EMPLOYMENT TRIBUNALS

Claimant:	**Mrs V Pearson**
Respondents:	**(1) The Belsteads Group Limited** **(2) Ms Kerry Pollard** **(3) Mr Alec Cussell** **(4) Ms Joanne Turner**
Heard at:	**East London Hearing Centre**
On:	**18, 19 and 20 April 2023 (Reserved decision in chambers on 9 and 22 June 2023)**
Before:	**Employment Judge B Elgot**
Members:	**Mr D Ross** **Mr J Webb**

Representation

Claimant:	Mr E Johnson (Lay Representative)
Respondents:	Mr A Williams (Solicitor)

JUDGMENT

1. The claim of unfair dismissal against R1 does not succeed and is DISMISSED.

2. The claim under section 47B Employment Rights Act 1996 (the 1996 Act) that the Claimant has been subjected to detriment by acts or deliberate failures to act by R1 done on the ground that she made protected disclosures (whistleblowing) as defined in section 43B of the 1996 Act SUCCEEDS against R1

3. By reference to section 47B (1A) of the 1996 Act the claim that the Claimant was subjected to detriment by acts or deliberate failures to act done by Rs 2 3 and 4 as her co-workers in the course of their employment SUCCEEDS against R 2 R3 and R4 and treated as also done by R1 their employer under section 47B (1B). Each of those Respondents R1 R2 R3 and R4 has joint and several liability.

4. The complaint of pregnancy and maternity discrimination under section 18 Equality Act 2010 SUCCEEDS against R1 and R3 each of whom has joint and several liability.

5. The complaint of harassment related to the protected characteristic of sex SUCCEEDS against R1 and R3 each of whom has joint and several liability.

6. The claim of direct sex discrimination under section 13 Equality Act 2010 does not succeed and it is DISMISSED.

7. The complaint that R1 has failed to give the Claimant a written statement of her employment particulars under section 1 of the 1996 Act SUCCEEDS. The award of compensation under section 38 Employment Act 2002 will be determined at the Remedy Hearing

8. The Claimant and R1 have agreed the total sum due and owing to her in respect of outstanding wages and holiday pay which is £ 413.06. A separate judgment has been issued for payment of this amount by R1.

9. The remedy to which the Claimant is entitled shall be determined at a Remedy Hearing in person listed for two days. A Notice of Hearing will be sent out in due course.

10. No later than 21 days before the Remedy Hearing the Claimant must send to the Respondents and to the Tribunal an updated and re-calculated Schedule of Loss by reference to the content of this judgment.

REASONS

1. The Claimant was employed by the First Respondent (R1) from 17 October 2019 until 9 October 2020 as a Support Worker in its care home Little Belsteads (the home) which is a residential care facility for up to four children/ young people aged 8 to 17 years who have learning difficulties and/or are neuro-diverse and/or have sensory impairment (the YP). Little Belsteads has around 28 staff with 7 or 8 on duty at any one time. The Third Respondent (R3) told us that in the period of the Claimant's employment there had been five pregnancies amongst the staff.

2. The care home is registered with and inspected by a government body- Ofsted (Office for Standards in Education, Children's Services and Skills) and is regulated by the Local Authority Designated Officer (LADO). The home has an internal Quality Assurance Manager named Susan Southey (SS) also responsible for safeguarding issues at the home and at the larger establishment of a school run by R1 on the same site.

3. We are satisfied that the Claimant did not receive a statement of her initial employment particulars which was compliant with section 1 of the 1996 Act, despite several written requests made by her for production of this document, until 13 August 2020 when it was sent to her under copy of a letter at page 406 of the bundle from the

Second Respondent, Ms Kerry Pollard (R2), who was then the Human Resources Manager of R1. The Claimant says that this is the unsigned document at page 121. R1 has been unable to discover or disclose any earlier copy of an employment particulars document and no signed copy. The amount of the award pursuant to section 38 Employment Act 2002 will be fixed at the Remedy Hearing.

4. The Claimant, during her employment, was line-managed by two Deputy Managers, Ms Joanne Turner (R4) and Ms Claire Ellis and by the Registered Manager of the home Mr Alec Cussell (R3). The home is registered with the Care Quality Commission (CQC) and thus, as Registered Manager, R3, who has experienced in working with young people with learning difficulties since 2010, had legal accountability to the CQC as regulator particularly in the care and safeguarding of the YP and in the development of staff.

5. The Claimant's employment with R1 was subject to an initial probationary period of six months *'during which time you will be required to demonstrate to the organisation's satisfaction your suitability for the role…performance and suitability for continued employment will be monitored'* which expired on 6 April 2020 with a discretionary power of R1 to extend that period for a further six months. The relevant clause is on page 123 of the bundle.

6. The Claimant was therefore employed for less than the two-year period qualifying period entitling her to bring a claim of what is sometimes called 'normal' unfair dismissal. She relies on her allegation that the reason for her dismissal was the making of protected disclosures by reference to section 103A of the 1996 Act which provides an exception to the requirement for two years' service to bring a claim of unfair dismissal.

7. An employee is regarded as having been 'automatically' unfairly dismissed if the sole or principal reason for her dismissal is that she made a protected disclosure (s). The first question we have therefore asked ourselves in this case is what was the reason or principal reason for her dismissal on 2 October 2020 with one week's notice to 9 October 2020?

8. The burden of proof to establish the jurisdiction of the Tribunal and to show that the making of protected disclosures was the reason or principal reason for her dismissal rests with the Claimant in cases such as this. In this respect the submission (with the accompanying bundle of two case authorities) made on her behalf by Mr Johnson is mistaken at his paragraph 4.2.1.1 – 4.2.1.18. That submission is only an accurate statement of the law where an employee has the two years' qualifying service and the jurisdiction of the Tribunal to hear an unfair dismissal claim is clear. This is not one of those cases covered by the leading authority of *Kuzel v Roche Products Ltd* [2008] EWCA Civ. 380.

9. R1 contends that the Claimant was dismissed for gross misconduct. The Grounds of Resistance at page 87 of the bundle refer to *'repeated safeguarding issues and her behaviour towards the Young People at the First Respondent's premises'*. *The Claimant's behaviour amounted to bullying of a Young People(sic) for whom the Claimant was meant to be caring for(sic).* Mr William's submission is that the dismissal was for '*repeated breaches of safeguarding provisions'*. It was not a summary

dismissal without notice. There is no copy of R1's disciplinary policy in the bundle and the Claimant confirmed that she had never seen it. We are unable therefore to know the definition of gross misconduct adopted by R1 in relation to its employees or to read any examples of such conduct and we conclude that the Claimant also had no such information.

10. The letter of dismissal sent in the name of and signed by R3 is at page 444 delivered 'by hand' and dated 2 October 2020. It does not in fact refer to a summary dismissal without notice for gross misconduct but states that the Claimant is being dismissed on one week's notice with an effective date of termination of 9 October 2020. It states that her employment has been terminated for *'poor conduct/issues, in particular, ongoing Safeguarding concerns'*.

11. The Respondent's document at page 268, despite being described in the bundle index as the 'Dismissal Letter', is in fact a draft letter, again in R3's name, dated Tuesday 29 September 2020 prepared in advance of the actual disciplinary and dismissal meeting which took place on Friday 2 October 2020. We find that it indicates a pre-determination of the decision to dismiss the Claimant.

12. We find that on the balance of probabilities the Claimant was dismissed for reasons relating to her conduct by reference to section 98(2)(b) of the 1996 Act. We give our full reasons for this conclusion below.

13. The Claimant has not shown that she was dismissed for any one of the reasons set out in section 108 (3) of the 1996 Act which lists exceptions to the requirement to be continuously employed for a period of two years and particularly she has not shown that section 103A applies. In those circumstances her claim of unfair dismissal fails.

Documents and Witnesses

14. The Claimant gave evidence on her own behalf and the Respondents' witnesses were Mr Alec Cussell (R3) and Ms Jo Turner (R4). Ms Kerry Pollard (R2) did not give evidence and we were told by the Respondent's representative that she could not be contacted. Each of the three individual Respondents has left the employment of R1; R3 did tell us that he had given some assistance to R2 in searching for relevant documents for disclosure in these proceedings but gave no detail of this activity. No current director, manager or employee of R1 was a witness on its behalf despite the fact that, for example, Mr Peter Adams, the Managing Director, is named as the signee of the Claimant's Employment Contract on page 121 (the Respondent's document) and that at page 342, the Employee Probation Report-26 Weeks, it is written that any extension of probation or recommendation for termination of employment because of a failure to achieve the required standard of performance during the probationary period requires '*that the Managing Director is consulted before any action is taken*.' The Claimant's probation was extended on 24 April 2020 by R3 and R4 with no evidence about any such consultation with Mr Adams.

15. We note that the Respondents' witness statements contain, in large part, very similar wording and simply contain a short blanket denial that any qualifying protected disclosures were made or that the Claimant was subjected to any of the detriments (paragraphs 87,88 89 and 90 of R4's statement and paragraphs 82,83, 84 and 85 of

R3's statement). Neither of the Respondents' witnesses therefore gave any sworn evidence to assist the Tribunal in resolving the issues at paragraphs 2,4 and 5 of the Agreed List of Issues and there are no submissions of substance from Mr Williams in this respect.

16. This was a hybrid hearing and thus the Claimant gave her evidence and was cross-examined in person. The Respondents' witnesses gave evidence using the CVP video facility when both representatives appeared in person to conduct cross examination and re-examination.

17. There is an agreed bundle of documents in two volumes with a total of 505 pages. Unfortunately, the bundle is not arranged in chronological or indeed any apparent order and it would not be unfair to say that this hindered and delayed the giving of evidence during the proceedings and the Tribunal's decision- making process in chambers. It appears that pages 1-299 are the Respondent's documents and pages 300 -505 are the Claimant's documents and that no attempt has been made to prevent duplication or to integrate the two sets of documents into a coherent chronologically arranged whole.

18. In accordance with the usual practice of the tribunal we read only those documents to which our attention was specifically directed by the parties, the representatives, or the witnesses.

19. Both representatives submitted written closing arguments delivered on 4 May 2023 in accordance with the Tribunal's order and Mr Johnson made useful submissions and sent a small bundle of case authorities. Mr Williams' submissions on behalf of the Respondents are extremely brief (less than two pages) and unhelpful consisting only of a series of one sentence blanket denials. He makes no reference therein to the evidence or to the relevant issues of law.

List of Issues

20. There is an agreed List of Issues in this case which is attached as Appendix A to the case management order of EJ Jones following a preliminary hearing on 18 January 2022. We have used this document as an agreed summary of the questions and issues the Tribunal is required to determine in these proceedings.

21. We note that the parties also had the benefit of guidance and orders made by Employment Judge Massarella at a Preliminary Hearing on 2 August 2021.

22. EJ Jones records in his Order that R1 does not rely, so far as the discrimination claims are concerned, on the 'defence' in section 109(4) Equality Act 2010 in relation to any one of the individual named Respondents in this case. Accordingly, anything done in this respect by the Claimant's co-workers (Rs 2 3 and 4) is treated as also done by R1. None of the Respondents made any application for the removal of Rs 2 3 and 4 as parties to these proceedings and the Claimant does not consent to such removal.

The Protected Disclosure

23. We are certain that the disclosures listed at paragraph 2.1.1 – 2.1.3 of the List of Issues qualify for protection under section 43B of the 1996 Act and were made in the public interest to R1 as the Claimant's employer. There was a disclosure in two parts made on 4 April 2020 as set out in 2.1.1.1 and 2.1.1.2 and a second disclosure on 22 August 2020 described in 2.1.1.3.

24. In summary there were two disclosures pertaining to alleged breaches of covid 19 restrictions and one relating to a failure to promote a role model of honesty and openness to a vulnerable YP by asking him to keep secrets about such alleged breaches. We agree with the Claimant when she said in her oral evidence, in response to a suggestion by the Respondent's representative that she was simply expressing her own personal concerns, *'this is public funding in a public environment and we have a duty of care to protect them (YP)and society and protect members of the public when we are out and about, we need to be conscious of their (YP) behaviour in public areas and not allow it to escalate. We were told to deliver mask wearing. This was covid, not a normal situation and it changed day by day'.*

25. The disclosures were information which in the genuine and reasonable belief of the Claimant were made in the public interest and tended to show one or more of the situations in section 43B (a) (b) and/or (c) had occurred or was likely to occur.

26. For completeness, we also record that we are satisfied that each of the Respondents held liable in this judgment knew of the protected disclosures and of their content.

27. The closing submission on behalf of the Respondents states *'it is denied that the claimant made any protected disclosures as alleged or at all'* but does not say why the Respondents believe this to be the case. The Grounds of Resistance at paragraph 66 are similarly silent. In his oral evidence R3 accepted that allegations were made *'re covid and Health and Safety' by the Claimant and' yes, we investigated'.* R3 also agreed in cross examination that he was told that the Claimant had reported a YP wearing his mask in an unsafe manner.

28. It is a somewhat troubling feature of this case that none of the Claimant's work emails have been disclosed by the Respondents. Mr Williams gave no satisfactory explanation on behalf of all or any one of the Respondents. Thus, the Claimant's email of complaint, identified in the List of Issues to have been sent to Ms Claire Ellis on 4 April 2022, is not in the bundle. It is not even attached as an appendix to the investigation report on pages 174-182 which was carried out by Ms Southey (SS) and completed on 7 April 2020. Indeed, none of the five appendices, including the Claimant's 4 April email, listed on page 174 in the box headed 'Overview of complaint' have been disclosed. The Claimant's evidence in paragraph 43 of her witness statement is that she emailed not only Ms Ellis but also R3 with several complaints about the incident when a YP met his mother to receive his birthday gifts outside the home on 3 April 2020 in apparent breach of the strict lockdown imposed by the government on 23 March 2020

29. Ms Southey was not a witness in these proceedings and nor was Ms Ellis. Nonetheless it is clear from the Respondents' timeline at page 173 that R3 was aware of and responded to the complaint as the Registered Manager. He was extensively interviewed in detailed terms by SS. The Claimant made the specific allegation that it was R3 himself who had encouraged the YP resident to keep the visit a secret especially from his peers. We find that the protected disclosure on 4 April 2020 was made personally to R3 and was not only about his managerial responsibilities but also his personal actions.

30. SS's relevant conclusions in her report are that the YP's mother should not have been allowed to visit because the dropping off of birthday presents was a '*non-essential journey to the home'*. She records that R3 had *'considered the potential risks and put in place strategies to comply with the social distancing'*. However, SS upheld the Claimant's complaint in this respect and recommended that families be discouraged from making such non-essential journeys to the home. SS also upheld the complaint (see page183) that it was inappropriate for R3 to tell the YP not to tell his peers about seeing his mother although this was '*not a serious safeguarding issue'*. SS acknowledged the Claimant's concerns as valid and as valuable feedback to assist the development of continuous learning and guidance at R1.

31. Again, we reiterate that there was specific criticism of R3 and an imperative placed upon him as a result of the Claimant's disclosures to undertake covid 19 risk assessments and to research and issue further guidance to staff and residents and families/visitors.

32. R4 knew of the 4 April disclosures and the content of SS's report undertaken on behalf of R1 because, for example, at paragraph 34 of her witness statement she writes '*I can confirm that the investigations into this matter show that the young person involved was advised not to mention to other young people the complaint lodged on 4th April 2020 (P173)'.*

Protected Disclosure of 22 August 2020

33. There are two conversation logs about this incident with a YP (DR) who went shopping with another YP (BH), the Claimant and a colleague named Becky Turner (BT). Ms Turner was not a witness in these proceedings. Ms Turner's log at page 409 of the bundle records a conflict between the Claimant and DR because his mask was not over his mouth and nose and the Claimant took issue with this failure because of the danger of infection to the YP and others. The Claimant's own conversation log on page 410 dated 22 August 2020 which looks as if it is signed by Ms Ellis (CE) records a similar concern that the YP should wear masks and keep the mask up over the nose. It records an apparently minor dispute resulting in the YP being '*awkward'* (R3's word on page 246) and becoming agitated by the Claimant's instructions. DR's version of the incident is recorded by R3 at page 245 and signed by DR. R3 calls this document a *'complaint'* which will be *'investigated and monitored'* by management. We have seen no evidence that this investigation or monitoring occurred.

There is no evidence of any reference to the 22 August 2020 'complaint' by DR in any of the correspondence or actions of the Respondents in the period leading up to the Claimant's dismissal on 2 October.

34. We are satisfied that the conversation logs recording the Claimant's concerns and her account of this incident is a protected disclosure. We have seen no copy of any email she sent to R3 on 22 August 2020 as referred to in paragraph 2.1.1.3.1 of the List of Issues. She did have another conversation with R3 which is recorded at page 246 duplicated at page 413 of the bundle and dated 24 August 2020. That conversation we interpret as a cry for help from the Claimant. She expresses herself as worried that she will be further criticised as having an inappropriately controlling manner with the YP and asks *'whether she could have done anything differently [on 22 August*]'. R3 records that he tells the Claimant again that '*we were willing to work on her improvement plan however should her demeanour towards the young people not change then we would have to terminate her contract…I would discuss this with her on her next shift 27/08/20*. This statement is not pleaded as a detriment.

35. The Claimant says that no such further discussion took place.

36. The reference by R3 on 24 August 2020 to the possibility of a termination of the Claimant's employment is to events pre-dating the whistleblowing on 22 August 2020 and particularly to a meeting between the Claimant and R3 on 20 August the notes of which are on pages 238-241. Prior to that meeting R1 R2 and R3 had prepared an unsigned letter in R3's name dated 19 August 2020 inviting the Claimant to a disciplinary meeting (no date or time fixed) headed 'Safeguarding Issues' and commencing with the words *'I am writing to tell you that The Little Belsteads is considering dismissing you'*. It contains vague and unspecified allegations of serious misconduct considerably different and in excess of any ongoing performance or capability concerns previously notified to her.

37. On 19 August 2020 the Claimant had for the preceding five weeks been the subject of a 12-week Performance Improvement Plan (PIP) seen on pages 367 -370 and dated 14 July 2020. We make further findings about this document, its nature and effect, below.

38. On 24 August 2020 when R3 wrote the conversation log on page 246/ 413 the Claimant was not the subject of any formal or informal, verbal or written, disciplinary warning in relation to her conduct under any disciplinary policy or procedure of R1. She had passed her probation on 1 June 2020 which was ultimately signed off by joint signatures on 29 June. She was the subject of a PIP stated at page 369, *'to help you achieve a satisfactory level of performance against the objectives and measures set out in the plan'* and warned that a failure to improve (with the requisite promised support) may result in a first written warning. No such warning was ever issued.

39. The later date of the second protected disclosure on 22 August 2020 and the 'complaint' by DR means that only the detriments set out in paragraphs 4.1.7 (unlawful suspension on 29 September 2020) and 4.1.8 (failure to conduct a fair investigation and disciplinary procedure after suspension) can be acts or failures to act done on the ground of this later second disclosure

40. We make further findings set out below that by the date of the conversation between the Claimant and R3 on 24 August 2020 there was at least a partially formulated determination to move towards the termination of the Claimant's

employment as is evidenced by the draft undelivered and unsigned letter dated 19 August 2020 on page 236 in R3's name which, we re-emphasise, makes no reference to any pre-existing disciplinary warnings or to the PIP of 14 July 2020.

The Claimant's dismissal and the reason for it

41. We are satisfied, as stated above, that on the balance of probabilities the Claimant was dismissed by R1 on 2 October 2020 for reasons relating to her conduct and that the reason or principal reason for her dismissal was not that she had made protected disclosures.

42. It is not possible to ascertain, because we have not had sight of R1's relevant policies and heard no evidence from R2 who advised on the dismissal, whether this was gross misconduct entitling R1 to summarily dismiss the Claimant. Certainly, it is described as *'tantamount to Gross Misconduct and therefore we are entitled to terminate your position'* in the dismissal letter signed by R3 at page 444 of the bundle. However, it was not a summary dismissal, and one week's notice was given and paid.

43. We find that the misconduct for which the Claimant was dismissed must have occurred during the period from 19 August to 2 October 2020. Her contract of employment (see page 123) provides that R1's disciplinary procedure does not apply to her during the probationary period which in the Claimant's case extended until 1 June 2020 and was not mutually 'signed off' until 29 June for reasons unknown.

44. We have identified this period because during the Claimant's fortnightly supervision on 24 July 2020 with R4 which is on pages 232-234 of the bundle there are no safeguarding concerns recorded. There is no discussion of conduct concerns, or any disciplinary issues let alone potential gross misconduct. Instead, the Claimant raises her unhappiness about being placed on a PIP as a result of performance issues described as '*shortfalls in your practice'*. Surprisingly, R4 does not know about the PIP and has seen no copy of it or of the letter at pages 367-370 from SS sent to the Claimant on 14 July 2020 and headed '*putting in place a performance improvement plan'*. (A copy of that letter is also in the bundle on pages 228-231). The PIP is for twelve weeks from 23 July 2020 to 27 October 2020.

45. If there was a separate Plan enclosed with or annexed to this letter, then that has not been disclosed by any party to these proceedings and we have not seen it.

46. We have made it clear in our findings below that we entirely reject any suggestion made by the Respondents' witnesses that the Claimant was placed on any kind of '*personal development plan'* which was less draconian than a PIP and/or that all team members including the Responsible Individual (RI) Mr Peter Adams were also on a PIP.

47. Paragraphs 52-53 of R4's witness statement which is repeated in the exact same words at paragraphs 49-50 in R3's statement simply does not make sense where it is written,

> '*During the period when the Claimant was placed on a personal development plan all team members including the RI were also being completed and others*

were placed on a PIP…the claimant was the first one to go on a PIP, but this had been in the pipeline for a while and within a short period of time all staff where (sic) on them'.

48. We firmly conclude that the letter dated 14 July 2020 conveys the *'Registered Manager's decision to implement a Performance Improvement Plan*.' It contains a clear statement of future sanction which is inconsistent with a personal development/ training plan applicable to all staff –'*if your performance does not improve sufficiently by the review date you may be issued with a first written warning'*

49. At page 379 dated 25 July 2020 there is an email to R3 from the Claimant stating, *'having just had supervision Jo is not aware of the letter and also completely unaware of the fact everyone is on a PIP plan'*. Clearly, there was no discussion at the supervision on 24 July 2020 of what R4 describes in paragraph 48 of her witness statement as serious 'Safeguarding issues' caused by the Claimant's behaviours which resulted in a 'Personal Development Plan'. R4's witness statement is not consistent with what appears in the contemporaneous documentation.

50. We also find that, contrary to R4's evidence in paragraph 47 of her witness statement, there was no discussion whatsoever during the Claimant's June supervision of any serious complaints against the Claimant which were considered serious safeguarding breaches. This fact can be ascertained by reading the content of the supervision template dated 29 June 2020 on pages 223-226 recording *'no safeguarding concerns'* at page 224. Page 226 states '*Vicky continues to work well as FB key worker and continues to have some really good ideas around how to support her and benefit FB in the long run… Vicky is managing to maintain her role as lead with the COSHH file…a huge responsibility for Vicky'.*

51. Again, on 7 August 2020 in the supervision with R3 (R4 was on holiday) on page 382 of the bundle no issues of poor conduct or performance are raised with her and under the heading 'Whistleblowing/Safeguarding Concerns?' R3 has written *'None'*. He has only stated '*can come across as blunt which may be an issue'* and records that *'strategies she can use'*, '*basic behaviour management/ updated behaviour support plans' [for YP*] were discussed. There is no discussion of the Claimant's extant PIP at this supervision.

52. By reference to the events of 19 and 20 August 2020 recorded on pages 236-241 we must first point out that R3 and R4 are incorrect when they say in their sworn witness statements that there was a meeting on 20 August 2020 between SS and the Claimant. The meeting was between the Claimant and Rs 2 and 3. It did not result in any further action let alone sanction- in the dismissal letter at page 444 R3 writes *'on the 19th of August (sic) we discussed the Safeguarding issues which had been raised with you. As a result of this we elected to seek to work with you and support you'*. The PIP was not discussed.

53. At page 240 part of the content of the 20 August 2020 discussion is recorded as follows -' *while LADO do not feel it is a safeguarding issue which is reportable, we do have to consider it as an internal safeguarding issue, which is serious. We cannot have the young people refusing to work with support staff.*

54. The meeting was called, as stated on page 238, to discuss a concern that '*four of the YP have stated that they do not want to work with you'*. No dates for those statements by the YP are given and we conclude it must have been a recent turn of events

55. In advance of the meeting there is the draft unsigned letter marked 'By Hand' in R3's name dated 19 August 2020 on page 236. It is described therein as an *'invite…to an open meeting'* and it threatens dismissal. The letter gives no dates, details, or circumstances of the concerns and reports allegedly raised by YP and team members. We conclude that no version of this letter was ever sent by any of the Rs to the Claimant as an invitation or in any other context.

56. However it does set out in paragraphs 1-4 and paragraphs A-E, albeit without specificity, some serious issues of workplace relationship breakdown *'beyond repair'*, failures of confidentiality, use of loud voice and tone, inappropriate behaviours causing 'escalation' difficulties in the behaviour of the YP, '*serious harassment and serious controlling behaviour'* indicating significant lack of judgment by the Claimant all of which are identified as highly problematic for the safeguarding of the YP. Several of these matters were discussed with the Claimant on 20 August 2020.

57. We are satisfied that although the letter was not sent or handed to the Claimant it contains an accurate summary of the mental processes and knowledge of the Respondents who had serious ongoing concerns about the Claimant's conduct and its effect on YP.

58. In the meeting on 20 August 2020 the Claimant was given additional information about the Respondents' concerns around her '*antagonising behaviour…we were at the point of advising you that you were going to be dismissed today'*. She was made aware of the criticisms of her practice and the fact that she caused FB to be crying in distress, that FB believed the Claimant '*hated her'* and that '*4 Young people have stated that they do not want to work with you…it seems like you are constantly poking to get a reaction… you come across as confrontational'*. We are satisfied that there was an explanation by R2 and R3, as senior managers of R1, that there were conduct issues which affected the welfare of the YP and were internal safeguarding concerns which she must address.

59. In fact, the Claimant was not dismissed or disciplined in any way on 20 August 2020 for any alleged misconduct including any kind of warning. Instead Rs 2 and 3 chose to have a long discussion with her about FB's support plan and R3 suggested strategies and techniques to modify the Claimant's approach and improve her working relationships with both the YP and her co-workers. R3 states '*The Claimant was encouraged to move forward'*. On page 241 R3 concludes the meeting by saying' *overall we see your potential and you need to work on being less rigid, tone down the volume and start setting expectations'.*

60. The meeting of 20 August 2020 was nonetheless the beginning of a period during which the Claimant's conduct and professional practice began anew to give real cause for concern to the Respondents.

61. No further criticisms of the Claimant's conduct or any safeguarding concerns are recorded in the supervision conducted by R4 on 28 August 2020 (pages 249-251) There was no discussion of performance issues or the PIP at this supervision. Similarly, in the discussion with R3 on 1 September 2020 (page 252) no criticisms of the Claimant's conduct were made.

62. It is not until the supervision meeting on 24 September 2020 that R4 raises issues of the Claimant's unacceptable conduct on 23 September. The notes are at page 421 in which R4 robustly informs the Claimant that she was '*like a tornado always causing stress to everyone… her erratic behaviour impacts on everyone in the Home… it seems that she always has an issue and whatever we put in place to support her is replaced immediately with another issue…not meeting the conduct requirements of her[performance]plan'*. R4's somewhat desperate sounding comments are focussed on the Claimant's behaviour having a seriously adverse impact on her managers and co-workers including constant interruptions, *'constant need to be in the office, asking questions and seeking reassurance'*, interference by the Claimant texting colleagues who were on holiday or querying the actions of those off sick. That supervision ended prematurely with the Claimant becoming *'visibly upset'*.

63. On 26 September 2020 there was a complaint against the Claimant from another YP named FB. The conversation log completed by one of the Claimant's co-workers Lesley Rawlings (LR) (who was not a witness) starts on page 423 and is counter signed by R3 on 28 September. It contains a serious and disturbing account of FB's agitated state which was interrupted by the Claimant's appearance in the doorway, '*talking. This resulted in FB became more agitated and shouted at her to go away…LR then asked the [Claimant] to leave twice which she eventually did'*. We are satisfied that this was sufficient evidence for R1 to have a genuine belief in misconduct by the Claimant in all the circumstances.

64. R1's belief was reinforced by the content of a second conversation log completed by LR on page 425 in which FB says about the Claimant *'I really need a break from her please, can I have a break from her, a long break'.*LR records FB becoming tearful and upset.

65. FB then went on to recount her feeling to LR that the Claimant was *'constantly on her back'* causing her to feel depressed. We are satisfied that this is the same type of behaviour by the Claimant and a similar reaction by the YP which resulted in the events of 19/20 August 2020 recounted above.

66. The complaint by FB was logged by the LADO Carole Fuller on 29 September 2020 as can be seen on page 426.

67. As a result, the Claimant was sent home on full pay on 29 September 2020, and we are satisfied that this was a paid suspension from work which lasted 3 days; the Claimant was suspended on the advice of SS.

68. LR was interviewed as can be seen from the note at page 259 of the bundle and confirmed her opinion that that Claimant had *'put herself in harm's way and I had to keep asking her to leave… if FB blew up then VP was blocking her exit …I had to constantly keep asking her to go away. VP kept constantly telling FB to do things…I*

feel VP is affecting FB mental health'. The full note repays careful reading as do the comments of Claire Ellis on page 260 *'I believe that VP behaviour has a negative impact on FB'*.

69. The Claimant was invited to attend a meeting on 2 October 2020 and told not to come into work until the designated time of the meeting at 10 am even though she was due to start her usual shift at 7.30 am. This was part of the suspension period. SS had advised the Respondents at page 261 that there was a safeguarding concern with which Ofsted would be unhappy and that the Claimant was detrimental to the welfare of YP.

70. On 2 October 2020 after a discussion lasting less than six minutes the Claimant was dismissed for '*poor conduct/issues'* and there is clear reference in paragraph a) and in the final paragraph on page 444 to the previous concerns raised on 19/20 August which have '*continued to be an issue and had a significant negative impact of (sic) the emotional wellbeing of our young people'.*

71. We conclude that the cumulative effect of the Claimant's behaviours over this period amounted to the misconduct for which she was dismissed, and those issues of conduct were the principal reason for which she was dismissed.

72. The Claimant was given the opportunity to appeal her dismissal but did not avail herself of an appeal.

73. There is no doubt that the process and procedures leading to the Claimant's dismissal were significantly flawed. We cannot agree with R3 when he writes at paragraph 79 of his witness statement '*The adopted dismissal procedures were reasonable in that they gave the Claimant full opportunity to put her case forwards during the disciplinary hearing on 2 October 2020'*. In fact, in response to cross examination R3 changed his mind, agreed that there was procedural unfairness and said '*it was unfair that she did not have a chance to talk before she was dismissed'*.

74. The Claimant was not notified except in the vaguest terms, despite several requests for information as appear from emails on pages 428,430,431,433, 436 and 441, what were the details of the allegations made against her and she saw no copy of interview notes with the *'several other staff in attendance over the weekend'* as mentioned on page 434 in an email to her from R2.

75. She was given no reasonable opportunity in terms of information, time, resources, or assistance to prepare a meaningful response to the case against her. She points this out herself at page 443 *'It is wholly unreasonable that you refuse to share or disclose what the exact allegations are, what evidence was used in arriving at those findings and what witness evidence has been obtained'*. Her email is dated 1 October and timed at 19:55 pm. The Claimant provides a full summary of the relevant email correspondence at paragraphs 110 -123 of her witness statement.

76. The Claimant was not warned in writing that she was at risk of the ultimate sanction of dismissal during or following the 2 October 2020 meeting.

77. She was not notified of any right to be accompanied at her disciplinary hearing.

78. It was and is unclear who made the decision to dismiss her and whether the dismissing officer of R1 was also the investigator, possibly R2. The meeting was attended by Rs 2 and 3. R4 states in her witness statement at paragraph 77 that it was a collective and joint decision between her, Claire Ellis and R3 with 'input' from R2. Certainly, both the draft dismissal letter dated as early as 29 September 2020 at page 268 (thus indicating a firm pre-determination) and the actual dismissal letter on page 444 are in the name of R3 and his signature is on page 445. R3 told us in cross examination that R2 made the decision to dismiss yet in the relevant parts of his witness statement he consistently uses the pronoun 'we'.

79. The transcript at pages 500-503 (from the Claimant's recording of her dismissal meeting) consists of R2 announcing a decision to dismiss which has already been made. The Claimant has no opportunity to defend herself or mitigate against that decision. It is certainly not the case that R2 and R3 follow R1's internal guidance for the conduct of the said meeting which is on the lower half of page 275. R3 agreed that none of those guidelines for the implementation of fair steps to a dismissal were in fact done.

80. It is to be hoped that R1 will correct and improve its procedures to comply with the ACAS Code on Disciplinary and Grievance Procedures and to be compliant with fairness and the principles of natural justice.

81. However, it is not an issue before this Tribunal to decide whether the fairness test in section 98(4) of the 1996 Act is met. This is because, as stated above, the Claimant does not have the two-year qualifying period entitling her to the right under section 94 not to be unfairly dismissed.

82. The question we are required to determine is what was the reason or principal reason for the Claimant's dismissal and we conclude that it was not by reason of her whistleblowing either in April or August 2020 or both.

83. We have carefully considered whether the serious procedural defects in the dismissal process raise an inference that the conduct reason for termination of her employment was a sham. We are certain that this is not the case because as set out fully above we have determined that there is robust and cogent evidence of a conduct dismissal and R1's genuine belief in the misconduct.

84. We should add that the concerns about, and interventions around, the Claimant's performance and conduct prior to 19 August 2020 were undertaken in a different way and from different angles. We do not conclude, contrary to Mr Johnson's submission, that there was a linear progression from the Claimant's first whistleblowing in April 2020 to a determination to dismiss her for making protected disclosures.

Bullying

85. Finally, we wish to make it clear that we have seen and heard no credible or consistent evidence that the Claimant bullied YP as, for example, alleged in the Grounds of Resistance paragraph 38 and in paragraph 41 of R3's witness statement.

86. The complaint made by DR on 24 August 2020 was not, contrary to what R4 writes at paragraph 59 of her witness statement, a complaint of bullying and it was not treated as such by the LADO.

87. The word 'bullying' is not mentioned in the Performance Improvement Plan letter on pages 376-370.

88. The draft dismissal letter at page 268 prepared in advance of the disciplinary meeting with the Claimant on 2 October 2020 does not refer to any allegation of bullying and nor was she notified in advance that she would be required to answer any such allegation of this serious kind.

89. The dismissal letter terminating her employment on page 444 of the bundle does not identify bullying by her of any YP as a reason for the ending of her employment.

90. **The extension of the Claimant's Probation on 24 April 2020**

91. In paragraph 4.1.1 of the List of Issues this act of R1 and R3 is listed as a detriment to which the Claimant has been subjected in contravention of section 47B of the 1996 Act i.e., that it was done on the ground that the Claimant made the protected disclosures earlier in April 2020. We find that this is indeed the case, the Claimant has discharged her burden of proof in this respect and this part of her claim succeeds against for the reasons we state below.

92. We find that it was R3 that took the ultimate decision to extend the Claimant's probationary period by a further month as he writes in his email to the Claimant dated 30 April 2020 on page 334 of the bundle in response to her query (page 335) as to why her probation has not been 'cleared' and signed off. R3 writes in the first person *'I have extended your probation to give you time to concentrate on the issues we discussed'.* These are emails only disclosed by the Claimant.

93. In fact, the first review of her probation should have occurred on 6 April 2020 after the initial 26 weeks of her employment. The review did not take place until 24 April 2020, 18 days late, and the decision to extend probation was thus made after the two-part protected disclosure made by the Claimant on 4 April 2020 and after the report by SS had been issued on 7 April upholding part of the Claimant's concerns.

94. R3 says he discussed the extension of probation with R4 and that she either initiated the idea or was heavily in favour of it but there are no notes or records of any such consultation with her. We are satisfied that in the relevant supervision meeting on 24 April 2020 R4 was supporting and implementing a decision taken by R3; this fact is confirmed on page 208. The Claimant's email on page 335 querying the fairness of the decision is forwarded by R3 to R4 leading us to conclude that each was corresponding with the other in relation to an agreed course of action.

95. We emphasise that the decision to extend the probationary period of employment for any employee is a significant disappointment to her/him involving at least the perception of failure in performance and the potential for future termination of employment in the absence of sufficient improvement. A reasonable worker would regard the extension of his/her probationary period as a detriment, and we find that the Claimant genuinely did so.

96. We reiterate that the R1's pro-forma document, for example on page 342, requires consultation with the Managing Director before any action is taken to extend a probationary period after the first 26 weeks. This did not occur, but we are certain that the decision was taken at senior level by R1 as employer, individually by R3 as the Registered Manager and supported by R4, the Claimant's line manager.

97. At pages 208-210 of the bundle there are notes of the 24 April 2020 supervision amended by the Claimant in her handwriting. She did not sign any version of the notes because they were not agreed by her. She did not accept that part of the comments about her performance being *chaotic* and confrontational. She does not agree that she has been given a four-week period in which *'to demonstrate that she understands the implications of maintaining a more level approach to communication]and possible reactions of the young people'*. Indeed, she draws attention to the fact that the criticism of her at her preceding supervision of her on 27 March 2020 that she could be over-verbal and over-loud was being successfully addressed. R4 writes on 24 April 2020, *'Vicky has been much less chaotic and much quieter over the past couple of weeks…Vicky has works very well in other areas of her work and is learning the keyworker role well'*.

98. Such improvement and praise are inconsistent with the probation extension in the absence of any other identified incident, complaint, or concern.

99. At page 210 the Claimant expressly asks whether the non-completion of her probation is a '*repercussion of her complaint regarding CK contact on his birthday'*. She suspects that the extension of her probation is an action of the Rs which is pursuant to her whistleblowing. R4 advises her that this is not the case and that she is a valued member of staff whose hard work and contribution is recognised.

100. On page 211 R4 confirms to the Claimant that she has sought advice from R3 to agree the extension of the probationary period. R4 was part of this decision-making process.

101. We are conscious that in making our decision we need not establish, by reference to the facts and the inferences we draw from those facts, that the protected disclosure(s) are the sole or principal reason for the imposition of the detriment(s). It is sufficient that the whistleblowing is a predominant or material factor. In this respect there is a less onerous causative link to be established than in relation to unfair dismissal which requires the Tribunal's finding as to the reason or principal reason for dismissal.

102. The Claimant must demonstrate that she made one or more protected disclosures and that she was subjected to the pleaded detriment or detriments. It is then, as stated in section 48(2) of the 1996 Act, for the Respondents to show the ground on which the acts or deliberate failures to act as described in section 47B of the 1996 Act were done and if the Respondents fail to do so then inferences must be drawn against them so long as those inferences are justified by the facts as we have found them. In this case we have made several findings of incoherent and inconsistent written and oral evidence from the Respondents and unexplained contradictory conduct leading to unfavourable inferences but in each instance, we have set out those findings in detail based on the evidence which we have heard and seen.

103. In relation to the detrimental extension of her probationary period for one month the Claimant has demonstrated the protected disclosure and indeed part of her complaint was upheld by SS. The Claimant has shown that detriment occurred, and she contemporaneously voiced her suspicion that she was subjected to detriment on the ground that she made the April disclosures. The Respondent has failed to produce coherent or consistent evidence of any ground on which the probation extension occurred, and we draw the inference that R1, R3 and R4 extended the Claimant's probationary period consequentially upon her whistleblowing.

104. We make this finding because in the seven supervisions with R4 (which were initially weekly then fortnightly) in which the Claimant participated from the commencement of her employment on 7 October 2019 until the extension of probation on 24 April 2020 there was no communication to the Claimant of any significant conduct or performance concerns and certainly no premonition of any need to extend the probationary period until after the April disclosures had been made. R4 agreed in cross examination that this was the case. R4 said that when, for example, she conducted the supervision on 6 February 2020 '*I did think she'd pass probation, yes.'* The Induction Framework dated 4 February 2020 on page 156, as one example, is complimentary *'Vicky is a good representative of Little Belsteads'*.

105. The Claimant received credit for engaging well in the steep learning curve required for her to engage in difficult work with challenging and vulnerable YP which she had not undertaken before. She was subjected to at least two episodes of serious aggression towards her by YP in December 2019 and March 2020 including physical injury which she overcame. She was allocated an important co- key worker role with one of the YP from November 2019 and given the COSHH register responsibility which she discharged well.

106. In the supervision of 27 March 2020 by R4 which can be found at pages 165-172 there is no indication that the Claimant's continued and permanent employment is in any way precarious. There is a negative comment that the Claimant's moods are sometimes heightened, and this has an impact on YP and other staff. Her manner is over-assertive and *'very loud'*. R4 writes *'we spoke about using a calm and quiet voice when talking to the children as her volume could be seen as confrontational. Vicky is aware of this and said she would try to lower her voice.'*

107. We agree with Mr Johnson's submission at his paragraph 4.14 '*given no concerns were raised or warning given on 27/3/2020 to extend probation then something must have occurred between that point and the 24/4/20 when the decision to extend probation was made'*. We find that the protected disclosures occurred during that period and the extension of the probation was done by R1 R3 and R4 on the ground that this specific whistleblowing took place.

108. On 3 May 2020 at page 336 there is a comment in an email to the Claimant from Claire Ellis concluding, '*a really good monthly report-well done!'*

109. As is evident from pages 340 -342 of the bundle, on 1 June 2020 the Claimant's probation was signed off and her permanent employment was confirmed. There are some highly positive comments about the Claimant's work, her relationship with the YP

and her effectiveness as a member of the Little Belsteads team. On page 340 it is recorded that '*Vicky has taken on board issues around her conduct and has managed well and has now successfully completed her probation'*. Surprisingly the joint signature of the Claimant on the relevant probation document was not obtained until 29 June 2020 and this was not explained to us.

110. There is no criticism of the Claimant's work, attitude, conduct or practice in the supervision undertaken with her by R4 on 29 June 2020. This makes it extraordinary that five days earlier on 24 June, when R4 was interviewed by SS as part of a second workplace investigation described below, R4 writes a vividly expressed and highly critical assessment of her which is at page 358. This account contradicts the content of the relevant supervision documents up to and including 29 June 2020. The reason for this inconsistency is not dealt with in R4's witness statement.

111. **Conduct of workplace investigation on 7 July 2020**

112. We equally find that the Claimant was subjected to detriment by the actions of R1 and R3 in implementing a second workplace investigation conducted by SS. This occurred following a single issue of concern raised by a YP named CK on or around 20 June 2020. The conversation log recording the discussion between CK and a member of R1's staff named Jess Brewer (JB) (not a witness) is on page 346 in which CK complains generally that the Claimant (VP) is '*really pissing me off…I just hate how controlling she is*.'

113. It was followed up by a discussion, three days later, on 23 June between CK and R3 where R3 writes down nine issues of varying seriousness which he and CK have talked about. For example, there are minor matters that the Claimant will not always let the YP have marshmallows in hot chocolate and that she asks CK to wear his hood down when sitting at the table to eat. Some of the incidents were found to be *'historic'* and could not be investigated but it is unclear from the ensuing investigation report which these are- they seem to be complaints 7 and 8 (pages 364-5)

114. We find that R1 and R3 have failed to show the grounds on which, after CK's complaint, R3 did not simply speak to the Claimant and her line managers in connection with her supervision, training and guidance but immediately instigated a wide-ranging comprehensive investigation during the course of which SS interviewed, over the period from 24 June to 13 July 2020, not only the Claimant herself and R4 but all of the YP and all their support workers to ascertain whether there were any safeguarding concerns. SS's report was completed on 13 July 2020 and is at pages 362-364.

115. This investigation occurred despite R3 being told on 24 June 2020(page 350) by the LADO that the CK complaint did not meet the [safeguarding] threshold.

116. Indeed, Jess Brewer (the author of the original conversation log) says at page 361 that she has no safeguarding concerns '*just a difference in working practice…VP was a bit controlling… her heart was in the right place but a bit strict'*

117. We emphasise that our finding is that at the time of the original 'complaint' by CK and given the nature and extent of it R1 and R3 cannot show the ground on which

SS was commissioned to undertake such an apparently unnecessarily broad enquiry. In both R3 and R4's witness statements they quite candidly do not maintain that the investigation was just about specific complaints against the Claimant herself. In fact, it was widened considerably. R4 states at her witness statement paragraph 46 *'the investigation was undertaken broadly to obtain a full picture of any safeguarding concerns within the home'*. The exact same wording is used at paragraph 43 of R3's statement.

118. That reason for a wide-ranging investigation involving several interviews of her colleagues and the YP was not explained to the Claimant during her June supervisions or at all. We find that the open and publicised exposure to this level of workplace investigation was detrimental to the Claimant and was done on the ground that she made the protected disclosures on 4 April 2020. R1 and R3 have failed to show the alternative grounds on which this action was taken at the time of CK's remarks.

119. (The Claimant reiterated some concerns about staff and YP behaviours on 18 June 2020 in an email to R3 at pages 344-345; we hereby make clear that this email is not in the List of Issues as an alleged protected disclosure, and it is not on the same subject and/or any continuation of the two-part disclosure around covid 19 restrictions and/or honesty with YPs that were part of that whistleblowing)

120. **Performance Improvement Plan (PIP) commencing 23 July 2020 for 12 weeks to 27 October 2020**

121. We have made certain findings about the nature and implications of this Plan in paragraphs 17.3-17.7above. Its implementation is notified to the Claimant in a letter dated 17 July 2020 from SS but stated to have been issued as a result of the '*Registered Manager's decision'* (R3). For the Claimant to be made the subject of a PIP was clearly frustrating and distressing for her as appears from her email on page 379 dated 25 July. This action of R1 is detrimental to her and she alleges that it was done on the ground of her protected disclosures in April 2020. The relevant paragraph of the List of Issues is 4.1.3

122. However, we have determined that, during the course of her investigation, SS did in fact ascertain significant evidence of poor conduct and performance by the Claimant albeit, as we confirm elsewhere in these reasons, that this evidence was not openly revealed to the Claimant or discussed with her in supervisions with R3 and R4. For example, R4's statement described at the foot of the page 358 as 'JT Staff Statement 24/20' and prepared for SS's attention on 24 June 2020 contains a highly critical indictment of the Claimant's behaviours and deficiencies which doubtless fed into the PIP, for example, in the Summary of Criticisms on page 370.

123. We find that, upon completion of her investigation, SS discovered poor practice by the Claimant. SS describes on pages 367-370 a cumulative tendency by the Claimant to be overbearing and '*controlling', 'dictatorial'*, too quick to impose sanction rather than reward, inflexible, to inflict her own heightened mood on others and to escalate rather than de-escalate situations with YP. She writes '*one young person said they did not like the way you spoke to them at times and another that you expect too much of them'*. The Claimant's attitude is found by SS to heighten the mood of the YP and escalate their challenging behaviours. The Claimant is described as

confrontational and loud '*you can often be confrontational with staff in the presence of young people as well as being very vocal about young people in their presence*.'

124. In circumstances where the Respondents were faced with consistent and credible evidence of a failure by the Claimant to meet behaviour and communication expectations in an environment where she was working with vulnerable, neuro diverse and often troubled YP we find that the Respondents have shown the grounds upon which the detriment of the PIP was imposed and have demonstrated that this action was not caused by or as a result of the Claimant's whistleblowing in early April 2020.

125. **The Respondents' failure to provide the written evidence in support of the PIP; the Respondents' failure to set measurable objectives and identifiable targets in the PIP; the Respondents' failure to provide support, training and mentoring in connection with the PIP (List of Issues paragraphs 4.1.4-4.1.6.)**

126. We have dealt with these three issues together. We are satisfied that each of these failures occurred as a result of the acts or failures to act by R1 R2 R3 and R4; the Claimant was given no tools to succeed in improving her performance and overcome the 'gaps' in personal development and training as they are described by R2 on page 400.

127. We incidentally observe that SS and R2 as senior group-wide personnel are assumed by us to have understood the nature and effect of a PIP, how to successfully implement it and provide options for progress. Instead, the PIP was dealt with in a chaotic, inconsistent, and unexplained way with little or no communication to the Claimant about the expectations placed upon her and how they might be achieved in an effective way. As we have seen R4 was not even properly briefed on the issuing of the Plan and its content so that she was unable at the supervision on 24 July 2020 to assist the Claimant to understand the expectations placed upon her.

128. We have seen no evidence that the Claimant was sent the statements of evidence obtained by SS during her investigation in July 2020 or any other relevant documentation despite several requests from her for this information. This was unfair to her.

129. The PIP itself sets no targets or goals and has no measurable objectives; R3 agreed in his oral evidence under cross examination that this was the case. At page 370 there is only a Summary of six categories of failure in the Claimant's practice and four actions. We repeat that no appendix or attachment to pages 367-370 has been disclosed by the Respondents and we are not convinced that any such document exists.

130. With reference to the four actions, the Claimant did receive some supervisions with R3 and R4, but these were not done fortnightly on a regular basis and astonishingly in five of these meetings there was no discussion of the PIP at all. In particular, in the supervisions with R3 himself on 7 August and 1 September 2020 no reference was made to the Claimant's progress in respect of the PIP.

131. The Claimant received and undertook no '*appropriate training/refresher training'* from any one of the Respondents or from external providers. The only mention of

training for her is to a postponement and re-arrangement of regular annual training. She was not allocated a shift mentor consisting of the senior on duty at each shift she worked.

132. We find that all and each of the Respondents have failed to show any ground upon which the detriments identified in the List of Issues at paragraphs 4.1.4-4.1.6 were imposed. None has pleaded or argued a third reason of ignorance about the PIP and its effects or incompetence in putting it into practice.

133. We find that the **Claimant's suspension on 29 September 2020** was not unlawful. There was a reasonable basis for her paid suspension over a short period whilst investigation into the FB complaint took place and she was informed of this by R2's email on page 427.As a result, by reference to paragraph 4.1.7 in the List of Issues we have not found any detriment caused to the Claimant by the actions of the Respondents in this respect.

134. **The failure by the Respondents to conduct a fair investigation and disciplinary procedure after the Claimant's suspension on 29/9/20**

135. We find this failure to be attributable to R1 R2 and R3. It is the Claimant's submission that by this date at least R3 was influenced by the second protected disclosure on 22 August 2020. R1 and R2 knew of it.

136. We have set out above in paragraph 17.20 our findings in relation to these failures to the extent that the investigation by R2 into the Claimant's misconduct and the dismissal process itself was fundamentally flawed.

137. It is axiomatic that the Claimant was substantially disadvantaged and was subjected to detriment in all these respects. The Respondent has failed to show cogent grounds or reasons for that detriment and disadvantage, for example, any emergency action required, or danger to others, extreme urgency, instruction from safeguarding authorities etc. In all the circumstances we conclude that the acts of R1, R2 and R3 causing the detriment described in paragraph 4.1.8 of the List of Issues was done on the ground that the Claimant made protected disclosures in April and August 2020 as particularised above.

Pregnancy and Maternity Discrimination

138. The Claimant makes claims against all four Respondents under section 18 Equality Act 2010 that she was treated unfavourably because of her pregnancy or because of illness suffered because of the pregnancy. The seven allegations of unfavourable treatment are set out in paragraph 7 of the List of Issues and each of those events occurred during the protected period.

139. The Claimant informed Claire Ellis of her pregnancy on 18 July 2020 via a messaging app at which point she was approximately six weeks pregnant. Her baby was born on 29 March 2021. On 31 July on page 235 R2 wrote on behalf of R1 to congratulate the Claimant and to send her some basic information prior to the issue of a MATB1 form of medical confirmation of pregnancy (usually at 20 weeks). R2 makes it clear that *'a formal risk assessment will be undertaken to add to the noted*

conversations you have already had setting out which children you can work with and what you should do should an incident occur'.

140. There is thus evidence of the Respondents consciously undertaking a dynamic individual risk assessment in relation to the Claimant's pregnancy at an early stage. We do not agree that R4 or any one of the Respondents treated the Claimant unfavourably because of her pregnancy by failing to conduct a risk assessment when that was requested (paragraph 7.1.5 of the List of Issues).

141. By reference to allegation 7.1.1 we can understand no reason why the Claimant asserts that she was unfavourably treated as a result of any one of the Respondents' failure to review her PIP plan following notification of her pregnancy. The PIP, as we conclude above, sets no *'actions designated'* as Mr Johnson describes them in his submission paragraph 11.3.1 and no objectives, targets or measurable outcomes which might require adjustment in the light of the Claimant's pregnancy; it was therefore not seemingly possible to review the Plan. The claim of pregnancy discrimination in this respect is not understood and was not further explained to us.

142. Paragraph 7.1.4. of the List of Issues - the Claimant does indeed tell R4 on page 251 in a supervision on 28 August 2020 that she is struggling with tiredness and concentration and very sick when travelling in cars. We cannot agree that R4 or any one of the Respondents treated the Claimant unfavourably in relation to her pregnancy by failing to act on this information and take appropriate steps to ensure the Claimant's welfare. The Claimant has not discharged her burden of proof in showing any prima facie evidence of such an omission beyond her own assertion that it was the case. On page 251, for example, R4 suggests that she tries travel bands to control nausea. The Claimant tells R4 that she has some travel bands at home and will '*check with her GP if this could be a symptom of pregnancy'.* The Claimant also agrees that she is under a lot of pressure at home with moving house and court attendances.

143. We also accept the oral evidence of R3 who says that he told the Claimant on occasion that she could sit and take rest breaks in the quiet '*little office'* in order to '*chill out'* when tired at work.

144. In the same meeting on 28 August 2020 R4 tells the Claimant that she will receive a formal pregnancy risk assessment at 12 weeks' pregnancy and the Claimant confirms that she will be at the 12- week stage on or around 18 September 2020.

145. Paragraph 7.1.6 On page 253 during a supervision with R3 on 1 September 2020 when the Claimant tells him she is feeling '*drained at the moment'* R3 removes her keyworker and COSHH register tasks from her so that she can concentrate on her other tasks and the Claimant does not object to this assistance.

146. The individual risk assessment prepared by R4 is at pages 255-256, as promised, on 18 September 2020 when the Claimant is twelve weeks pregnant. There was no unfavourable treatment because of pregnancy or pregnancy related illness in this respect. R4 did not fail to conduct a risk assessment when requested

147. We have seen no generic pregnancy risk assessments by reference to regulations 3 and 16 of the Management of Health and Safety at Work Regulations

1999 which are applicable to the home or R1's organisation overall. It is not possible to ascertain from the Respondents' evidence whether this is because such documentation does not exist (although R3 said it does, to his recollection) or because it has failed to be disclosed. In either case the Claimant has not succeeded in showing prima facie evidence i.e., something from which we could conclude that this absence of documentation was unfavourable treatment because of her individual pregnancy (where no comparator is of course required to be shown) or that she experienced less favourable treatment because of her protected characteristic of sex as compared to the way all or any of the Respondents would treat others. No actual or hypothetical male comparator has been identified. In those circumstances the claim of pregnancy discrimination in relation to this issue and the claim described in paragraph 6 of the List of Issues i.e. of direct sex discrimination under section 13 of the 2010 Act do not succeed.

148. There were certain dynamic personalised risk adjustments undertaken in respect of the Claimant. For example, at page 233 it is confirmed that she need not work with two of the YP (DR and KB) due to their 'challenging behaviour' and potential injury to the Claimant as had occurred in the past. That decision is confirmed by R3 in the 1st September supervision recorded on page 252 '*I discussed with Vicky that we had stopped her working with DR to protect her'.* R4 goes on to remind the Claimant that, therefore, when faced with a conflict situation involving DR on 22 August 2020 this '*could have led to her being injured and that she should have left the situation with the staff member who was working with DR'.* This is what the Claimant had previously been advised to do.

149. Issue 7.1.2 Beach Trip In hot weather of an exceptional kind on 11 August 2020 there was no dynamic risk assessment for the Claimant when she was part of a group taking the YP to the beach at Walton on the Naze and this omission was unfavourable treatment by R1 because of her pregnancy.

150. The trip is described in the Claimant's witness statement at paragraphs 95 and 96. This expedition and the journey there and back required a specific individual risk assessment in all the circumstances of heat over 30 degrees, to provide, for example, adequate shade, ventilation, and rest for a pregnant employee in these conditions. There is no evidence that this risk assessment was done and in fact the Claimant stresses the long hours worked by her that day and a lengthy drive home in a minibus until 10 pm in order to drop off one of the YP in Braintree. The Claimant had been at work since 7.30 am. R4 concedes in paragraph 114 of her witness statement that the trip did last longer than expected and there was a delay in returning the Claimant home.

151. The Claimant says, and was not contradicted in cross examination, that two others of her pregnant colleagues were excused from this trip. The absence of any adequate individual risk assessment which was properly implemented was a failure of R1 as a responsible employer. We have no evidence of specific individual failure by Rs 2 3 and 4.

152. Issue 7.1.3. We find that the refusal by R1 and R3 to allow the Claimant to take annual leave on the following Saturday 15 August 2020 at very short notice was not unfavourable treatment because of her pregnancy or pregnancy related tiredness /

illness. The refusal occurred because of insufficient staffing which would '*leave the service in a vulnerable situation'* on the day off requested by the Claimant on pages 384 and 386. She was permitted to arrange a swap of shifts if she could.

153. On page 389 R2 provides the Claimant with a longer explanation that she is expected to give four weeks' notice for booking holiday if possible and pointing out that her rota had already been amended once '*to cater for your child care needs and this Saturday was one of the agreed days'.* R2 reassures the Claimant that the weather is expected to be much cooler at the weekend and that various measures are being taken to keep staff cool after specific consultation with the HSE.

154. In the penultimate paragraph of the email on page 389 there is information provided by R2 that the Claimant may face disciplinary action for unauthorised absence if she fails to attend and does '*elect to subsequently call in sick'.* We do not interpret the information in this email as a '*threat of disciplinary action by R2 when the Claimant asked for time off due to pregnancy related tiredness.'* This is because on page 386 the Claimant asks for the day off due to '*the stress in the heat and home';* she does not refer to pregnancy related tiredness. On page 388 she again does not refer to pregnancy related tiredness or illness but does saying that working in the heat and driving longer distances is *'tough'* given her pregnancy. She goes on to state that she has '*given notice [of her intended absence] rather than calling in sick'.* In other words, there is an implicit threat by the Claimant herself that if she is not given the day off, as requested, she will self- certify as sick.

It is unsurprising that R2 sees fit to warn her of the consequences of any such unauthorised action. The text of R2's email is not a threat of disciplinary action for the request for time off in itself. The Claimant has failed to show any evidence from which we could conclude that the refusal to give her the day off on Saturday 15 August was unfavourable treatment because of her pregnancy. The reason why the Claimant was not permitted the day off is that R1 would have been under-staffed on that day if she did not attend as rota'd by prior agreement with her. The reason why R2 reminded her that disciplinary action may follow from an unauthorised absence is because the Claimant herself threatened to take time off without authorisation by '*calling in sick'.* On page 391 the Claimant confirms that she will attend work.

155. Issue 7.1.7 This statement by R3 on 10 September 2020 to the effect that if the Claimant returned from maternity leave full time she may be given the opportunity to return as a 'senior' whereas if she returned only part-time she would not be eligible for that promotion is a statement which R3 now concedes that he made '*because seniors are not employed part-time'*. It was unfavourable treatment because of pregnancy and maternity and this complaint of pregnancy and maternity discrimination succeeds.

156. **Harassment related to the protected characteristic of sex- Section 26 Equality Act 2010**

There are two allegations of harassment at paragraphs 8.1.1 and 8.1.2 of the List of Issues:-

157. We do not agree that when R2 asks the Claimant in the letter on page 235 to '*think about how long you would like to take off for your [maternity] leave'* this query

constitutes unwanted conduct related to the Claimant's sex which had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for her at work. It is a normal standard enquiry phrased in courteous terms which it is perfectly reasonable for an employer to raise in relation to a female employee's pregnancy and maternity leave and it imposes no oppressive pressure or obligation on the Claimant to answer at all let alone to give any preferred answer. The Claimant did not respond in writing objecting in any way to the query.

158. The complaint of harassment related to sex does succeed in relation to Issue 8.1.2 because we find that R3 made those or similar remarks in a meeting about two weeks after the Claimant had notified her pregnancy i.e.' *we should all be careful what seat we sit on.* He concedes that the remark was inappropriate and demeaning and we find it was unwanted conduct having the effect of harassing the Claimant in relation to her protected characteristic of sex. The remark implies that her pregnancy was somehow a contagious and perhaps unwelcome condition that others may not want to catch. The Claimant said in evidence that it made her feel very uncomfortable.

159. Under cross examination R3's evidence was that he could not remember the comment at all and then he said he could not remember who said it. R4 says that she heard no such comment being made by R3. On balance we prefer the evidence of the Claimant set out in paragraph 71 of her witness statement that this derogatory remark was made by R3 in the context of a number of other current pregnancies amongst the staff at the home.

160. In all the circumstances the following list is a **summary** of the claims made by the Claimant which succeed and a note of which of the Respondents are jointly and severally liable.

Detriments
4.1.1 Extension of probation R1 R3 R4
4.1.2 Unnecessary investigation R1 and R3
4.1.4 -4.1.6 Mis-handling of the PIP R1 R2 R3 and R4
4.1.8 Failures in the disciplinary investigation and dismissal process R1 R2 R3

Pregnancy Discrimination R1 and R3

Harassment relating to sex R1 and R3

161. A Claimant who is an employee cannot contend that her dismissal is a detriment done on the ground that she made protected disclosures. Section 47 B (2) of the 1996 Act confirms this principle.

162. Despite having received no oral or written submission or argument from any of the parties on the subject we have applied our minds to the case law in Jhuti v Royal Mail Group 2019 UKSC 55 and considered whether the pre-dismissal acts or failures to act by the individual Respondents R2 and R3 in failing to conduct a fair investigation and disciplinary process show a sufficiently strong and active causative connection between the acts of co-workers (for whom R1 is vicariously responsible) to the dismissal itself so as to amount to a detriment of dismissal done by R2 and R3 but for

which R1 is liable. This might entitle the Claimant to claim what is sometimes called an 'indirect remedy' for the financial consequences of her dismissal. We do not reach this conclusion. We are satisfied for all the reasons given above that the Claimant's conduct dismissal would have occurred and her contract of employment would have been terminated any way. The agency of R2 and R3 in relation to these detriments is not sufficient to designate them as in effect personally liable for the dismissal.

163. A case management order giving directions for the Remedy Hearing will be sent out under separate cover.

Employment Judge B Elgot
Date: 27 July 2023