issuing a reminder that whilst it is legitimate for the tribunal to form its own view on that question as part of its thinking (acknowledging that is often difficult to avoid) but that view is not determinative and Tribunals should be careful not to substitute its view for that of the maker. ²⁴

²³ *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [\[2017\] EWCA Civ 979](#)

²⁴ *Nurmohamed* (above)



Unfair dismissal.

38. If, as here, a claimant does not have qualifying service to bring a claim of unfair dismissal the burden is on a claimant to prove s/he fell within the ambit of statutory protection ²⁵.
39. Where the reason (or, if more than one, the principal reason) for dismissal is that the employee made a protected disclosure s. 103A ERA provides the employee **“shall be regarded for the purposes of this Part as unfairly dismissed”**. Thus, if the employee persuades the Tribunal the reason for dismissal was the s. 103A reason. the dismissal is automatically unfair and there is no need to assess the reasonableness of the dismissal, as required by s.98(4) ERA.
40. The reason for dismissal was classically assessed by reference to the set of facts known or beliefs held by the employer which caused it to dismiss the employee ²⁶. That includes information coming into the respondent’s knowledge on the hearing of the appeal (if any) ²⁷. That formulation may not be perfectly apt in every case ²⁸, the essential point remains a valid one; the "reason" for dismissal connotes the factor(s) operating on the mind of the decision-maker which cause him/her to take, or, as it is sometimes put, what “motivates”, the decision ²⁹. Thus **“... if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason ...”** and **“it is the [Tribunal’s] duty to penetrate through the invention rather than to allow it also to infect its own determination”** ³⁰

²⁵ *Smith v Hayle* [1978] IRLR 413 (CA), *Marley Tile Co Ltd v Shaw* [1980] ICR 72, *Maund v Penwith DC* [1984] ICR 143 and specifically in the context of s.103A in *Ross v Stobart* [2013] UKEAT/0068/13 a view more recently endorsed by the EAT in *Okwu v The Shrewsbury & Rise Community Action* [2019] UKEAT 0082/19.

²⁶ *Abernethy v Mott, Hay & Anderson* [1974] ICR 323 CA per Cairns LJ at 330B-C

²⁷ *Browne-Wilkinson P in Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91 (EAT) at [95] approved by Lord Bridge in *West Midlands Co-Operative v Tipton* [1986] IRLR 112 (HL)

²⁸ *Hazel v Manchester College* [2014] ICR 989 (CA) per Underhill LJ at [23]

²⁹ see also *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658 [41]

³⁰ *Royal Mail Group Ltd v Jhuti* [2020] ICR 731, [2019] UKSC 55 at [60,62]



Detriment

41. Detriment is assessed objectively, namely, how it would have been perceived by a reasonable litigant ³¹. It has been given a wide interpretation by the courts ³² as not meaning anything more than essentially '**putting under a disadvantage**'. That is a question of fact for the Tribunal to decide ³³.
42. In making that assessment we must bear in mind that an unjustified sense of grievance cannot constitute detriment ³⁴, and whilst it is not a defence per se that the employer behaved honestly and reasonably, save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment ³⁵. A person may be treated less favourably and yet suffer no detriment.

Other authorities cited by Mr Hoyle

43. In addition to the principles and cases we list above Mr Hoyle forwarded to Ms Dhaliwal and the panel a list of the cases he intended to refer us to and links to them. We ensured the principles he was relying upon were explained to Ms Dhaliwal. Those not set out above were:- *Ling Kong -v- Gulf International Bank (UK) Limited* [2022] EWCA Civ 941, *Ms L Parsons -v- Airplus International Ltd* UKEAT/0111/17, *Dray Simpson -v- Cantor Fitzgerald Europe* [2020] EWCA Civ 1601, *Mid Essex Hospital Services NHS Trust -v- Smith* EAT 0239/19, and *Gallacher -v- Abellio Scotrail* UKEATS/0027/19/SS

³¹ *Ministry of Defence v Jeremiah* [1979] IRLR 436 (CA), 31 per Brightman LJ (a case involving the interpretation of the 1975 Sex Discrimination Act) approved in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830

³² Lord Hoffman in *Khan* at [53] and Brandon LJ in *Jeremiah*

³³ adopted and approved by the HL in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 which in turn referred often to another HL decision *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 48

³⁴ *Shamoon* (as above) per Lord Hope [35].

³⁵ *Pothecary Witham Weld v Bullimore* [2010] IRLR 572, [2010] UKEAT 0158/09 at [19(3)] applying *Derbyshire v. St. Helens Metropolitan Borough Council* [2001] ICR 841



OUR FINDINGS

We make the following primary findings of fact on the balance of probabilities and from the information before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

The background & context

44. Ms Dhaliwal was employed by the respondent from Tuesday 4 May to a disputed date (either 9 or 28) September 2021.
45. The chronological context in which this claim sits is that Ms Dhaliwal commenced her employment just over 12 months after the first UK lockdown started.
46. Ms Dhaliwal's contract (statement of main terms) [154-156] provided that she would initially be employed on a probationary period of 6 months. We also had before us Ms Dhaliwal's job description & person specification [157-158] and the respondent's staff handbook [159-174].
47. Ms Dhaliwal is a Level 3 Child Care Practitioner. She had previously held a number of childcare roles including leadership roles within nurseries. She told us she had been taking what we will describe as a "career break" from 2017 due to the stresses she found her previous role had entailed.
48. Her appointment as a nursery practitioner by the respondent was thus at a substantially lower level than that that she had undertaken prior to her "career break". She was essentially operating at least two levels of management (room leader and deputy manager) lower than that at which she had previously worked.
49. The respondent is a day nursery located in Halesowen that commenced trading in April 2019. At the time of an OFSTED inspection on 24 August 2021 [313-319] (shortly after Ms Dhaliwal's employment terminated) it employed 20 members of childcare staff. It provided day care for babies of 3 months or more to pre-school children of 4 and 5 years old.



50. The building in which it sits is modern, has CCTV throughout and we were told has a security entry system in place. We were provided with various plans of the building. During her evidence Ms Williams identified where some of the walls that were shown were actually low height to allow extra visibility and weird annotated the plan at [523] accordingly. We are also provided with a number of photographs [374-399] although we were not told when these were taken or who by.
51. The nursery had four main rooms catering for babies, tweenies, toddlers and pre-school children. We were referred to the Statutory Framework for the Early Years Foundation Stage (EYFS) [102-138] which sets out the statutory staffing requirements including the required practitioner levels and the ratios for the various age groups at paragraph 3.1 following. Save for the baby room which was on the first floor, all the other main rooms were on the ground floor. The preschool and toddler's room had direct access to a walled and fenced outside play area.
52. During her employment Ms Dhaliwal worked initially in the baby room which was led by Ms Caroline Clarke, a Level 3 practitioner and latterly also in the pre-school room which was led by Ms Bethany Rowe (a room leader who was also a qualified teacher and who at all times that concern us about whom it was known that she was shortly due to leave the respondent (see (60))).
53. Within the first week of her employment Ms Dhaliwal had cause to make a complaint about Ms Clarke. Further complaints followed within the weeks thereafter against a number of staff including Ms Tooth and "Jacob"³⁶ (both apprentices).

³⁶ There were two spellings of Jacob's given name used before us. Given we will not be using his surname, for the sake of consistency we will refer to him using this spelling.



54. Over the weekend following her first week of employment Ms Dhaliwal messaged a friend (“Mandeep”) stating *“I think ill be making enemies on Monday”* [491].
55. As a result of the complaints, she made Ms Dhaliwal alleges that she suffers a number of detriments. These included (1) & (2) Ms Tooth refusing to interact with claimant; Ms Tooth refusing to follow Ms Dhaliwal’s instructions and being rude and unhelpful to Ms Dhaliwal; (3) a WhatsApp post of 25 May 2021 of a gorilla sitting on a small child’s chair made by Ms Clarke that Ms Dhaliwal states was aimed at her; (4) Staff jokes (referencing Ms Dhaliwal’s father, their ages, Ms Dhaliwal being single and comments concerning older women having babies) again in her view aimed at Ms Dhaliwal ; (5) two grievances raised by Ms Clarke and another colleague “Gurdeep” (another level practitioner who principally worked in the baby room) dated 9 July; linked to that (7) Ms Williams and Ms Henderson allegedly encouraging staff to make complaints against Ms Dhaliwal and (6) & (8) comments by Ms Williams on 9 July *“we just need to get rid the bad apple”*; *“you can just leave”* and a comment reported to Ms Dhaliwal by another colleague Ruth (another apprentice) by Ms Henderson *“with Hannah joining us now we can get rid of the bad apple in the baby room”* which Ms Dhaliwal states were directed at her.
56. The respondent’s position is that Ms Dhaliwal’s complaints were ill founded and when talking to colleagues Ms Dhaliwal criticised them directly and commented negatively on third-party colleagues and management, thereby upsetting staff and creating an air of negativity. The respondent suggests that a number of staff complained about this verbally over time but did not wish to take matters initially further forward. By 9 July, the respondent alleges a significant number of staff had indicated to Ms Henderson that they had had enough and wished to raise formal grievances. The respondent states that she responded by telling them they needed to put those matters into writing.



The respondent alleges a number of written complaints were lodged by staff as a result.

57. Ms Dhaliwal takes issue with these matters from a number of perspectives:-

- 57.1. Whilst we were told some of the typed versions of Ms Clarke's statements merely repeated manuscript versions that had previously provided those manuscript versions were not before us
- 57.2. It was accepted where they were dated, for the most part those dates were added retrospectively to the dates they were alleged to have been originally made.
- 57.3. As to the series of other complaints/statements from various members of staff that were provided [348-370] almost all post dated Ms Dhaliwal's claim form (on they basis they were made in response to it [e.g., 355-363])
- 57.4. On some of the documents the maker's name was clearly added (different handwriting and/or ink [e.g., 367])
- 57.5. Ms Leach's complaint [507-508] is undated. Ms Leach told us that was produced after she was approached by Ms Williams about the incident again in December 2021 (after the claim was presented) and was asked to write a written statement. Ms Leach told us orally she had not put anything in writing until December 2021.
- 57.6. The complaint of a colleague, Gurdeep [283] is dated 9 August, but we were told by Ms Henderson that this was a mistake, and it was also received on 9 July
- 57.7. Ms Clarke's complaints dated 17 and 28 May at [263 and 270] are identical albeit differently formatted. That of 17 May [263] is listed in



the index as a duplicate included in error. Ms Clarke explains how that of 28 May came about :-

“37. On 28th May 2021, Ms Henderson and I had a further discussion about how the Claimant was getting on. I was asked to write down my thoughts which I did (page 501).

38. I was asked to type up more detail about these notes by Ms Williams earlier this year although I can't remember the exact date I did this (page 270).

39. Similarly, following the Claimant's claims, I was asked to provide statements by Ms Williams on a number of allegations, which I did (pages 354 to 363).

40. On 9th July 2021, I felt it necessary to put my concerns about the Claimant in writing and I did so to Ms Henderson (page 289). I was not forced into writing this.”

- 57.8. Whilst in her witness statement Ms Clarke's accepted in the typed version of her grievance dated 9 July [289] she spelt her own name incorrectly she told us this was her own error. She did not however address how two identical documents came to have the same date.
- 57.9. Ms Tooth accepted her statement dated of 9 July [290] was written on the day of or the day following the incident that forms the subject of PID2 and thus her statement at [290] must have been written before 9 July 2021. However, she also accepted the final paragraph of that statement [290] had been added later. She accepted her statement [351] was written in December 2021.
58. Essentially, Ms Dhaliwal suggests those statements were elicited by the respondent from its staff only once it became aware she intended to lodge a grievance herself and/or to compliant to OFSTED and the various errors we identify above cast doubt on their reliability.
59. The respondent points us to the duplicate of Ms Clarke's grievance as indicative of the position [263 and 270]:-



“... After a short time, Sukhdeep started to ask questions, which was expected being a new member of staff, but it is her responses that she gives, such as “ I know how to do that” or ‘ why do you do like that” and the way she speaks feels harsh, I feel like she is interrogating me. When I ask Sukhdeep to help with her responsibilities like washing up, nappy changes or cleaning, which I explained to her on her first day in Baby Room, Sukhdeep makes comments to avoid helping, such as she cannot because of her asthma, or she is doing something else. This means most of the time I am having to do her jobs as well as my own. Sukhdeep is not making any attempt to work with me or offer to help the other staff. Instead, she walks around distracting and questioning staff, who have mentioned to me they feel uncomfortable with her talking so much.

I have asked Sukhdeep to contribute to our weekly planning for the room, for example ideas for activities or what she noticed the children were interested in. I wanted Sukhdeep to get to know the children and interact with them more. But Sukhdeep’s responses were ‘I’ll have a look and see’ or ‘I will write it later’ but never contributed when completing this planning. It was therefore left up to me and other staff in the room to complete.”

60. Whilst Ms Clarke did not give evidence before us, based on the documents we were taken to and statements we have before us from the respondent’s staff, we find the complaints Ms Clarke describes represent a common theme on the part of the respondent’s staff including its witnesses Ms Tooth [LAT/14-16] and Ms Leach [AL/5-9]. We address below at (161) following how Ms Dhaliwal’s account provides some support for the account of Ms Clarke, Ms Tooth and Ms Leach.
61. From the outset it was apparent that Ms Dhaliwal expressed dissatisfaction not only about the respondent’s procedures but also that she would have preferred to have been working somewhere other than in the baby room. As a result, Ms Dhaliwal told us after the first week she essentially worked both in the baby room and in pre-school room. The respondent alleged that given her qualifications, previous roles and that a room leader’s post was due to become vacant as a result of Bethany Rowe leaving, within the first week or so of her employment that Ms Dhaliwal was asked if she was interested in



becoming a room leader. The respondent alleges that Ms Dhaliwal was willing to undertake the role at the rate of pay that the respondent was offering.

62. The respondent also asserts that it was clear from about 5 weeks after she started that Ms Dhaliwal had decided that she no longer wish to stay at the nursery. It was common ground that on 1 July Ms Dhaliwal asked Miss Williams if she could reduce her hours so she could attend interviews for jobs. Within a month after that the respondent had decided to terminate her engagement.
63. We now turn to the alleged protected disclosures.

PID1 – 7 May 2021 - Ms Dhaliwal to Ms Williams

CC (Baby Room Leader) – preoccupied on her ipad and doing paperwork, not attending to or interacting with the children or attending to their physical needs like wiping their noses, if required. Also, leaving the baby room short staffed and below require ratios.

64. This alleged disclosure for the most part speaks for itself save in two respects. Firstly, within her claim form Ms Dhaliwal made an allegation at several points that appeared to suggest [24 - ET1/6.1] that a member of staff was not allowed to leave the room for any reason or for any length of time if it would place that room out of ratio. Secondly, one of the members of staff was not competent and thus could not count for the ratios.
65. The person who Ms Dhaliwal alleges was not competent was Ms Tooth. We address that complaint as part of our findings in relation to PID3 to which it directly refers (see (74-86)). We find there that the respondent was entitled to consider Ms Tooth competent.
66. The next aspect of this complaint is that Ms Clarke was not caring for the children in her group, and this impacted ratios. The respondent's position on this is that on the day concerned Ms Clarke was additional to the number of ratioed staff and thus whilst sitting in the room she was legitimately



undertaking administrative duties (she was assisting the respondent's management by undertaking the duties of a deputy manager).

67. Having considered the rotas for the day in question we find that that was the case, and that Ms Clarke was therefore permitted to undertake administrative duties.
68. Ms Dhaliwal accepted [SKD/48] and before us that **"staff are allowed to leave the room for short periods of time ... provided (a) it is short; (b) they tell someone and (c) they do not take a child with them."** That would for instance allow for them to go to the toilet but to do so for a lengthy period was not permissible. We address that point further under PID6 & PID7 below at (146-152).
69. Given the rotas that were before us on their face suggested ratios were being complied (see (82)) with in our judgment if Ms Dhaliwal wished to allege that the legal requirements concerning ratios were being broken she would have needed to provide information to underlay that; the date and time, so the ages and number of the children and staff could be ascertained (these changed as the day went on) and how long an individual was absent from a room for. She did not.
70. Those points aside if Ms Dhaliwal wished to assert a legal or health and safety obligation was being breached she needed to assert what that was. That and any best practice issues aside, we sought to clarify, how a child's health and safety was being put aside if his/her nose was running. When we drilled down into her complaint it became apparent that she considered Ms Clarke was responsible for the child whose nose was running and she told Ms Clarke, about that rather than attending it to herself. She accepted before us that she had not attended to the child's nose.
71. Ms Dhaliwal was employed to undertake work in that room as a nursery assistant, it was thus her role to care for the children and insofar as for



instance she saw a child's nose was running but that a colleague had not, it was her role as much as her colleagues to attend to it. If she had truly considered this to be a health and safety issue as she claimed we find that she would have attended to it as well as raising the matter with Ms Clarke. As we go on to find this formed a consistent theme on the part of the respondent's staff about Ms Dhaliwal's attitude, her not helping with tasks and instead criticising others . We return to this below (119).

72. Given the absence of the information we set out at (69) and given Ms Dhaliwal's knowledge as a long standing practitioner and the knowledge with which she held herself out, the temporal points we make concerning how she raises the ratio issues (68) and the points we make at (70) we find Ms Dhaliwal had neither relayed the necessary information for that disclosure to qualify nor did she have a reasonable belief that PID1 tended to show a breach of a legal obligation or that health and safety of an individual was being placed at risk.
73. The view we came to in relation to this matter is further supported by our findings generally as to the reasonableness of the views Ms Dhaliwal came to in the remaining disclosures below and that as to the reasonableness of Ms Dhaliwal's belief that we address at various points below.

PID3 - w/c 10 May 2021 – Ms Dhaliwal to Ms Williams

CC had left the baby room with 6 babies and only C and an inexperienced Apprentice below required staff ratios.

74. We find this alleged disclosure predates PID2 for reasons we go on to address (see (104)) and so we turn to PID3 first.
75. The way Ms Dhaliwal addresses PID3 in her witness statement is thus:-

"37. On 10 May 2021 I started my shift in the Baby Room at 7.45am. I was not due to move to the Preschool until 9am. At 9am I left to go to the Preschool leaving Gurdeep [...] in the Baby Room with two Apprentices (Anna Leach and Anya [...]) and 9 babies. Another 2



babies joined later during the day. This meant until Caroline Clarke or someone else came in Gurdeep [...] and two Apprentices were left with 11 babies between the three of them.

38. I reported my concerns to Kerry-Ann Williams later that day (PIDA 2). I pointed out that since I had joined I had discovered that the Baby Room was significantly under ratio. Sometimes I was the only qualified member of staff looking after 6 babies and on occasion this rose to 9 babies when people left for their breaks etc. ...”

76. The complaints as put in the list of issues and Ms Dhaliwal’s witness statement are therefore slightly at odds.
77. Ms Dhaliwal did not say which day this occurred but the staff rota for the w/c 10 May [259] showed the baby room with Ms Clarke, Gurdeep and either Anya (or Ms Leach) everyday, on some days both Anya and Ms Leach and Ms Dhaliwal. It appears Ms Dhaliwal moved rooms (shown as an arrow) on 10 May. She was not shown as in the room on the 11 May but was there for the rest of the week. It was common ground that from the second week Ms Dhaliwal moved into the pre-school room and worked there either for all or at least the latter part of each day.
78. The respondent asserts that due to the impending departure of Ms Rowe, Ms Dhaliwal was asked to work in the preschool room from the second week she worked at the nursery so Ms Williams could assess if she was suitable to fulfil Beth’s role as room leader [KAW/73]. The fire drill record we reference at (179) amongst other evidence supports that. The respondent suggests that Ms Dhaliwal indicated that she would have only been prepared to undertake that role at a rate of pay that it was unable or unwilling to pay. Irrespective of whether that was so, Ms Dhaliwal was not offered/did not take up the room leader’s role.
79. We considered if the respondent offering Ms Dhaliwal a room leader’s role was at odds with the alleged behaviours the respondent asserts Ms Dhaliwal displayed. We find it was not at that point. That offer occurred only a few days into Ms Dhaliwal’s employment and by that point only the first



protected disclosure was alleged to have occurred. We find that it was understandable given Ms Dhaliwal's previous experience and qualifications that the respondent would consider her for that role given the impending departure of a room leader. Nor is that inconsistent with the concerns it subsequently advances about Ms Dhaliwal's behaviours. On its own account the respondent only gained a fuller picture of those matters by a later date.

80. The ratio for children under 2 (babies) was 1:3 (EYFS 3.31) [124].

“Early years providers (other than childminders)

3.31. For children aged under two:

- there must be at least one member of staff for every three children*
- at least one member of staff must hold a full and relevant level 3 qualification, and must be suitably experienced in working with children under two*
- at least half of all other staff must hold a full and relevant level 2 qualification*
- at least half of all staff must have received training that specifically addresses the care of babies*
- where there is an under two-year-olds' room, the member of staff in charge of that room must, in the judgement of the provider, have suitable experience of working with under twos”*

81. The EYFS provides for exceptions to this:-

“3.30. The ratio and qualification requirements below apply to the total number of staff available to work directly with children. Exceptionally, and where the quality of care and safety and security of children is maintained, changes to the ratios may be made. For group settings providing overnight care, the relevant ratios continue to apply and at least one member of staff must be awake at all times.”

and we return to a specific exemption that applied due to COVID below (146-152).



82. Based on the rota before us there were between 8 and 11 babies in the baby room over the course of that week although some were not there all day. The numbers of staff, their status and numbers of babies on the rota accords in general with Ms Dhaliwal's account. We thus accept the rota reflected staffing and number of babies each day.
83. Accordingly, three staff were required (Tuesday – Thursday (for 8 or 9 babies)) and four staff (Monday and Friday (11 and 10 babies respectively)). Further based on the staff shown on the rota each day the room was nominally in ratio.
84. The way this complaint was put in the list of issues was that if the inexperienced member of staff was incompetent the room would not have been in ratio. Alternatively, if Ms Clarke had left Ms Dhaliwal with only one other competent member of staff in the baby room, the ratio limit for babies was 6.
85. We heard that Ms Leach had undertaken a psychology degree and as part of that had undertaken a placement. She told us she was offered a trial by the respondent sometime in March and the next day she was offered a job but could be no more precise on dates. Thus, by the time of this incident Ms Leach had been working at the Nursery for around 6 weeks from March 2021.
86. At the time of this incident, she was undertaking a Nursery Practitioner apprenticeship. We heard from the respondent that from the outset that it via Ms Williams had been monitoring, reviewing and providing feedback to Ms Leach. We were told that feedback was almost entirely positive and Ms Williams viewed Ms Leach as a competent member of staff. Thus after a few weeks employment she was included within the rotas for ratio purposes.
87. In her witness statement Ms Dhaliwal said this:-

“38 ... Anna Leach had only been working for the Respondent for less than a month and had openly admitted that she did not feel competent



or responsible enough to be left alone. It was too soon. I had observed her. and she was unable to soothe a crying baby and was continually asking for support. Anna Leach, through no fault of her own, could not be classed as competent or responsible.

*39 ... Kerry-Ann Williams dismissed my concerns telling me "**She just needs to be more confident**" and suggested that Anna Leach had "**three years' experience working in Early years.**" When I asked Anna Leach about this, she explained that she did not have three years' experience as alleged. She had undertaken a psychology degree during which she undertook placements in different settings; nursery provision was only a small element. She had no experience with babies."*

88. That demonstrates that Ms Dhaliwal did not accept Ms Williams' view (as the person responsible for carrying out the assessment of Ms Leach). Ms Dhaliwal confirmed both in her statement and orally that she had firstly challenged Ms Leach about the issue of her competence, then Ms Williams, and then again questioned Ms Leach about it:-

*"38. ... I note the Respondent suggests at paragraph 57 Amended ET3 that discussions between Kerry-Ann Williams and Anna Leach later revealed that I had tried to convince Anna Leach that she was not competent enough to be counted in ratio and that she should consider resigning and joining a different nursery. **I strenuously deny the same.***

41. In any event Anna Leach confirms I questioned whether she felt competent enough to be included in the ratio - clear evidence I highlighted it as a concern. Anna Leach explains 'I asked for a meeting with management to discuss my conversation with Suki. I informed them I felt pressured and bullied into saying I was not competent by Suki and her repeated hostile comments about my practice and also my character ... Up until Suki left the nursery; she continued to make the same harsh comments and made me feel increasingly uncomfortable ... Management at the time were great in supporting me and reassuring me during this time.'

42. I accept I questioned Anna Leach about her experience and competence when I saw she didn't know how to hold or calm a baby. I had concerns for the babies and Anna Leach admitted to only having experience with older children not babies and how she would prefer to work with older children. We had this conversation twice, once when I saw her struggling and her admitting she was not competent and another, after I spoke to Kerry-Ann Williams. I was concerned for my own job not other people's."



89. Whilst it is unclear whether in her statement Ms Dhaliwal was strenuously denying ***[our emphasis]*** that she had tried to convince Ms Leach that Ms Leach was not competent to be counted in ratio ***and that*** she should consider resigning and joining a different nursery, we find Ms Dhaliwal made it clear to Ms Leach that she doubted Ms Leach's competence to practice. Ms Dhaliwal's statement [SKD/41 & 42] not only demonstrates that was so but highlights the effect that had on Ms Leach.
90. Further, the closing comments of [SKD/42] demonstrate what in our view was Ms Dhaliwal's lack of concern the effect of her directly questioning Ms Leach's competence had had on someone who Ms Dhaliwal accepted was an inexperienced member of staff and secondly, the potentially conflicting signals that could have conveyed to an inexperienced member of staff given she accepted orally that she had not checked on the feedback management had relayed to Ms Leach.
91. Ms Dhaliwal's text to a friend of Saturday 8 May [491] made clear that comment had occurred by the previous day at the latest:-

"We were understaffed n they counting apprentices in ratio but u can only do that if they are competent. I asked 1 girl do u think your competent she said no! 🙄"

92. Whilst Ms Dhaliwal stated she gave that feedback to Ms Leach in front of others in her claim:-

"6.2 the apprentice was new and inexperienced so did not see herself as competent, which she admitted in front of myself, Anya and Gurdeep" [25], and in her statement "27. ... Anna Leach was new and inexperienced so did not see herself as competent, which she admitted to me, Anya [...] and Gurdeep ..."



Ms Leach told us that was done but on a one-to-one basis only. Giving the benefit of the doubt to Ms Dhaliwal we accept that this was done on a one to one basis. Even so the appropriate mechanism to raise those matters via the individual whose role it was it was to assess Ms Leach's competence, Ms Williams, first and not direct to Ms Leach.

93. Ms Dhaliwal, who had previously been in a senior position in other nurseries, should have known that that was the appropriate mechanism for doing so. Ms Dhaliwal's acceptance that she took it upon herself to question Ms Leach's competence without having ascertained first what feedback had been given to Ms Leach does Ms Dhaliwal no credit. We find it was wholly inappropriate for Ms Dhaliwal to have conducted herself in this manner. That is also a matter that could impact on the objectivity and reasonableness of her stance both in relation to this issue and generally. That Ms Dhaliwal was prepared to speculate (see (96)) reinforces that view.
94. As to that stance Ms Dhaliwal formed on that issue, she was asked why and how she formed the view that she did given the complaints in PID1 lead us to conclude that Ms Dhaliwal formed the view that Ms Leach was not competent within the first four days of Ms Dhaliwal's employment commencing.
95. In her witness statement she stated she essentially considered that Ms Leach was unable to soothe a baby and was continually asking for support. Before us the only explanation she gave for forming the view that Ms Leach was not competent was Ms Leach's inexperience. It having been pointed out that there was a significant difference between inexperience and incompetence Ms Dhaliwal accepted that.
96. Any points about the different way this complaint is put in the list of issues to Ms Dhaliwal's witness statement aside, the allegation at [SKD/37] is that Ms Dhaliwal having left the baby room, when babies joined that room later in the day the room would be out of ratio. The inherently involved a degree of



speculation as Ms Dhaliwal was not in the room at that point and was not aware if as suggested Ms Clarke mor others joined the room. The fact Ms Dhaliwal was prepared to speculate again does her no credit.

97. As the allegation at SKD/38 this appears to be based on Ms Dhaliwal asserting that she was the only “*qualified member of staff*”.
98. If the issue solely related to “*qualified member of staff*” the EYFS did not require all members of staff to be qualified. Indeed, it expressly provided otherwise :-

*“3.29. ... Students on long term placements and volunteers (aged 17 or over) and staff working as apprentices in early education (aged 16 or over) may be included in the ratios **if the provider is satisfied that they are competent and responsible.**”*

[Our emphasis]

99. Given her previous role and qualifications Ms Dhaliwal ought to have known that and again making such an assertion does her no credit.
100. If Ms Dhaliwal wished to assert that there was an issue beyond this, namely that staff had left on breaks and cover was not provided, she would have needed to identify the date and time concerned so that could be addressed. The absence of that information meant in our view this was more akin to an allegation than the relaying of the information.
101. Further as we state above, given the way Ms Dhaliwal held herself as a long standing practitioner and the knowledge with which she held herself out as having, identifying breaches of very specific obligations, we find Ms Dhaliwal did not have a reasonable belief that PID3 tended to show a breach of a legal obligation or that health and safety of an individual was being placed at risk. That view is supported by our findings as to the reasonableness of her belief above (72-73) and those that follow.



PID2 - 12/13 May 2021 – Ms Dhaliwal to Ms Williams

Leigh-Anne Tooth (Apprentice) had (1) left the pre-school room on 2 occasions that day (with and without a child) without informing c as Room Leader and impacting staff ratios; (2) she has left a child alone and unsupervised.

102. We record above (67) that Ms Dhaliwal accepted staff could leave a room for a short period and the impact of the EYFS “disapplication” statutory guidance at (149) below. Ms Dhaliwal confirmed during the afternoon of day 3 that the first element of this complaint was no longer pursued so any issues concerning ratios in any event fall away.
103. The respondent accepted the second element of this issue was raised by Ms Dhaliwal but it is disputed that it is a protected disclosure.
104. It is clear that Ms Dhaliwal had given Ms Williams information that tended to show a legal obligation and a health and safety issue had arisen (Section 3.28 EYFS. ***“Children must ... always within sight and hearing.”***).
105. The question for us to determine is what were the facts that underlay Ms Dhaliwal’s belief and was her belief a reasonable one.
106. Firstly, an issue arises concerning when this incident occurred. The only (near) contemporaneous documentary reference of a child being left alone that we were taken to by Ms Dhaliwal was in the messaging chain between Ms Dhaliwal and Mandeep [492]. The message concerned was sent on Thursday 27 May but referred to “*last week*”. That would date the incident to the w/c Monday 17 May not 12/13 May as is alleged.
107. A further concern with regard to the date alleged by Ms Dhaliwal is that the rota for 12 & 13 May [259] shows that Ms Dhaliwal was not rostered to be in the pre school room but the baby room. Both those matters cast doubt on that element of Ms Dhaliwal’s account of that incident.



108. The rota identified Beth, Ms Tooth Jacob and Hollie in the preschool room. Ms Tooth could not recall the exact date but accepts she did leave the room to speak to the room leader Beth who was working across the Hall having non contact time. In her witness statement at paragraph 46 Ms Dhaliwal alleges she was the Room Leader on the day concerned as she was the only qualified Level 3 staff member in the room. That was thus at odds with Ms Tooth's evidence and the rota.
109. The rota making no reference to Ms Dhaliwal does not necessarily place Ms Dhaliwal's account as at odds with the other evidence (save for the date) because Ms Dhaliwal told us from the w/c 10 May she had been working for part of her time in the pre-school room as Beth was leaving. That was not disputed and so we accept she may have been working in that room.
110. Ms Tooth said this:-

"5. We went into the office to see Bethany, our room leader. She was in the office having non-contact time. I could see the children were happily playing in the garden with Hollie, Suki, and "Jacob" before I left the room with the child.

6. I don't remember the exact date but when I was in the office, Bethany asked me about the planning. We went back into the pre-school room where JP was sitting on time out.

7. I was reading the planning board and Suki watched some children go to the toilet and I asked her if she could watch JP whilst I ran this to Bethany. She said OK and I was as quick as possible. I was asked to write a statement about this which I did on 09/07/2021 (page 290)."

111. The rota showed 24 children on 12 May and 22 on 13 May. Whilst a ratio issue is no longer pursued the relevant ratio of 1:8 would require three members of staff including a level 3 practitioner. If Ms Dhaliwal's account is correct and Ms Tooth left the room it would be out of ratio. She said this:-

"45. Leigh-Anne Tooth was an Apprentice and worked in the Preschool. On or around 12/13 May 2021 I observed her removing a young boy from the room. If a child is removed from the Preschool for whatever



reason, the Room Leader should be informed. Leigh-Anne's actions were contrary to standard safeguarding practice namely: (1) If a staff member leaves the room, it is leaving the room under ratio so this needs to be addressed; (2) if no one is informed that a child is being removed from the room, other staff will conclude that the child is missing and (3) in case of a fire, no one in the room knows where the missing persons are because they haven't informed anyone of their leaving.

46. I was the Room Leader that day as I was the only qualified Level 3 staff member in the room. Leigh-Anne Tooth did not seek my permission to remove herself or the child. I therefore assumed she had told someone else. **Jakub [...] (Apprentice) was the only other person in the Preschool Room,** so I asked him. Jakub [...] confirmed he did not know where Leigh-Anne was or why the boy had been removed. Leigh-Anne then returned with the child, so I asked where she had been. She replied that she had removed him because **"he was being silly"**. I reminded her of the correct safeguarding practice, but she ignored me. I then went in the garden with my group for outdoor play. I returned shortly after when one of my group needed the toilet. On taking this child I discovered the same young boy sat on the floor in a room by himself. Leigh-Anne had left him alone and unsupervised. This is contrary to Section 3.28 EYFS. **"Children must ... always within sight and hearing."**

47. I later discovered Leigh-Anne Tooth had decided this boy needed "time out". A child should never be left alone. I therefore rang Kerry-Ann Williams and reported the incident to her (PIDA 3). I reported two concerns: (1) Leigh-Anne Tooth had left the room twice that day (once with a child) without informing anyone thus impacting the staff ratios and (2) Leigh-Anne Tooth had left a child alone and unsupervised. She had endangered a child. Again, Kerry-Ann Williams' response was **"But Leigh-Anne is such a lovely girl and been with us for ages"**. I pointed out that a child should (a) not be removed without consent and (b) not left alone and unsupervised but Kerry-Ann Williams dismissed my concerns claiming **"Leigh-Anne would have asked one of the Toddler staff to watch him"**. That was not what happened. There were no Toddler Room staff around. Kerry-Ann Williams did not seem to appreciate the gravity of what I was reporting. I repeated that Leigh-Anne Tooth had left a child alone. When I found him there was no one watching or supervising him, anything could have happened. I called out to see if there was and no one responded. I suggested that if she doubted me then Kerry-Ann Williams should check the CCTV in the Room. I knew this would corroborate my account.



112. Thus, Ms Dhaliwal makes clear Hollie (who Ms Dhaliwal accepts was also a level 3 practitioner (see PID5)) was not present. She challenged Ms Tooth about her account that Hollie was present. Ms Tooth maintained that Hollie was.
113. If we accept Ms Dhaliwal's account, given she told us only Jacob **four emphasis** above and that neither Hollie nor Ms Tooth were present, she had left Jacob (an apprentice) on his own with in excess of 20 pre schoolers. That was in essence the core of what she initially complained that Ms Tooth had done. Further, if she was the room leader, she had not noticed one of her reports leaving the room with or without the child and on her account had done nothing to try to prevent this.
114. Ms Dhaliwal having complained, Ms Williams told us that she investigated matters. She told us that Ms Tooth was adamant she only left the room when Ms Dhaliwal was in the room, she never left the child on his own and she had asked Ms Dhaliwal [KAW/92].
115. We are left with a choice of whose account we prefer. Ms Tooth appeared to us to be a truthful and honest witness. In contrast we have already highlighted our concerns about Ms Dhaliwal's account of this incident .
116. Viewed from either perspective Hollie's presence/absence places doubt on either Ms Dhaliwal's account or the reasonableness of her view. Her presence is at odds with Ms Dhaliwal's account. Her absence gives credence not only to the account of Ms Tooth but also places an entirely different perspective on and undermines the reasonableness of Ms Dhaliwal's view for the reasons we give above. With regard to the latter Ms Dhaliwal also withdrew the first aspect of this complaint and more generally we have found she could not reasonably have come to the view there were breaches in relation to ratios either generally or based on the EYFS disapplication statutory guidance (see (149)).



117. Those matters being so having been left with a stark choice between their accounts we prefer Ms Tooth's account and find that she asked Ms Dhaliwal to look after the child and the reasonableness of the view she says she formed that was the basis for PID3.
118. We find those matters being so, that Ms Dhaliwal did not reasonably believe that PID2 tended to show either a legal obligation had been breached or the health and safety of an individual was put at risk.
119. We are mindful that whilst a witness' account in relation to one matter is not accepted by the court or tribunal does not mean that witness is lying and further "**... witnesses can believe that their evidence contains a correct account of relevant events, but be mistaken because, for example, they misinterpreted the relevant events at the time or because they have over time convinced themselves of the account they now give**".³⁷ Taking into account her complaint at PID1, the points we make in relation to PID2, the way in which she equated inexperience with competence and challenged colleagues directly about that and our findings in relation to the events that follow, we find that from the outset of her employment there was a consistent theme on Ms Dhaliwal's part that she did not view events reasonably and objectively. Instead, she looked to find fault in relation to others, yet was oblivious to her own failings. That was the lens through which she viewed events and she maintained it before us even when the contradictions were pointed out to her.

PID4 w/c 17/5/21 – Ms Dhaliwal to Ms Williams & Ms Henderson

C identified a safeguarding issue - Halima (a student undertaking work experience) was alone supervising 12 toddlers in the garden against required staffing ratios.

³⁷ *R v Lucas* [1981] 1 QB 720, in particular at 74G and F/H, and *R v Middleton* [2000] TLR 293



120. Ms Dhaliwal points us to the respondent accepting this incident having occurred in the original response form (ET3/28 [52]) but denied that was so in the amended response form (ET3/60 [93]).
121. In the claim form and list of issues the date this allegation is stated to relate to is 17 May. In her witness statement [SKD/78] this is referred to as PID8 and this incident is dated to 27 May. Ms Dhaliwal refers in her witness statement to a text to her friend Mandeep [492] of 27 May. The reference in the text being to yesterday that dates the incident to 26 May.
122. That text exchange with Mandeep having stated the incident occurred the day before that is the closest chronological evidence we have of a date and thus we place the date of the alleged incident to 26 May.
123. We accept that change of date together with similarity of this allegation to PID5 (which in turn confusing is referred to as PID4) could cause prejudice to respondent but the dating issue aside the respondent responded to the issue in original ET3 in clear terms – the allegation in the original complaint (ET1/6.3 [25]) was clear, it was clear what it related to, was separate to PID4 and the named individual was a different individual to that named in PID5. Thus, we do not accept the respondent's explanation why its position changed (that it had little time to respond). Hence notwithstanding our concerns about the way Ms Dhaliwal was viewing events that we address at (119) we treat the respondent's change of position with some caution. That is further reinforced by the concern that we highlight about the respondent at (263) following.
124. Whilst this alleged incident is included at paragraph 5 in what Ms Dhaliwal stated was her report to OFSTED [265-266] no date of the incident was given. The alleged report to OFSTED had a handwritten date of 17 May. That annotated date cannot be correct for the reasons we give at (202-206) – as will be seen those reasons include but are not limited to incidents referred to



at paragraphs 9 & 10 of the alleged report to OFSTED having taking place after 17 May.

125. There are further issues with the weight we can give to that report evidencing what was said or done to OFSTED by Ms Dhaliwal, the date that occurred [265-266] or the reasonableness of Ms Dhaliwal's belief (208-218).
126. The pre-school room (where Ms Dhaliwal was working at that time) and the toddler room where Halima was assigned were one large inside space separated by low dividing wall. Both those rooms opened into an outside space that wrapped around the outside of the building in an L shape. From one of the photographs, we saw [e.g., 390] and layout plan [523] there were no physical divisions in the outside area. As the outside area was in a long "L" shape there would clearly be line of sight issues and ratio points so the groups may not have been able to cross supervise.
127. On Ms Dhaliwal's account both Halima and the children were supervising and Ms Dhaliwal's group of children were in the areas outside their respective rooms albeit on claimant's account Halima was at the other end of the outside space and Ms Dhaliwal had to be told by the colleagues she was working with that Halima was alone emphasising the line of sight and supervision points.
128. In both response forms the respondent states it took the view this was not a ratio issue given the staff were in the room adjacent to the garden (implicitly it argues the garden area was essentially an extension of room). However, it accepted it was not best practice and when it investigated informed the staff of such.
129. Whilst a rota was available for the w/c 17 May [264] (Halima was not named on that rota) one was not before us for the w/c 24 May. We were unable to check the rotas. That aside on Ms Dhaliwal's account of who was present in both rooms were that they were suitably staffed accordance with ratios.



130. Those matters aside we find it was not a fair description for Ms Dhaliwal to allege without providing the context that Halima was left alone outside – she was in an outside area adjacent to the toddler room where on her own account other members of staff were. Further on Ms Dhaliwal’s account, Ms Dhaliwal and other members of staff were also present in that outside space (albeit supervising another group with its own ratios to address and line of sight issues).
131. We find that was an attempt by Ms Dhaliwal to mis-portray the incident.
132. Having discovered that Halima was on her own, Ms Dhaliwal told us she went into the pre-school room (where she was working at that time) and discovered staff from toddler room Ms Rowe (room leader), Ms Tooth , “Charlotte” and Nicole Edwards stood around chatting. Having raised her concern, one of them went outside.
133. On Ms Dhaliwal’s account the immediate risk issue concerning Halima’s group having been resolved Ms Dhaliwal could easily raised her concerns later, instead she then left her own group of 20 pre-schoolers (1:8 ratio) with “Tegan” (a student) and Ms Leach (an apprentice) and went it to the office (in another part of the building to report). She volunteers no explanation why it was necessary for her to do that straight away rather than to wait.
134. Whilst Ms Leach was alleged to be there she makes no mention of this in her statement and she was not asked about this by Ms Dhaliwal.
135. Given the ratio complaints Ms Dhaliwal raises about her colleagues and management we find that staggeringly she was thus placing her own group out of ratio, a situation worsened by her account that she personally considered that Ms Leach was not competent.
136. We find that was an example of Ms Dhaliwal seeking to pick fault but without regard to the health and safety of the children in her own care or the legal



obligations concerning ratios and given the stark conflict to her complaints about others does her no credit and casts yet further doubt on the genuineness of her beliefs generally.

137. The exchange of texts Ms Dhaliwal had with Mandeep on 27 May [492] references this incident as having occurred the day before (see (121-122)). For the reasons we give at (217) below that text exchange casts doubt on the reasonableness of Ms Dhaliwal's belief.
138. Those concerns about the reasonableness of her belief, the mis-portrayal of the Halima incident and the other incidents we reference above, lead us to conclude she was more concerned about complaining than any health and safety concerns to her group or breaches of legal obligations.

PID5 w/c 17/5/21 – Ms Dhaliwal to Ms Williams.

Jacob (Apprentice) left alone unsupervised to run a yoga session with 20 pre-school children. Leigh-Anne (Apprentice) and Hollie [...] (Level 3 NN) sat laughing and chatting in the room and not assisting or supervising Jacob.

139. Again, this incident was incorrectly referenced in Ms Dhaliwal's witness statement as PID4 [SKD/52 following]. Again, we disregard the numbering error.
140. The respondent accepts Ms Dhaliwal had mentioned to Ms Williams that Jacob did not appear to know many yoga positions and that Ms Tooth and Hollie had been laughing and chatting rather than assisting him. It denies concerns were raised by Ms Dhaliwal regarding ratios or regarding Jacob's ability to supervise children generally.
141. The respondent accepted Ms Williams investigated this incident by speaking to Ms Tooth, Jacob and Hollie and they all disagreed with Ms Dhaliwal's comments.



142. The difficulty with this incident for Ms Dhaliwal is that on her own account two other staff were in the same room as Jacob and one of them Hollie was a level 3 practitioner. On the basis Jacob was competent (no specific allegation is made he was not competent to supervise (only his knowledge of yoga and thus the quality of the lesson being doubted)) the correct supervision was in place and the ratio (1:8) correct.
143. To allege that Jacob was unsupervised when on her own account those other members of staff were in the same room as him was incorrect, at odds with reality and again gave a false impression. That causes us to cast yet further doubt on the reasonableness of the content of Ms Dhaliwal's complaints.
144. In our judgment insofar as a genuine issue was being raised by Ms Dhaliwal that related to the quality of the content of a lesson rather than a legal obligation being breached or health and safety being placed at risk by virtue of lack of supervision. If a legal obligation was being breached as to quality of care/health and safety Ms Dhaliwal would have needed to have identified that specifically detail and why that was so. She did not.
145. Again, that disclosure does not qualify for protection.

PID6 - w/c 17/5/21 - Ms Dhaliwal to Ms Clarke

Staff ratio in baby room fell below minimum required level as Gurdeep had to answer the door and liaise with parents dropping off leaving c alone. C asked CC to arrange for Anya to support the room.

PID7 - w/c 17 May 21 - Ms Dhaliwal to Ms Henderson

Staff ratio in baby room fell below minimum required level as Gurdeep had to answer the door and liaise with parents dropping off leaving c alone. C asked CC to arrange for Anya to support the room.

146. We address these near identical complaints together.
147. In her witness statement Ms Dhaliwal refers to PID6 as PID5 [SKD/54-59 following] and PID7 as PID6 [SKD/60-64]. We disregard the numbering error.



148. As to both PIDS 6 & 7 the respondent accepted that that Ms Dhaliwal did speak to Ms Clarke & Ms Henderson during that week but denied it was operating out of ratio or that Ms Dhaliwal's comments amounted to a protected disclosure.
149. Ms Dhaliwal accepted before us that at the relevant time the EYFS guidance applied and that paragraph 4 of that guidance provided for exemptions from the normal EYFS ratios in relation to the situations she complains about in relation to both these alleged disclosures.
150. That guidance aside, on her own account (see (67)) Ms Dhaliwal accepted that a member of staff could leave a room out of ratio for a short period in any event without there being a breach. That being so she did not address how this gave rise to a breach.
151. However, these complaints point to failures on Ms Dhaliwal's part to keep up to date with guidance upon her return from her "career break" in the light of the pandemic. That was something we consider she should reasonably have made herself aware of before making these complaints.
152. That and her steadfastly maintaining and pursuing those two complaints despite that knowledge also calls into question the reasonableness of her belief in these allegations and her allegations more generally.
153. Again, for those reasons these disclosures did not qualify for protection.

PID8 - Mid May 2021 - Ms Dhaliwal to Ms Clarke

- *Out of date food;*
- *Fridge dirty and no cleaning rota for the fridge;*
- *Bedding was dirty and was not being washed leaving blankets covered with food stains;*
- *Floors dirty and un-mopped.*



154. The respondent denies these matters were raised with Ms Clarke. But as we state above she was not called for the reasons we give above.

155. Ms Williams told us the respondent employed a full time cook and :-

“149. In respect of the allegation regarding washing laundry, the nursery cook was responsible for washing laundry, however, all members of staff would assist as and when required.

150. Dirty laundry would collect due to the nature of the business; however, the washing machine was always in operation.

151. Once one load had been washed another load would be added to the washing machine. The washing machine is in the staff room kitchen, the office is directly below I can hear when it is on its final spin.

152. In any event, we have lots of spare sheets and blankets and it's never been a problem (P186). The cook was also responsible for cleaning the fridge as and when required. The out-of-date food the Claimant appears to refer to was a box of chocolates for staff at Christmas. From March onwards, the room has not been used (P337, P358 and P359).”

156. We were told orally the chocolates had been left in a staff fridge and therefore the respondent alleged Ms Dhaliwal could not reasonably have considered that to be a breach of a legal obligation or a health and safety risk; if a member of staff other than the person who the chocolates belonged to had come to eat the chocolates they would have checked the date and children did not have access.

157. As to the other matters complained about again the respondent alleges these were all tasks Ms Dhaliwal and other staff all to a degree, shared responsibility for. Whilst for the most part primarily they were the responsibility of the cook, if bedding needed to be changed and washed it was also the responsibility nursery assistants such as Ms Dhaliwal to do this. Similarly in relation to floors if they were found to be dirty.

158. In relation to bedding beyond what she had alleged, Ms Dhaliwal told us she had placed dirty bed linen on a bed because no clean linen was available.



When we asked why she had not washed the dirty linen rather than doing something she knew to be wrong and when she had raised this Ms Dhaliwal accepted it was not a credible that she had done this given the high standards she expected and could not points to where she had raised those issues.

159. Further, Ms Dhaliwal accepted if this had been the routine case OFSTED would have been expected on its visit to have found mounds of dirty linen and yet its report did not identify that was so (see (**Error! Reference source not found.** & 267)).
160. In relation to dirty floors, she told us she did not know where the mop was. It would have been a simple matter for Ms Dhaliwal to ask.
161. It was suggested to Ms Dhaliwal that after only four days working at the nursery she had criticised a room leader, accused a member of staff of being incompetent and sent a message to someone outside of business, that that demonstrated bombastic attitude and that she knew she was making enemies. She did not refute this but instead responded stating that she was told she was causing problems.
162. Ms Dhaliwal's account in relation to replacing dirty linen and not knowing where a mop was not just simply untenable but supports the tenor of the complaints embodied in the Ms Clarke's complaint concerning failures on Ms Dhaliwal's part to undertake basic tasks that formed part of her role (see (59)).
163. We find that if Ms Dhaliwal had reasonably believed these matters to be health and safety or breaches of legal obligations she would have raised them with OFSTED with the other matters she alleges she raised. That she did not together with the various credibility points we identify above lead us to conclude she did not. That being so our findings here yet further call into question the weight we give to Ms Dhaliwal's evidence generally.



164. This disclosure for those reasons did not qualify for protection.

PID9 - End May 2021 – Ms Dhaliwal to Beth (Room Leader)

Leigh-Anne [Tooth] had shouted at a SEN Child for splashing water and then punished the child for crying when the water was taken from them.

165. “Beth” the room leader to whom the complaint was made is no longer employed by the respondent. Whilst the respondent states it cannot therefore either confirm or deny if this complaint was said to Beth, it does not say when Beth left (in the context of whether it had an opportunity to raise this with Beth).
166. We address the two aspects of the allegation in turn. Firstly, as to shouting, Ms Dhaliwal orally gave us a different account - she said Ms Tooth moved the child away and said stop splashing water. Ms Dhaliwal did not allege Ms Tooth shouted - or give details of manner that was done.
167. In her description of the events concerning this alleged disclosure in her witness statement (its is correctly referenced on this occasion as PID9) [SKD/83] Ms Dhaliwal makes no reference to Ms Tooth shouting. Only in [SKD/84] where she describes her complaint to Ms Rowe and subsequent events did she reference Ms Tooth shouting.
168. There are also differences concerning the second aspect, punishment, namely the activity being stopped and a time out being issued. Given the SEN child was wetting other children orally Ms Dhaliwal accepted that others might take a different view to her about what should be done and that both her view and Ms Tooth’s were reasonable responses.
169. Those differences in her account are not alone in casting doubt in our view about this complaint.
170. Despite Ms Tooth refuting the allegation in her witness statement, reminders from us to challenge witnesses about matters in dispute and Ms Tooth being



asked questions about related matters such as the dates she made statements about incidents, Ms Tooth was not specifically challenged by Ms Dhaliwal about this incident.

171. Further and significantly, Ms Dhaliwal accepted she did not know the SEN child well and, having had to be repeatedly asked if she had checked the child's SEN plan before undertaking the activity with the child, accepted that she had not and that she should have done so.
172. We find it would have been good practice for her to have checked the SEN plan before undertaking the activity and it would have been reasonable for her to have checked that before making such an allegation. She had done neither.
173. We find this was a further example where she was prepared to make allegations without having checked the basis for them first again that cast doubt of the reasonableness of this disclosure and her complaints more generally.
174. For the reasons we outline above this disclosure did not qualify for protection.

PID10 - w/c 1 June 2021 - Ms Dhaliwal to Ms Clarke

Staff unaware of fire procedures. No practice drills had taken place.

175. Irrespective of the respondent's assertion that Ms Dhaliwal underwent an induction in her first week not only did Ms Dhaliwal accept that a drill had taken place about a month after she started, albeit only after she raised it, but we have seen records of drills at which Ms Dhaliwal was present dated 17 May and 17 June 2021 [274-275] and two further drills on 27 July and 12 August 2021 [276-277].
176. That is in direct conflict with this allegation and for that reason alone we find Ms Dhaliwal could not have had a reasonable belief that was so and thus alleged disclosure does not qualify for protection.



177. However, further issues arise as to the reasonableness of Ms Dhaliwal's belief.
178. Before us Ms Dhaliwal also expanded suggesting that when she had been senior position in a nursery and had undertaken inductions it was normal for a drill to take place within the first month to ensure that new starters were conversant with appropriate procedures. She had accepted that within a month was an appropriate timeframe for such a drill to have been conducted.
179. Whilst a rota was not provided for 17 June the rota for 17 May [264] indicated that Ms Dhaliwal was in the pre-school room with Beth, Hollie, Ms Tooth and Jacob. The individuals Ms Dhaliwal was grouped with on 17 May within those fire drill sheets suggested our view that she was working in the baby room at the time of the fire drill on the 17 May (Ms Clarke, Ms Leach, Ms Dhaliwal, Anya & Gurdeep). That supports the oral evidence we heard that in the second week Ms Dhaliwal was working in the baby room at the start of the day and in the preschool room later that day.
180. We find that a fire drill took place on 17 May and it was more likely than not that Ms Dhaliwal was in the baby room that day. We therefore find that the issues that she identified before us concerning the evacuation of babies down the stairs and out of the building were matters she should have aware of at the latest by the time of that fire drill. We find that being so she should have raised this by the time of or shortly after that drill on 17 May.

PID11 - 7 June 2021 - Ms Dhaliwal to Ms Henderson.

CC using her personal insecure laptop for work purposes including confidential data. Staff have access from home to that confidential data.

PID12 - undated - Ms Dhaliwal to Ms Clarke & Ms Henderson

CC using her mobile phone to access confidential information on the First Step website.



181. We address these two alleged disclosures together.
182. In Ms Dhaliwal's witness statement PID11 is referred to as PID12 [SKD/99-100] and PID12 as PID13 [SKD/101-103]. Again, we have disregarded that numbering error and considered the substance of what was said.
183. The respondent accepts PID11 as per the list of issues was raised by Ms Dhaliwal with Ms Henderson. It accepts PID12 as per the list of issues was raised to Ms Clarke but not Ms Henderson. It denies that either were protected disclosures.
184. As to the first of these complaints Ms Dhaliwal addresses it thus:-

"99. On 07 June 2021 I discovered that Caroline Clarke was using her personal laptop for work and would take this laptop home to complete observations etc. This is contrary to Section 3.69 EYFS which provides "Confidential information and records about staff and children must be held securely and only accessible and available to those who have a right or professional need to see them." By using her personal computer for work it now contained highly sensitive data such as the children's photographs and addresses. Anyone could gain unauthorised access to this data. Anya [...] also logged on at home from her own laptop to access the First Step site to carry out observations. This website holds the children's personal data, but staff were accessing it from home on their personal computers. This data was not secure which was why the Respondent had work tablets. These should have been used for this purpose and not personal computers.

100. ... I note the Respondent disputes this in the Amended ET3 claiming Caroline Clarke had a laptop which she no longer needed so this was purchased by the Respondent "Ms Clarke may well have been using what was her old laptop during the Claimant's employment however. the Respondent's laptops and iPads never leave the premises and the laptop was being used for work purposes as authorised by the Respondent." This is a sloppy attempt to justify the Respondent's actions. The fact remained, Caroline Clarke used this laptop in work and took it home with her at the end of the day, claiming it was hers. It was not left on work premises as alleged or at all. It was yet a further example of unsafe practice. I watched her putting the device in her bag and taking it home with her. When I questioned what she was doing she confirmed it was her own personal laptop and she could take it home. There was no policy in place for using personal electronic devices for



work. *The children were being put at risk. I had never worked in a setting that permitted this hence why I raised my concerns.*

101. I also noted that Caroline Clarke would frequently use her mobile phone to access the First Step site. This meant her personal phone had access to the children's personal information. Caroline Clarke accepts in a handwritten note (page 361) that she used her mobile phone once in the office with Zoe Henderson. This was apparently "to add notes to the children's daily sheets on the 1st steps with full supervision and permission of Zoe" because I had not completed them correctly. Words fail me. It was not once it was repeatedly which was why I reported my concerns. It was also contrary to the Respondent's own Mobile Phone Policy (page 187) which provided "The nursery forbids the use of mobile phones . . . in the setting... Any personal devices carried by staff/visitors will be signed into the office where they will be locked away securely." Any failure would result in disciplinary action because the Respondent was fully aware of the safeguarding implications.

102. On 07 June 2021 I asked Gurdeep [...] why this practice was permitted. It was the same situation as the personal laptops. Gurdeep [...] agreed that it should not be permitted as the data would not be held securely: anyone could access it. What if you lost your phone? I therefore challenged Caroline Clarke about it and questioned if she should be using her personal mobile phone to access the First Step site, but Caroline couldn't see the problem. I therefore raised it with Zoe Henderson when we were discussing the laptops who confirmed Caroline was permitted to use her personal mobile phone to access the First Step site (PIDA 13). Zoe Henderson quipped "It's fine she's just doing daily sheets." I maintained that you should not be able to access a child's personal data using your personal mobile phone, but my concerns were dismissed."

185. The respondent told us it operates a cloud based secure password protected system; "First Steps" to data and an app that ran alongside it that was created specifically for that purpose. That system is "time limited" such that out of office hours access is restricted even if access was attempted via a laptop or phone at home.
186. Ms Dhaliwal did not dispute either of those points. The fact that "First Steps is cloud based indicated it was intended to be capable of being used remotely. Ms Dhaliwal provided no explanation how given "First Steps" was a secure



cloud based password protected system how “**anyone** could gain unauthorised access to this data”.

187. Ms Dhaliwal further accepted she did not know what data Ms Clarke was entering on her phone or laptop but had assumed what it was. She did not seek to argue that the laptop that was being used formerly belonged to Ms Clarke, but it had been “donated” to the nursery once a factory reset performed, wiping all original data.
188. As to her assertion that Anya had logged on to the respondent’s system from home and the system was not secure Ms Dhaliwal accepted she had never logged onto the “*First Steps*” system so could not explain why she thought it was unsecure stating that she believed it was so because it was an online system.
189. Following a subsequent inspection OFSTED’s report of 24 August 2021 [313-319] of the respondent was critical of a number of matters; the assessment heads, “quality of education”, “behaviour and attitudes” and “personal development” all were assessed as requiring improvement and the head “Leadership and management” was rated Inadequate, no issue was raised by OFSTED of the cloud based storage system or the way it was used. We return to the OFSTED report at (267).
190. Ms Dhaliwal accepted before us she had made assumptions that formed the basis for these allegations without checking the actuality before doing so.
191. When asked if she had read the respondent’s data protection policy she replied that she had read something but when asked for the detail did not know what it was, its purpose and/or the detail of what was stored or not on remote devices.
192. The respondent’s staff handbook [159-173] and at [163] under the heading “mobile phone” cross references its ‘Camera and Recording Devices policy’



[187-190] which extends beyond the ambit suggested by its title and includes guidance on taking photographs and more widely the use of electronic devices (iPads and laptops) and their storage.

193. Thus, contrary to what Ms Dhaliwal alleged not only was there such a policy [188] –

“Ipads and laptops ... should only be used on the Nursery premises within working hours. The Family App can not be accessed outside of these working hours due to management specifically setting access times within the system. The app should not be accessed by staff members during working hours when not on the premises. Management are able to see who is logged on and when and will continue to monitor this to ensure policies are followed accurately. Alike the cameras, Ipads and laptops are locked away securely at the end of each day as part of the nursery shut down process. Failure to adhere to the contents of this policy will lead to disciplinary procedures being followed.”

but Ms Dhaliwal also referenced it in her witness statement arguing the respondent had not complied with it [SKD/101]. We find it is implicit from them being locked away at the end of the day and not removed from work premises that only iPads/laptops issued by the respondent should be used.

194. That succinctly highlights the problem with many of Ms Dhaliwal’s complaints; she could and should have been aware of where she could check the matters she alleges formed the basis of her complaints (here her contract and staff handbook), did not do so, and instead made assumptions. She also failed to identify the conflict in her case (making an assertion and then pursuing an argument at odds in part or whole with it) and despite that being something she was or ought to have been aware of and then pursuing the allegation notwithstanding. Again, those matters damage the reasonableness of the belief she necessarily must have held for the alleged disclosures to qualify for protection.



195. Given what we found was the absence of a reasonable basis for her to make those assertions and Ms Dhaliwal's willingness to raise those matters without that, again we find the alleged disclosures do not qualify for protection.

PID13 – undated - Ms Dhaliwal to Ofsted (verbal)

- *Minimum staff ratios not being met;*
- *Inexperienced staff being counted towards ratios;*
- *Cleaning inadequate;*
- *Bogus staff on staff notice board;*
- *Staff told to say they worked their;*
- *Parents not told of staffing changes and changes to child key person;*
- *No key person allocated after staff departure.*

196. By virtue of the two email receipts of 3 June 2021 at 17:26 [280/1 & 281/2] and the further third email receipt of 7 July 2021 at 16:37 [279] all to Ms Dhaliwal's email address we find Ms Dhaliwal had been in contact with OFSTED by 3 June 2021 at the latest. What is not clear is when those emails or calls took place, what was said or written and/or if so what if any information was relayed that was capable of constituting a qualifying disclosure.

197. Ms Dhaliwal's pleaded case and witness evidence was at odds with her witness statement and oral account:-

ET1/14:-

"9. On 25 May 2021

10. It was at this point that I felt that I was left with no alternative but to start looking for another position. ... I confided in Gurdeep towards the end of May 2021 who appreciated my concerns. I explained that I also felt that I had no option but to raise my safeguarding concerns with Ofsted in the hope that they would be treated seriously. I know



Gurdeep shared my concerns as did Ruth (Apprentice) who later messaged me saying "I really think you should have some back up, from what I've been hearing you should definitely involve someone higher up with your concerns before it's too late."

11. *At the end of May 2021 ...*

...

13. *Unfortunately, my safeguarding concerns continued into June 2021:*

...

14. *(PIDA 13) I called Ofsted on 3 June 2021 and reported my concerns about child/adult ratios often not being met in all rooms and management are not doing anything after the concerns are raised. Also, that a new inexperienced apprentice was also being counted towards ratio when she considers herself lacking and not competent. I stated that cleaning is not done regularly, and the owner has pictures of staff from her other nursery on the staff board, which she claimed they come over and help out during half term and when were short staff, but staff are claiming this is false. It's been a year, and no one has seen them, but they were told by the owner to say they work there if asked by outsiders. I also told them children were not transitioning into the rooms properly affecting their development and parents were not informed of staff leaving and who their child's key person has changed to and some had no key person assigned after staff have left."*

198. In her witness statement Ms Dhaliwal dates her complaints to OFSTED a fortnight earlier:-

SKD/65:-

"I decided I had no option but to formally raise my concerns with Ofsted which I did week commencing 17 May 2021 (pages 265-266). We had a discussion over the phone. I also told Gurdeep [...] what I had done."

SKD/94-95:-

"94. ... I decided the best way to manage this, and all my concerns was to report them to Ofsted so they would be aware when they came to carry out an inspection of the nursery.

95. I accordingly emailed Ofsted on 03 June 2021 and reported my concerns about child/adult ratios often not being met in all rooms and



management are not doing anything after the concerns are raised (PIDA 11) (page 280-281) ...”

199. As to the documents referenced the document at [280-281] was one of the receipts from OFSTED we refer to above (196). We return to the document [265-266] at (202).
200. Orally, Ms Dhaliwal told us that she had firstly emailed OFSTED and then contacted them verbally.
201. Ms Dhaliwal sought to explain that conflict by reference to her not having explained it well due to her dyslexia. Given she has been legally assisted throughout and her complaint to OFSTED was a core issue we find that is not an issue that can be attributed to a mix up due to dyslexia when that should or ought to have been readily apparent.
202. When Ms Dhaliwal was asked about the contents of her email to OFSTED she initially told us this had been filled in on line, so she didn't have a copy and she had not taken a screen shot. She subsequently referred us to [265-266]. That had a handwritten date of 17 May (in contrast to the remainder comprising typed text).
203. Reference was also made at points to Ms Dhaliwal keeping notes on her phone [KAW/235]. Ms Dhaliwal told us that the note she was keeping was that at [265-266].
204. Ms Dhaliwal was asked why it included matters that appeared to have occurred after 3 June 2021. She told us that was because it was a document she had amended as time went by. She accepted for her not to have explained that she had continued to update it gave a misleading impression.
205. She was asked why she had not provided the earlier versions or the properties of the document (“metadata”) to show when it was created. She was also taken to her messaging exchanging with Mandeep on 27 May at



20:45 [492] which shows a word document being sent to Mandeep for her to review. Ms Dhaliwal was asked why that had not been provided. She told us she had not realised that either was required.

206. We told her it was open to her to still provide them (she gave her evidence at the start of the hearing). She did not.

207. For the reasons we place no weight on that document [265-266] as evidencing anything that was said or done by Ms Dhaliwal to OFSTED on or by a given date.

208. Before we turn to what was said by Ms Dhaliwal to OFSTED found for the reasons above (196) Ms Dhaliwal had been in contact with OFSTED by 3 June.

209. In Ms Dhaliwal's exchange of messages with Ruth (an apprentice at the nursery) Ruth stated:-

"13/07/21 16:52 – Ruth: I have emailed ofsted and am in conversations with them about my concerns for you" [285]

and then went on to give Ms Dhaliwal OFSTED'S email address. The exchange continued for several days until:-

"19/07/2021, 13: 20 - Ruth: Did you speak to ofsted? I have x

19/07/2021, 13: 20 - Suki: They need to think and read up on regulations before they reply that's why!" [287]

210. Thus, in addition to Ms Dhaliwal having been in contact with OFSTED by 3 June, by 13 July so had Ruth (209). The respondent told us that it believed that Ruth had contacted OFSTED. We return to that at (287).

211. By that time OFSTED had already been in contact with the respondent, OFSTED's letter of 4 June refers [502]. We had before us only the first page of that document and we find given that ended mid way through that



document comprised more than one page. No explanation why was provided why the remainder was missing.

212. The letter of 4 June was thus dated the day after the email receipt Ms Dhaliwal received from OFSTED (196). The letter of 4 June cited the reference number (2522855) for the nursery and gave a case reference number (4803592) which was also that used on the receipt provided to Ms Dhaliwal [279-281]. When asked Ms Dhaliwal accepted that of the four issues OFSTED identified in that letter:-

“ Children are not transitioning into new rooms and this is delaying their development.

• A Key Person left months ago, and parent/carers have not been kept updated.

• Staff have been moved around a lot and the children are not familiar with certain members of staff.

• There is an apprentice who is included in the ratio but is not confident with the children.”

only the last of the four related to those she told us she had raised with the respondent by that point.

213. As to the others of those matters they are dealt with in the remainder of [SKD/95] that we did not relay at (198) above:-

“95. ... Also, that a new inexperienced apprentice was being counted towards ratio when she considered herself lacking and not competent. I stated that cleaning is not done regularly, and the owner has pictures of staff from her other nursery on the staff board, which she claimed they come over and help out during half term and when were short staff, but staff are claiming this is false. It's been a year, and no one has seen them, but they were told by the owner to say they work there if asked by outsiders. I also told them children were not transitioning into the rooms properly affecting their development and parents were not informed of staff leaving and who their child's key person has changed to, and some had no key person assigned after staff have left. Section 1.10 'each child must be assigned a key person' and Section 3.27 'each child must be assigned a key person'. Section 3.28 provides "providers must



inform parents about staff deployment" and Section 3.73 'providers must make following information available to parents - staffing in the setting, the name of their child's key person and their role.'

214. Ms Dhaliwal does not address in her lengthy statement the discussion she refers to as having had with Ms Williams about transitioning and assignment of staff that predated her raising these matters with OFSTED. Nor does she raise them as one of her disclosures.
215. There are also various differences between what Ms Dhaliwal's email to OFSTED, OFSTED's letter and the content of Ms Dhaliwal's statement about what her complaint related to. Her statement appears to relay a wider complaint that is not limited to merely photographs of staff being updated. Further, her statement still fails to detail how transitioning was being affected or the pupils concerned. As to that last issue contrary to Ms Dhaliwal's view the OFSTED inspection report undertaken a couple of months later (24 August 2021) stated "*transitions throughout the nursery are smooth*" [314]. We return to that inspection report at (267) following.
216. Further despite the letter from OFSTED having the same reference as Ms Dhaliwal's email receipt(s) and it being dated a day later the disparity between what it identified had been raised and what Ms Dhaliwal told us she had raised and the conflicts both within her accounts and between the documents and her accounts we place no weight on that document as evidencing what Ms Dhaliwal alleges she said to OFSTED or when.
217. The other concern the respondent raises as to the reasonableness of Ms Dhaliwal's belief relates to her exchange of texts with Mandeep. Within that exchange on 27 May Ms Dhaliwal identified that the respondent had failed to address regarding an egg allergy [492], a potentially catastrophic medical issue and a concern that a child might be smacked [493]. Despite that Ms Dhaliwal did not include either concern in her complaints to OFSTED. If those concerns were genuine we find it staggering given their seriousness they were not raised with OFSTED.



218. Those matters being so Ms Dhaliwal has not discharged the burden that is on her to show what was said to OFSTED and that it qualified for protection.
219. The inconsistency of Ms Dhaliwal's account as to the core matter over what was said to OFSTED and when, the fundamental changes to that account, its lack of detail on parts, her failure to provide highly relevant documents she could easily have provided having been represented throughout together with our wider concerns as to the content of Ms Dhaliwal's email to OFSTED that we refer to above (206) lead us to give little weight to her account on this issue and in our judgment those matters lead us to cast doubt on the weight we should give to her account generally.

The events of early July 2021

220. As we say at (62) by 1 July it was not in dispute that Ms Dhaliwal had told the respondent that she was looking for a new job and asked for her hours to be reduced so she could do so.
221. Some of the documents supplied during the hearing show that on Monday 5 July the respondent had offered a trial to a prospective employee, "Hannah", whom we heard was a level 3 apprentice. We return to that below (291).
222. On 8 July there was an exchange of texts between Ms Dhaliwal & Ms Williams in which we find Ms Dhaliwal indicated she wished to raise a grievance. Ms Williams suggests that when Ms Dhaliwal referred to grievance she believed that related to a loss i.e., she was grieving. Given she is an experienced nursery manager who told us she encouraged staff to raise issues we find that less than credible.
223. It was common ground they arranged to meet the following day, 9 July, even though Ms Williams was not scheduled to be at the nursery.
224. At 19:05 on the evening of 8 July the message chain between Ms Dhaliwal and Ruth commenced [285-288].



The events of Friday 9 July

225. On the morning of 9 July, we heard that despite that being the day Hannah attended for her trial Ms Williams was not in attendance at the nursery.
226. Whilst Ms Henderson did not say this within her statement, orally she told us that whilst she had received complaints from other members of staff previously about Ms Dhaliwal, on the morning of 9 July she received further complaints. In the following respect her oral and witness statement concurred namely Ms Henderson *“said to the girls if they wanted things to be taken seriously, they needed to put things into writing.”* [ZH/29]. Irrespective of that additional detail from Ms Henderson it was common ground that right at the outset of the meeting Ms Dhaliwal was told that other members of staff had raised complaints to Ms Henderson. A dispute as to when they were received aside, we accept that complaints had been received by the respondent before the meeting about Ms Dhaliwal. Ms Dhaliwal relayed matters thus:-

“112. ... On sitting down. I began saying I wanted to "make a complaint" and how I was feeling bullied after highlighting safeguarding concerns. Before I could finish, Kerry-Ann Williams said, "Can I stop you there?" She then proceeded to tell me that she had received two grievances about me that morning saying I was bullying other staff members – Gurdeep [...] and Caroline. I couldn't believe what I was hearing. Zoe Henderson added "You've made two lovely staff members cry." It was clear that the Respondent was fully aware of my intention to lodge a formal grievance and had decided to get in first to undermine and discredit me.

113. I was told how for the "past few weeks staff have been complaining about your bullying. " The Respondent has since alleged in the Amended ET3 that "Ms Henderson was in receipt of a written grievance from two members of staff regarding the Claimant's conduct towards them, which had been submitted in May 2021." At no point was this raised with me at the time. I therefore asked why it hadn't been raised until now. ...

*114. I was then told that I "intimidated staff by asking them questions".
...*



115. *I was not shown the grievances, I was only told that my way of questioning was upsetting staff. No specific details or examples were provided so I suggested that we went through the two grievances there and then to allow me to respond. Nothing was produced ...*

118. *Kerry-Ann Williams then told me that she knew I had made a complaint to Ofsted and asked to see my 'list of complaints'. I knew that Gurdeep [...] had told them. I had only confided in Gurdeep [...] that I had raised concerns with Ofsted back in May 2021. ... I confirmed there was no list. I had written a letter to Ofsted, but I did not have my letter of complaint with me. Kerry-Ann Williams said "We have a group of lovely staff members. We just need to get rid of the bad apple." I was then urged to leave and find another job as quickly as possible. I did not ask about my notice period as the Respondent asserts. Instead, Kerry-Ann Williams volunteered that as I was still working my probation period "you can just leave, you don't have to give notice" as if this would entice me to move on. It was clear I was being asked to leave. I could only conclude that this was because I had raised protected disclosures. ...*

121. *I explained that my concerns should not be ignored and suggested they spoke to the staff on a one-to-one basis. There were issues that needed to be addressed. Kerry-Ann Williams replied that she would speak to the staff but only "to find out who the bad apple is." It was clear she was referring to me. The Respondent asserts at paragraph 155 ET3 "Ms Williams did however explain to the Claimant the negative impact she was having on the other staff due to things she had been saying about them and it was therefore confirmed to the Claimant during this meeting that she wasn't going to be successful in passing her probationary period and a permanent position was not going to be offered to her." This is yet another blatant lie. Nothing was said about passing or failing my probation period during this meeting and there is absolutely no mention of it in my subsequent dismissal letter. Is the Respondent suggesting it terminated my employment in this meeting? If it is why was I permitted to continue working until 28 July 2021 when I was dismissed? Why not ask me to leave then? This simply did not happen.*

122. *At the end of the meeting, I confirmed I would file my grievance formally and I was assured that the Respondent would get back to me. I was then asked to leave the room and I returned to my duties."*

[Our emphasis]

227. On 9 July no minute was taken by either party. It was common ground Ms Henderson was also present, but she told us she had to intermittently leave



the office to go to the adjoining toilet, due to suffering from morning sickness.

She told us :-

“18. I do however recall parts of the conversation of Kerry Ann trying to get Sukhdeep to understand that it wasn't what questions she asked that was upsetting staff members, more so the way in which she asked.

19. At one point I did join the conversation directly and explained how Sukhdeep had made two senior members of staff cry, in an attempt to show her how hurtful some of her comments had been, this made no impact as she didn't believe me.

20. Sukhdeep seemed oblivious even after Kerry Ann explained how staff members had said they had been made to feel belittled and patronised through the aggressive manner of questioning from Sukhdeep.

21. Sukhdeep was told by Kerry Ann during this meeting that she had not passed her probationary period and was given three weeks to find another job. ...”

228. Ms Dhaliwal asserts those grievances resulted from the respondent actively seeking and pressurising staff to provide them and that dates on them were retrospectively added to suggest they had been made earlier, the suggestion being that was in response to her telling Ms Williams she wished to raise a complaint.
229. The respondent argues that until Ms Williams came into the office on the afternoon of 9 July she had not spoken to Ms Henderson. It states that the grievances from her colleagues were unrelated to Ms Dhaliwal telling Ms Williams that she wanting to raise a grievance herself.
230. Ms Dhaliwal knew from the outset of her employment that she was potentially going to be making enemies [491]. Her own account is that she asserted Ms Tooth was incompetent and had questioned Ms Clarke and others. Ms Dhaliwal refers repeatedly to her confiding in Gurdeep not just as to her complaints but also about her referring the respondent to OFSTED.



231. The respondent in contrast asserts that Gurdeep complained about Ms Dhaliwal and refers to what it states was her grievance. Ms Williams put it this way “247. Gurdeep was very upset and had told on week [commencing] 5th July 2021 that she felt pressured by the Claimant asking her to search for wrongdoings so she could add them to her list.”. Neither party called Gurdeep and so we place little weight on her complaint.
232. The apparent coincidence between the date Ms Dhaliwal told Ms Williams she wanted to raise a grievance and the little weight we place on what Ms Williams told us she understood Ms Dhaliwal meant by her grieving, as we say at (54 & 161) Ms Dhaliwal’s own account is that some staff had been treating her badly, and that was so was because she had raised complaints about them and so that leads us to conclude on balance staff had complained about her by 9 July. We return below (266) to our findings why the respondent had not raised those complaints with her prior to then and thus she had not had a chance to address them as good practice ordinarily would require.

Was Ms Dhaliwal told she was dismissed with immediate effect on 9 July?

233. The respondent suggests that Ms Dhaliwal was dismissed with immediate effect on 9 July and the claim was not presented in time.
234. The respondent’s subsequent emailed letter of 28 July 2021 (timed at 12:20) [309-310] (see (272) following) stated Ms Dhaliwal's dismissal would be effective Friday 30 July 2021. An effective date of termination of either the 28 or 30 July means the unfair dismissal claim was in time.
235. Whilst Ms Dhaliwal disputes that she was dismissed on 9 July she accepted she was told as she was working her probation period “*you can just leave, you don't have to give notice*” and “*It was clear I was being asked to leave*”. However, whilst being asked to leave could equate to a constructive unfair dismissal that is not the way Ms Dhaliwal puts her claim; we find she did not



leave and nor did she treat it as a constructive unfair dismissal, she continued working and positively claims she was not dismissed until later.

236. Good practice suggests that had the respondent intended to dismiss Ms Dhaliwal at that meeting it should have recorded that in writing to Ms Dhaliwal stating the date the termination was to take effect. The respondent did not do so until several weeks later (28 July).

237. The only words that purport to support the respondent's argued case before us were the words Ms Williams told us she used :-

"239. I told her she was not passing her probation and we would not be offering her a permanent job. I said I was happy to give her 3 weeks to find another job.

240. I explained I would cover her for interviews and that we didn't need any notice if she found a job before then. ..."

238. Whilst that is far from specifying a precise date Ms Williams' own account is that Ms Dhaliwal could expect her role to continue working for at least that period and thus her employment would not end until at least 30 July.

239. Ms Henderson supported Ms William's account at [KAW/239].

240. Ms Dhaliwal specifically denies she was told she would not be passing her probation but did not expressly deny in her witness statement she was told she had three weeks to find another job. Orally she was asked about not passing her probation and denied that the words were used. She was also asked if she had been told she could go and she would be paid to the end of month. She told us that had not been said to her.

241. The three week point aside, being told as is alleged that she wasn't going to pass her probationary period (that was not due to end until the start of November 2021) and/or that a permanent position was not going to be offered to her cannot be assumed in our judgment to imply Ms Dhaliwal was being told that her employment was to expire with immediate effect.



242. The use of the reference to three weeks to find another job would at best place Ms Dhaliwal's dismissal to Friday 30 July 2021 (3 weeks after the meeting on the 9 July) and not as the respondent seeks to argue with immediate effect on 9 July.
243. Thus, the words the respondent alleges were used on 9 July suggested alternatively Ms Dhaliwal leave, that she would not be employed after her probation had finished in November and/or that she had three weeks notice.
244. We find that the respondent did not make clear in unambiguous terms that Ms Dhaliwal's employment was terminating forthwith or in three weeks at the end of July. That view is reinforced by the exchange that followed.
245. At 18:35 (that is after the meeting on 9 July) Ms Dhaliwal sent a text to Ms Williams [284] asking her to confirm if it was still ok for her to work less hours from August rather than the last week in July.
246. Mr Hoyle suggested that Ms Dhaliwal sent that text not because she had misunderstood what had been said at the meeting but because she heard only what she wanted to hear (and saw what she wanted to see). If that were so it would have been a simple matter for Ms Williams to have corrected any error on Ms Dhaliwal's part. Ms Williams had an ideal opportunity to do so 50 minutes later when she replied to Ms Dhaliwal's text. She did not and instead replied "Ok yes". That response in our view is at odds with what the respondent asserts occurred during the meeting and suggests Ms Williams had not dismissed Ms Dhaliwal.
247. We return to our determination on the date of dismissal when we turn to the respondent' dismissal letter of 28 July at (272) following.



PID14 - 18 July 21 – Ms Dhaliwal’s grievance

248. Whilst within the grievance [298-307] this is dated 18 July it was not sent to the respondent by email until 12:38 on 19 July [296]. Alongside that email Ms Dhaliwal sent to the respondent a sick note issued on 16 July [297].

249. Despite the respondent asserting it encouraged staff to raise matters there was a distinct absence of record keeping by the respondent of complaints or grievances and when meetings were held they were not minuted. Ms Williams also failed to investigate Ms Dhaliwal’s grievance. She told us this was because:-

“256. On receiving the grievance, I read the first 2 pages, looked at how much was there and felt overwhelmed. I felt it was repetitive, everything again we had been over.

257. I hoped that the Claimant would return to work so we could discuss it. I still had other jobs to do. This was so deflating, trying and time consuming and I never got around to replying.”

250. We find that no point before she sent to Ms Dhaliwal her letter of dismissal did Ms Williams make any real attempt to address that or the grievances against Ms Dhaliwal. That is not consistent in our view with the respondent being a business that actively encouraged such issues to be raised as was claimed.

251. Whilst Mr Hoyle sought to suggest Ms Dhaliwal’s grievance was a response to her being told her employment was being terminated for the reasons we give below at (272) following we found she was not formally told of her dismissal until 28 July after her grievance was lodged and in any event had decided long before that she was looking for another job in any event (see (62 & 220)).

252. Those complaints about the respondent’s failure to address Ms Dhaliwal’s grievance aside Ms Dhaliwal’s grievance including for the most part a repeat of the disclosures and detriments we have identified above. However, in the principle matters that were additionally raised were:-



Gorilla WhatsApp post

252.1. The way Ms Dhaliwal addresses this in her witness statement was as follows :-

“9. On 25 May 2021 Caroline posted a photograph on the work WhatsApp group at 20:19 of a gorilla sat on a chair with the caption “Gorilla sitting on a comically small chair ... look familiar”. Zoe Henderson replied “Depends who you’re referring to” with three laughing emojis. Caroline was quick to retort “Haha just anyone trying to sit on small chair.” I knew this was aimed at me. I was the only member of staff who sat on the children’s chairs. As an Asian employee I also considered it to be a racist slur. I was extremely offended. ...”

Gossip and ridicule surrounding her.

252.2. Again, the way this claimant address this in her witness statement was as follows :-

“15. I also found that I was subject to gossip and ridicule. For example, my father would drop me off at work and pick me up. On 14 June 2021 Zoe Henderson asked me who picked me up etc. I confirmed it was my father. Leigh-Anne and Shannon Louise [...] were also present as Zoe Henderson quipped, “See told you Suki was single”. Shannon Louise [...] added “I told them he was too old to be your husband” and they all laughed. When I asked Shannon Louise [...] how old she thought I was, she replied “Old”, and they all laughed again. It was clear that I was the butt of their jokes. On 25 June 2021 Shannon Louise [...] and Leigh-Anne were openly discussing their belief that women over 30 shouldn’t have children because “they are too old”. They knew I was over 30 and childless. Yet again I felt this was aimed at me.”

Jacob changing nappies.

252.1. Ms Dhaliwal puts this thus in her grievance:-

“Jacob asked me in the break room have I worked with men before I said yes. Then he said ‘where they allowed to do nappies’, I said yes they were. He expressed how unhappy he was when Racheal told him, his not allowed to do nappies because Kerry and Zoe do not want him to due to him being a male. Emilie was present so she joined in the conversation, I sad that rumour is going around but speak to management. If that was said it should not have been because its gender discrimination, and no one will admit to saying that. However, if



this is a rumour made by staff then they need to find the source. Both me and Emilie were telling him to speak to Zoe in the office first before deciding what he wants to do and ask if he can start doing nappies and if they say no find out their reason for refusing. Then he can talk to again for advice if he wants too. Then Racheal came in the break room after Jacob left and brought up Jacob in conversation, so I told her he was really upset over the nappy situation, and it is not nice to find yourself in a situation where you are being discriminated against over your gender. [301/302]

Water station

- 252.2. This is argued as the water station did not work and that she had to wet a paper towel to wash children's hands.[301]
253. We have dealt with the identified disclosures (PID1-14) above. How these additional points were argued as disclosures or tending to show that the health and safety of individuals were put at risk, or they were breaches of a legal obligation were not explained before us by Ms Dhaliwal despite her repeatedly being asked.
254. As to the first three of these they appeared to be being argued as race, sex, pregnancy/maternity, age or marital status (although there is no protection to single individuals provided by the ss.13(4), 19 and 26 EqA) discrimination complaints.
255. In paragraph 5 of the respondents original form of response [49] it identified that it was not clear if Ms Dhaliwal was pursuing a race discrimination complaint. Prior to the CMD conducted by Employment Judge Perry on 17 May 2022 [80] a case management agenda was lodged setting out the various complaints it was understood Ms Dhaliwal was making [63].
256. The claim was identified the CMD as being one of wrongful dismissal (notice pay) and whistleblowing detriment and dismissal.
257. Ms Dhaliwal remained represented until the first morning of the hearing. Her representative was alive to those issues before, at and after the CMD.



Despite that and them being mentioned in her witness statement a list of issues was agreed on the first morning while her representative was still representing her as the complaints that the tribunal would need to determine. That agreed list of issues did not include other complaints. Mr Hoyle suggested it follows those matters having been raised repeatedly with Ms Dhaliwal's representative and her representative being a highly experienced advocate that those matters were not pursued on advice.

258. Had Ms Dhaliwal wish to bring complaints such as race discrimination (or for that matter and age, sex, pregnancy/maternity or marital status) she would have needed to seek to amend her claim and identify what was said or done by whom and when that formed the basis of those complaints. She did not do so.
259. We explained to Ms Dhaliwal that being so the Tribunal had to address the issues as identified and agreed at the start of the hearing and they did not include complaints of discrimination.
260. As to the water station issue Ms Dhaliwal was asked given there were other washing facilities provided how this was a health and safety issue or to show a legal obligation had been breached. She was unable to do so.
261. Ms Dhaliwal identifying and then persisting in the view these were disclosures yet being unable to point us to how they tended to show the relevant "**states of affairs**" or what the basis for her coming to that view was again support for the view we outline above as to the reasonableness of her belief.
262. Whilst we found the disclosures do not qualify for protection we address the remaining points below for completeness.



Our concerns centring on the respondent.

263. Before we turn to the dismissal letter sent to Ms Dhaliwal we first address a number of matters concerning the respondent's behaviour (or lack of it) that could allow us to give adverse weight to the respondent's evidence.
264. In addition to the matters concerning Ms Dhaliwal's grievance that we identify at (249-250) those other concerns centred around the issue regarding the respondent's change in position concerning PID4 (see (120-123)), Ms Williams apparently not knowing what Ms Dhaliwal meant in her exchange of texts with Ms Dhaliwal on 8 July by her "grieving", the proximity between Ms Dhaliwal intimidating a grievance and the respondent's staff bringing forward their own grievances, the concerns we identify at (57) concerning those grievances, and the respondent having clearly been aware not only of her grievance but of Ms Dhaliwal involving OFSTED by the time it sent the dismissal letter to Ms Dhaliwal.
265. In addition, the respondent sought to argue a dismissal date that was at odds with the accounts of both Ms Williams and Ms Henderson. That does it no credit.
266. As to her concern regarding if and when her colleagues had been complaining about Ms Dhaliwal, the respondent told us they had been reluctant to come forward, hence Ms Henderson had to tell them if they wished matters to be pursued they need to put them in writing see (56, 226 & 226)). Ms Dhaliwal rightly states that good practice dictates that these issues should have been raised with her so she could respond to or address them. Whilst we accept those complaints had been made and for the reasons we give at (307) they were long standing, the respondent should have addressed those matters with Ms Dhaliwal for the reasons we give at (249-250). The fact it did not was poor practice but does not in our detract in our judgment from the fact they were made.



267. Those points and the matters we refer to at (189 & 215) aside the eventual OFSTED inspection and report that ensued was a ***“routine inspection”*** [318] rather than one prompted by the complaints. The inspector looked at ***“... relevant documentation, including qualifications and first aid certificates in evidence of the suitability of those working with children”*** [318] .

268. Amongst other matters the OFSTED report 2021 [313-319] identified that :-

268.1. *“The management team has high expectations for all children. The team has devised an effective curriculum. However, this is not consistently implemented across the nursery”*. [314]

268.2. *“Children are supervised well. However, weaknesses in risk assessments and the security of the premises compromise children's and staff's safety”*. [314]

That appeared to be a reference to a fault on the front door on the day of the inspection not being secure enough to prevent unauthorised persons gaining access.

268.3. *“The quality of teaching is variable within the nursery”*. [314]

That appeared to relate to developmental issues in toddler room.

268.4. *“self-evaluation of the nursery is not affected. Leaders have not identified weaknesses in practice in the toddler room. Leaders do not currently monitor staff practice closely enough. The lack of appropriate supervision arrangements means that the quality of some observations, assessment and teaching requires improvement. However, the manager carefully considers how to use additional funding to improve outcomes for disadvantaged children.”* [315]

268.5. *“Leaders do not sufficiently support staff's health and well-being. They do not ensure that staff workloads are managed effectively. Staff do*



not receive enough training and guidance from leaders to adequately for their roles. There is a high staff turnover.” [315]

269. The improvements the report identified as required were to:-

- *“ensure that the risk assessment process is effective in identifying and removing all potential hazards to children and staff, particularly in relation to access to the cellar and the security of the premises*
- *support staff to ensure the individual learning needs, interests and stage of development of every child is used to plan suitably challenging and enjoyable experiences for each child in all of the areas of learning and development to ensure they always make consistently good progress*
- *support staff to ensure the required progress check for children between the age of two and three years is carried out for all children and provide parents with a short written summary of their child's development*
- *provide support to enable all staff to fulfil their roles effectively, and to develop a culture of teamwork and commitment to continuous improvement*
- *ensure staff supervision, staff training opportunities and the monitoring of practice are more closely focused on improving the quality of teaching and experiences for all children. “*

270. Save in relation to the first of those matters which was required to have been done by 10 September 2021 the remainder were to be undertaken by 24 September 2021. The report continued:-

“To further Improve the quality of the early years provision, the provider should:

- *review observation and assessment processes in the toddler room to ensure consistent accuracy in order to help children move on to the next steps in their learning.”*

271. We find those are facts that might lead the respondent to have been concerned that complaints had been made by Ms Dhaliwal to OFSTED, may have played some part in the respondent’s rationale for acting as it did and



thus require it to provide an explanation. We return to that below and in particular at (285) following.

The respondent's email of 28 July

272. By 28 July Ms Dhaliwal had not been in work since 9 July (3 weeks).
273. Ms Dhaliwal accepts she received the dismissal letter via email at 12:20 [309-310]. It stated her dismissal would be effective on Friday 30 July 2021. She told us she contacted ACAS as a result (although she had been speaking to them previously).
274. Contrary to respondent's allegation that Ms Dhaliwal was dismissed on 9 July the wording of the respondent's dismissal letter refers to matters as part of its rationale that could only have been known to the respondent after the 9 July **[our emphasis]:-**

“ ...

You were employed as a level 3 with management experience to help lead and support our team. Various members have stated on many occasions find that your style of questioning and laughing at them is belittling and happening too often, your actions and attitude towards others is having an adverse impact on our team.

It was brought to my attention very early on that you were collecting evidence to complain to Ofsted which I find hurtful but instead of listening I still gave you benefit of doubt. ...

*Following our meeting to discuss concerns with your conduct my aim was to try and agree a solution. Unfortunately I feel you held no accountability for your actions **I am aware you have told others that you are going to continue to call in sick until you find another job.** I feel we are unable to sustain your employment because you are failing to work as part of a team you show no accountability for your actions and make no effort to establish good working relationships with other members of our team. I would be happy to discuss any of the above with you should you wish.*

As such your employment with Spotty Zebra Day Nursery will be terminated with effect from 30/07/2021. Please make arrangements to drop back uniform to the nursery as soon as convenient. ...”



275. When looking at what the parties allege was said on 9 July we found the words used by the respondent on 9 July were ambiguous, suggesting alternatively Ms Dhaliwal leave, that she would not be employed after her probation had finished in November and/or that she had three weeks notice (see (243 &244)). The respondent had an ideal opportunity to correct Ms Dhaliwal's misunderstanding, if that was what it was, when responding to her text of 18:35 on 9 July or by clarifying the position by writing to her. It did neither (see (246)).
276. Given that ambiguity we find Ms Dhaliwal was not informed she was dismissed until 28 July when she received the dismissal letter by email from the respondent stating her dismissal was effective on 30 July.
277. That view is merely reinforced by the respondent referring to events that it could only have become aware of after 9 July as forming part of its rationale for dismissing. Thus, that rationale could only have been definitively arrived at after 9 July.
278. We find the respondent did unambiguously communicate that to her on 9 July and it was not its intention to dismiss her with immediate effect on 9 July.
279. Whilst the period of three weeks referred to on 9 July was ambiguous, the date given in her dismissal letter (30 July) was consistent with the three weeks Ms Dhaliwal was told she would be given to find another job.
280. Accordingly, we find it was never the respondent's intention to terminate her employment earlier than with effect from 30 July (although as we say it did not express that unambiguously until 28 July 2021).

The respondent's reason for dismissal

281. The dismissal letter of 28 July [309-310] was emailed to Ms Dhaliwal at 12:20:-



“... Various members have stated on many occasions find that your style of questioning and laughing at them is belittling and happening too often, your actions and attitude towards others is having an adverse impact on our team. ... Unfortunately I feel you held no accountability for your actions ...”

282. Ms Dhaliwal told us [SKD/138 & 139] she *“... returned to my GP on 27 July 2021 who signed me off until 26 August 2021.”* and that her email sending that sick note from her GP to the respondent crossed with the Respondent’s dismissal email.

283. The sick note from her GP [320] was dated 30 July, two days after she received the dismissal letter. Whilst Ms Dhaliwal sought to explain that contradiction by stating to us that she had called her GP on the 27 July asking for her sick note to be extended we were not taken to a document showing when that sick note was forwarded to the respondent. The earliest that sick note could have been sent by Ms Dhaliwal to the respondent was 2 days after the dismissal letter was received and the day her dismissal was due to take effect. That being so Ms Dhaliwal’s statement that they crossed is misleading.

284. Ms Williams’s witness statement expanded on the rationale conveyed in the dismissal letter:-

“227. ... It is the way you are asking like you are trying to prove the point that you know and they didn't and then I've heard you telling staff that's because you're not being trained properly because its bad management. You shouldn't be saying that it is damaging to my business. We are still working with covid everyone is feeling the stress all staff know what they need to know for their room.

228. They didn't need the extra stress and confusion of being questioned about other rooms at this point. ...

229. Ms Henderson could hear that the Claimant was not accepting any responsibility for upsetting people.

230. Ms Henderson then said Ms Clarke was crying last week and you have even upset Gurdeep. The Claimant was still not expecting that when she is talking about staff in the staff room and it is getting back to them, they are going to be different around you.



231. *The staff felt frustrated as they were working hard and she was always criticising and not helping. She said she was entitled to her opinion, that wasn't a good reason for people to not talk to her and she wasn't there to make friends.*

232. *I could tell by her reaction that she didn't care and in this case I felt nothing was going to improve. I said I was willing to give her the room leader job but her responses that day were disappointing and I needed someone that is passionate for the job and I would have paid you more for doing a good job.*

...

237. *It wasn't my plan to dismiss the Claimant in this way on 9th July 2021 but I couldn't see a way of moving forward and I was annoyed that she would not see things from anyone else's point of view. I didn't feel she wanted to make any effort to try to create good work relationships and she had no respect for how hard we were working.*

238. *I had lost hope, trust and confidence. I felt her words were damaging. This was becoming time consuming, unhelpful and exhausting.*

239. *I told her she was not passing her probation and we would not be offering her a permanent job. I said I was happy to give her 3 weeks to find another job.*

..."

285. The respondent's conduct, and what occurred at the meeting on 9 July caused us to consider what weight we should give to her account and that letter. Those concerns were heightened by Ms Williams' comments in her witness statement addressing what was said at the meeting on the 9 July:-

"235. I said it's also been brought to my attention that you have a list on your phone of complaints.

...

247. Gurdeep was very upset and had told on week condensing 5th July 2021 that she felt pressured by the Claimant asking her to search for wrongdoings so she could add them to her list."

286. Indeed Ms Dhaliwal's dismissal letter (see (272)) refers to Ms Williams being aware from any early stage that Ms Dhaliwal was collecting evidence to



complain to OFSTED but Ms Williams stated she gave Ms Dhaliwal the benefit of doubt.

287. Those matters and in particular the letter the respondent received from OFSTED on 4 June [502] suggested the respondent's actions were motivated by a concern Ms Dhaliwal was making disclosures including potentially to OFSTED. The evidence in our view suggests otherwise. We find Ms Williams was genuine when she told us she believed that the OFSTED letter of 4 June [502] arose from a complaint by Ruth and not Ms Dhaliwal. If the respondent's rationale for acting as it did was a concern about disclosures being made it would have no doubt taken action earlier against Ruth. Ruth had commenced her employment on 7 September 2020 and thus had less than two years service throughout. Despite that she remained employed by the respondent until 28 February 2022 that is a further 9 months after the OFSTED letter.
288. In contrast the concerns conveyed by Ms Williams about Ms Dhaliwal's behaviour and the effects she alleges it had in her dismissal letter (see (281)) are however supported by not only the contemporaneous evidence but our findings above and the evidence of Ms Henderson:

“22. It was clear that Sukhdeep could not work as part of a team and was oblivious that it was her behaviour which prevented her from doing so.”

289. Ms Dhaliwal openly accepted she questioned the competence of junior members of staff directly rather than using the correct channels and then having raised concerns through the correct channels again approached staff undermining both her managers and the staff in the process. Ms Dhaliwal also acknowledged to her friend Mandeep at the outset that she would be making enemies. We find that was not because of what she was raising but the way she was doing it. That is supported by the view formed by staff, that she stood back and criticised rather than muck in and undertake the work she was employed to do. In turn, she failed to recognise her own failings or the result



of her actions as was demonstrated by Ms Henderson and Ms Williams' comments.

290. It was common ground that by 1 July at the latest Ms Dhaliwal had told the respondent she was seeking a new job and had sought to reduce her hours accordingly.
291. As we say at (221) on Monday 5 July the respondent had offered a trial to "Hannah" to take place on the Friday 9 July the day Ms Williams met with Ms Dhaliwal. That trial went ahead and Ms Dhaliwal saw Hannah at the nursery that day. On Monday 12 July the documents show that Hannah was offered a job. We were told she started on 17 August 2021.
292. That at least is suggestive that the respondent had decided to address the anticipated departure of Ms Dhaliwal by early July.
293. Whilst Ms Dhaliwal had intended the meeting on 9 July to address her grievances it was common ground the discussion focussed on the grievances from the respondent's staff about Ms Dhaliwal. We find those grievances were not fabricated or elicited by the respondent as a response to Ms Dhaliwal indicating she had intended to bring a grievance. Instead, we found they arose because staff were unhappy with Ms Dhaliwal's behaviour and had been for some time. Ms Henderson told us [ZH/72] that she had found Ms Dhaliwal rude. When challenged about when she formed that view she told us it was from quite early on in Ms Dhaliwal's employment and when pressed further dated that to the second week of Ms Dhaliwal's employment.
294. Irrespective of our findings that the alleged disclosures did not qualify for protection we find that they were not the reason or principle reason for her dismissal. Instead, we find that by 9 July or shortly thereafter Ms Williams took the view Ms Dhaliwal's behaviour was disruptive and causing conflict in the workplace, Ms Dhaliwal had made it clear she was looking for another job and was going to leave shortly. We find Ms Williams was not prepared to



permit the damage she viewed that Ms Dhaliwal was causing to staff harmony to continue and thus she decided to terminate Ms Dhaliwal's employment.

The Detriments

295. Whilst we determined that the alleged disclosures did not qualify for protection for completeness we address the detriment complaints.
296. Ms Dhaliwal asserts that her relations with her colleagues only deteriorated after she reported her concerns [SKD/62] (albeit that was in the context of Ms Dhaliwal pointing out her colleagues concerned were not raised with her). She asserted [SKD/49] "*... I do know that from that point on my working relationship with Leigh-Anne Tooth deteriorated significantly*". Ms Dhaliwal's grievances started within a few days of her employment starting. The period prior to her disclosures commencing cannot thus form a benchmark to identify a change in the treatment of Ms Dhaliwal.
297. The respondent accepts Ms Dhaliwal upset staff we find it was thus likely that staff would react negatively to that. The principal issue we need to address is whether the detriment was in some sense influenced by the alleged disclosure.
298. Detriments (1) & (2) relate to Ms Tooth refusing to interact with Ms Dhaliwal; her refusing to follow Ms Dhaliwal's instructions and her being rude and unhelpful to Ms Dhaliwal. Whilst we find Ms Tooth was reluctant to engage with Ms Dhaliwal this was for understandable reasons. Contrary to the feedback Ms Tooth had been given by the respondent's management, Ms Dhaliwal had questioned Ms Tooth's competence, both to Ms Tooth personally and to management, and informed Ms Tooth directly of that. It was not Ms Dhaliwal's function or role to engage directly with Ms Tooth in relation to those matters. Instead, if she had concerns, Ms Dhaliwal should have raised them with management **and** allowed management to address them rather than seeking to address them direct.



299. As to the complaint that Ms Tooth was rude this was not put directly to Ms Tooth nor was evidence led by Ms Dhaliwal as to specific incidents. The closest Ms Dhaliwal came to this were her comments that "**Leigh-Anne Tooth showed me nothing but contempt during my employment with the Respondent**". [SKD/125], the allegation that she was ridiculed by Ms Tooth and other (see (252.2)) and Ms Tooth's comments dismissing Ms Dhaliwal's view in relation to the incident regarding the SEN child (PID9) [SKD/83] "**She is always like this. She doesn't listen. She is just being silly**".

302. In contrast Ms Tooth said this in her witness statement about Ms Dhaliwal:-

"13. I showed her around the room but when she spoke to me I felt she was saying I was doing things wrong and I got the feeling she didn't like me.

14. I found Suki quite difficult to be around as I always felt on edge and in fear of upsetting her."

303. Given Ms Dhaliwal's own account includes assertions that Ms Tooth was making errors it is easy to understand why Ms Tooth would feel the way she says she did in paragraph 14. We accept Ms Tooth's account of how she felt and her reluctance to engage with Ms Dhaliwal. Save with respect to that finding we find Ms Dhaliwal's other contentions with regards to this detriment did not occur.

304. With regards detriments (3) the WhatsApp post of a gorilla sitting on a small child's chair on 25 May 2021 by Ms Clarke and (4) the alleged staff jokes referencing Ms Dhaliwal's father, her age, that she was single and comments regarding older women having babies, we have addressed above (254) how Ms Dhaliwal sought to put these as discrimination complaints rather than related to her protected disclosures.

305. That confusion over the reason for those actions is further questioned by Ms Dhaliwal's failure to say how "Shannon" the maker of one of the negative comments Ms Dhaliwal refers to [SKD/104] was aware that Ms Dhaliwal had



made a disclosure, what that was, when it was made or what her motivation would be for that. She was not named expressly in any of Ms Dhaliwal's grievances and Ms Dhaliwal does not specifically set out what motive she might have had for behaving in the way she was alleged.

306. Nor did Ms Dhaliwal show how a generic post of the gorilla sitting on a tiny chair was aimed at her rather than what the respondent said it was namely a joke about adult staff sitting on the small chairs provided for the children in their care. Indeed, Ms Henderson told us she thought it was aimed at her as she was pregnant at the time.
307. Detriment (5), related to the grievances raised by Ms Clarke and "Gurdeep" dated 9 July and (7) Ms Williams and Ms Henderson allegedly encouraging staff to make complaints against claimant the allegation those grievances appears to have emanated from Ruth [SKD/132 & 136]. That allegation dates to 9 July. Ms Henderson accepts she told staff if they wished to pursue them they should put their grievances in writing (see (225 & 226)). Ruth was not called by Ms Dhaliwal. Nor were Gurdeep or Ms Clarke. We thus do not know how Ruth came by the allegation.
308. We do know based on what Ms Dhaliwal told us, that staff were unhappy with her from the outset, that goes some way to support the respondent's account. Given the absence of direct evidence those complaints were elicited in the way Ms Dhaliwal describes we find on balance that the staff complaints had been genuine and long standing and despite the elaboration by Ms Henderson that we refer to (see (226)) we accept her account on those matters. we find the grievances were not "forced" by the respondent but instead staff were told if they wished the grievances to be addressed they needed to put them in writing.
309. Detriments (6) & (8) relate to comments which Ms Dhaliwal states were directed at her. The first she states was made to her by Ms Williams at the 9



July meeting “*we just need to get rid the bad apple*”; “*you can just leave*” and a comment reported to Ms Dhaliwal by another colleague Ruth (an apprentice) that was alleged to be made by Ms Henderson “*with Hannah joining us now we can get rid of the bad apple in the baby room*”

310. Whilst Ms Dhaliwal on numerous occasions indicated that Ms Williams referred to her as a bad apple [SKD/109,118 & 121] the only reference we can trace of that by Ms Williams in Ms Dhaliwal’s witness statement is one at the meeting on 9 July. In addition, Ms Dhaliwal references Ms Whitehouse as having made the same comment [SKD/109, 132 & 136] and refers to it in her grievance.
311. As to the other source, Ruth, Ms Dhaliwal suggests that the comment made in Ruth’s presence was at the same time as the meeting of 9 July. The first reference to Ms Dhaliwal having heard that from Ruth was in the exchange of messages with Ruth on 16 July 2021 [286] a week later. In context, which was after the meeting where Ms Dhaliwal states they were said to her direct. That casts doubt in our judgment on Ms Dhaliwal’s recollection of which came first.
312. Ruth was not called by Ms Dhaliwal. We thus have no detail when they were made, who was present or context. Nor were those comments directly put to Ms Williams or Ms Henderson, albeit Ms Williams specifically denied them in her witness statement but did not deny raising concerns with Ms Dhaliwal.

“248. I did not make any comments to the Claimant which implied she was a ‘bad apple.’ I did state I had concerns that the Claimant appeared to be raising various concerns with staff, rather than approaching me directly.”

313. Given what Ms Williams accepted she did say, the lack of challenge and our concern about Ms Dhaliwal’s recollection when this first arose we prefer the account of Ms Williams and that the phrase “*bad apple*” was not used.



Summary

314. We found that elements of this claim were extremely troublesome and by no means straightforward. That aside we determined :-

314.1. Ms Dhaliwal was dismissed on 28 July 2021. No timing issues arise from her dismissal.

314.2. None of the alleged disclosures qualify for protection.

314.3. Notwithstanding our finding with regards to the disclosures we determined that the reason or principle reason for Ms Dhaliwal's dismissal was because the respondent had decided she had failed her probation period and the breakdown in the working relationship between Ms Dhaliwal and her colleagues, in terms of both staff and management.

314.4. Similarly, insofar as Ms Dhaliwal was subjected to detriments we found that that was due to her manner and way in which she raised her complaints and they were not materially influenced by the alleged disclosures.

314.5. Accordingly, Ms Dhaliwal's claims fail in their entirety.

signed electronically by me

Employment Judge Perry

Dated: 24 February 2023

The employment tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. Shortly after a copy of all judgments and reasons are sent to the parties a copy will be published, in full, at www.gov.uk/employment-tribunal-decisions. The employment tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the employment tribunal for an order to that effect under rule 50 of the employment tribunal's rules of procedure. Such an application would need to be copied to all other parties for comment.



APPENDIX

AGREED LIST OF ISSUES 5/1/23

[NOTICE PAY – Not pursued]

1. TIME LIMITS

- 1.1 Given the date the claim form was presented (19/11/21) and the dates of early conciliation (28/7/21 / 19/8/21), any complaint about something that happened before 29 April 21 may not have been brought in time.
- 1.2 Was the unfair dismissal complaint made within the time limit in section 111 and 48 of the Employment Rights Act 1996? The Tribunal will decide:
 - 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / detriment complained of?
 - 1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within threemonths (plus early conciliation extension) of the last one?
 - 1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - 1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?



[R accept they (Kerri-Ann) emailed the dismissal letter to the Claimant at 12:20 on 28/7/21 but do not accept that she read it then. Question for the ET: when did C read that email to first learn of her dismissal? C says she learned of dismissal on 28 July and logged ACAS EC that day. C says EDT 30/7/21 per letter of dismissal so she had until 20/11/21 to issue the claim so in time]

2. AUTOMATIC UNFAIR DISMISSAL – S103A ERA 96

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

2.1.1.1 7/5/21 claimant to Kerry-Ann Williams - Caroline (Baby Room Leader) – preoccupied on her ipad and doing paperwork, not attending to or interacting with the children or attending to their physical needs like wiping their noses, if required. Also, leaving the baby room short staffed and below required ratios.

2.1.1.2 12/13 /5/21 – claimant to Kerry-Ann Williams - Leigh-Anne (Apprentice) had left the pre-school room on 2 occasions that day (with and without a child) without informing claimant as Room Leader and impacting staff ratios; (2) she has left a child alone and unsupervised.

2.1.1.3 Week commencing 10/5/21 – claimant to Kerry-Ann Williams - Caroline had left the baby room with 6 babies and only claimant and an inexperienced Apprentice below required staff ratios.

2.1.1.4 Week commencing 17/5/21 – Claimant to Kerry-Ann Williams and Zoe Henderson (Deputy Manager). Claimant identified a



safeguarding issue - Halima (a student undertaking work experience) was alone supervising 12 toddlers in the garden against required staffing ratios.

- 2.1.1.5 Week commencing 17/5/21 – Claimant to Kerry-Ann Williams. Jacob (Apprentice) left alone unsupervised to run a yoga session with 20 pre-school children. Leigh-Anne (Apprentice) and Hollie Horton (Level 3 NN) sat laughing and chatting in the room and not assisting or supervising Jacob.
- 2.1.1.6 Week commencing 17/5/21 – Claimant to Caroline (Baby Room leader) - Staff ratio in baby room fell below minimum required level as Gurdeep had to answer the door and liaise with parents dropping off leaving claimant alone. Claimant asked Caroline to arrange for Anya to support the room.
- 2.1.1.7 Week commencing 17 May 21 – claimant to Zoe Henderson. Staff ratio in baby room fell below minimum required level as Gurdeep had to answer the door and liaise with parents dropping off leaving claimant alone. Claimant asked Caroline to arrange for Anya to support the room.
- 2.1.1.8 Mid May 2011 – claimant to Caroline
- Out of date food;
 - Fridge dirty and no cleaning rota for the fridge;
 - Bedding was dirty and was not being washed leaving blankets covered with food stains;
 - Floors dirty and un-mopped.
- 2.1.1.9 End May 21 - claimant to Beth (Room Leader) - Leigh-Anne had shouted at a SEN Child for splashing water and then



punished the child for crying when the water was taken from them.

2.1.1.10 Week commencing 1 June 21. Claimant to Caroline, Staff unaware of fire procedures. No practice drills had taken place.

2.1.1.11 7 June 21. Claimant to Zoe Henderson. Caroline using her personal insecure laptop for work purposes including confidential data. Staff have access from home to that confidential data.

2.1.1.12 Claimant to Caroline and Zoe Henderson. Caroline using her mobile phone to access confidential information on the First Step website.

2.1.1.13 Claimant to Ofsted (verbal)

- Minimum staff ratios not being met;
- Inexperienced staff being counted towards ratios;
- Cleaning inadequate;
- Bogus staff on staff notice board;
- Staff told to say they worked their;
- Parents not told of staffing changes and changes to child key person;
- No key person allocated after staff departure.

2.1.1.14 Claimant's formal grievance in writing dated 18 July 21/emailed to respondent on 19 July 21.



- 2.1.2 Did she disclose information?
- 2.1.3 Did she believe the disclosure of information was made in the public interest?
- 2.1.4 Was that belief reasonable?
- 2.1.5 Did she believe it tended to show that:
 - 2.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation; **S43(B)(1)(b)**
 - 2.1.5.2 that the health and safety of any individual has been, is being or is likely to be endangered. **S43B(1)(d)**

The Claimant relies on the Statutory Framework for the Early Years Foundation stage (Published 3/3/17 / Effective 3/4/17.

- 2.1.6 Was that belief reasonable?
- 2.2 If the claimant made a qualifying disclosure, was it made:
 - 2.2.1 to the claimant's employer? s.43C(1)(a)
 - 2.2.2 to a prescribed person (Ofsted)? S.43F
- If so, it was a protected disclosure.
- 2.3 If so, was the reason (or, if more than one, the principal reason) for the dismissal that the claimant made a protected disclosure?

3. **DETRIMENT (EMPLOYMENT RIGHTS ACT 1996 SECTION 47B/48)**

- 3.1 Did the respondent do the following things:
 - 3.1.1 Leigh-Anne refused to interact with claimant; (Para 7 ET1)
 - 3.1.2 Leigh-Anne refused to follow claimant's instructions and was rude



and unhelpful to claimant; [Para 7 ET1]

3.1.3 Caroline Clarke's WhatsApp post aimed at claimant; [Para 9 ET1]

3.1.4 14/6/21. Staff jokes at claimant's expense; [para 15 ET1]

3.1.5 2 grievances lodged against claimant by Gurdeep and Caroline (para 17 ET1)

3.1.6 Kerry Anne Williams comment "we just need to get rid the bad apple"; "you can just leave". [Para 20 ET1]

3.1.7 Kerry Anne Williams and Zoe Henderson encouragement of staff to make complaints against claimant;

3.1.8 Zoe Henderson's comment "with Hannah joining us now we can get rid of the bad apple in the baby room"; [Para 22 ET1]

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that she made a protected disclosure?

4. **REMEDY FOR PROTECTED DISCLOSURE DETRIMENT / UNFAIR DISMISSAL**

4.1 Should C receive a Basic Award:

4.2 What financial losses has the detrimental treatment / dismissal caused the claimant?

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

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

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



- 4.6 Is it just and equitable to award the claimant other compensation?
- 4.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 4.8 Did the respondent or the claimant unreasonably fail to comply with it?
- 4.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 4.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?
- 4.11 Was the protected disclosure made in good faith?
- 4.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?